
MARRIAGE EQUALITY IN INDIA: DEVELOPMENTS, COMPARATIVE ANALYSIS AND FUTURE POSSIBILITIES

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ABSTRACT

Love is a universal force that transcends borders and defies prejudice. The love shared by same-sex couples, however, has been entangled in a complex web of social, legal and moral debates which will be discussed in this paper. It embarks on a historical journey, tracing the evolution of same-sex relationships in the Indian socio-cultural landscape. The paper undertakes an exploration of dimensions surrounding marriage equality, delving into both legal and social implications. The paper evaluates the arguments put forward for and against the unions. The diverse landscape of international comparisons is explored with an aim to provide global context of the issue. Against the backdrop of this exploration is the recent landmark judgment delivered by the Supreme Court of India, an essential milestone in the ongoing conversation about same-sex marriage. Finally, the paper contemplates the way forward contributing to the ongoing dialogue on recognition and acceptance of same-sex unions. The paper aims to contribute to understanding the complexities attached to the issue.

INTRODUCTION

Same-Sex Marriage or equality marriage is a marriage performed between two individuals of the same biological sex. The concept encompasses a complex web of legal, social and ethical

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considerations. The debate about whether there should be marriage equality includes diverse perspectives and opinions from all corners of the society. It represents a situation that intertwines hopes, challenges, stories and victories of several individuals who have been advocating for or against the cause.

In the vast landscape of human rights, marriage equality stands as a profound symbol of pursuit of equality. Beyond the mere desire to love and marry without prejudice, it encloses a fundamental struggle for essential rights that these couples face despite being a part of the society. For instance, in Dias and Anand's case, as per the present law only one of them is recognized as the legal parent of their son. This, beyond the emotions, affects them in matters, for instance while making medical decisions for their son.¹ It is the practical challenges like these that warrant urgent attention. Representation is imperative and while the importance of equal treatment for all individuals cannot be overstated, the urgency also lies in addressing these tangible issues.

The struggle for marriage equality is not confined to any particular region, it resonates worldwide. This makes it clear that the issue is not about any religion or community or any other sentiments but it is simply about prejudices, lack of acceptance and lack of tolerance.

SAME SEX RELATIONSHIPS AND THEIR HISTORY

The Supreme Court of India in 2018 pronounced the judgement which decriminalised homosexuality. After the judgement people started a "commotion" stating that India is embracing western culture and ideologies. However, if we delve into the history, the historians and mythologists will disagree. They believe that homosexuality has been there in India since ancient times to modern times.² Ancient India shows the existence of diverse sexual orientation. Going back to the pre colonial era, India was much tolerant towards accepting gender identity. Some

¹ Mogul, R. (2023) *India's top court is set to rule on same-sex marriage. Here's what that could mean for millions of people*, CNN. Available at: <https://edition.cnn.com/2023/10/16/india/india-same-sex-marriage-ruling-lgbtq-intl-hnk-dst/index.html> (Last visited: 02 November 2023).

² *Homosexuality in ancient India: 10 instances* (2018) *India Today*. Available at: <https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10> (Last visited: 19 November 2023).

instances of the ancient and mediaeval period where one can confirm that India before colonialism did not have fake moral standards are illustrated below.

In ancient India:

- In the Valmiki Ramayana, gender fluidity and same-sex intimacy are subtly acknowledged through certain episodes. One such instance occurs when Lord Hanuman while returning from Lanka after meeting Goddess Sita observes Rakshasa women passionately kissing and embracing other women.³
- The Krittivasa Ramayana narrates a tale of King Dilip, who had two wives but died without leaving an heir. Following his death, Lord Shiva instructed the widowed queens that if they united with one another, one of them would conceive a child. The queens followed this divine guidance, and as foretold, one became pregnant and gave birth to the future king.⁴
- The Mahabharata has the story of Shikhandini, whose life played a crucial role in Bhishma's death. Shikhandini was born female but raised as a man and later underwent a transformation with divine assistance to assume a male identity. This enabled Shikhandi to enter the battlefield and confront Bhishma, ultimately leading to his downfall.⁵
- Chapter Nine of Vatsyayana's Kamasutra discusses oral sexual practices, referred to as Auparashtika, and also acknowledges same-sex relationships as well as sexual relations involving transgender individuals.
- The founder of the Mughal Empire, Babur, openly recorded his attraction to the same sex in his memoirs. He wrote about his affection for a young man named Baburi in Kabul and even composed poetry expressing his feelings for him.⁶

³ Mehrotra, D. (2021) The pre-colonial history of homosexuality in India: Why Love is not western (part i/iii), The Pre-Colonial History of Homosexuality in India: Why Love Is Not Western - Academike. Available at: <https://www.lawctopus.com/academike/history-of-homosexuality-in-india/amp/> (Last visited: 19 November 2023).

⁴ ibid.

⁵ ibid.

⁶ ibid.

It is evident that this issue did not originate in India's rich historical and cultural traditions, but rather when the British colonial administration criminalised it under Section 377 of the Indian Penal Code. Ironically, these relationships were legalised in England through the recognition of civil marriages for same-sex couples in 2013, while India continues to struggle for similar legal recognition. The disparity observed underscores the enduring challenge of confronting societal prejudices that are deeply rooted in our minds, not in our values or history.

SOCIAL IMPLICATIONS OF SAME SEX MARRIAGE

India is recognised for its culture, traditions and social values. In recent years, there has been a growing demand for the legal recognition of same-sex marriage, alongside increasing visibility and acknowledgment of individuals belonging to the LGBTQIA+ community. According to government figures from 2012, approximately 2.5 million people were identified as part of this community. However, gay rights activists and global estimates believe that the number is at least 10 percent of the population, or more than 135 million now.⁷ While some see this as a progressive step towards equal rights and opportunities, others think that it could corrode India's social and cultural system.

Indian society is deeply rooted with its traditional family structure. Marriage in Indian society is seen as a pure, social and traditional institution between a man and a woman. It has been viewed as the most important institution of human society. However, at the same time acceptance and diversity is a huge part of our identity. The coexistence of diverse cultures and beliefs is not just a feature but a strength of our society.

Marriage is considered as a sacramental union⁸ and forms the basis of the family structure. Although variously defined in its archaic form, marriage looks as the social union between male and a female forming the social institution for the establishment and regulation of a proper

⁷ Pathi, K. (2023) India's Supreme Court declines to legalize same-sex marriage, saying it's up to Parliament, PBS. Available at: <https://www.pbs.org/newshour/world/indias-supreme-court-declines-to-legalize-same-sex-marriage-saying-its-up-to-parliament> (Last visited: 18 November 2023).

⁸ Tekait Mon Mohini Jemadai vs Basanta Kumar Singh, (1901) ILR 28 CAL751

relationship between the sexes.⁹ Same-sex marriage is defined simply as the marriage between the same biological sex / identity.

There has been ongoing debate and discussion after the supreme court decision on same sex marriage where the court denied the right to marry for same sex couples and declined to legalise the same. The social impact of legalizing same-sex marriage on Indian society would likely to be multifaceted.

To start with, it has the potential to bring about several positive changes. Legalizing same sex marriage could contribute to greater social acceptance of LGBTQIA+ community in India. It may help reduce stigmatisation and discrimination, leading to a more inclusive society. It can also help to maintain mental and emotional well being of LGBTQIA+ individuals who are likely to experience social isolation and face barriers while accessing basic facilities. Thus, legalizing same-sex marriage would benefit the society in numerous ways starting with improved health outcomes like bringing down social distress and suicide rates. It also gives people a right to marry their loved ones and will give them freedom and sense of security associated with legal and financial benefits and also reduce tension. It will give the same-sex couples more legitimacy in the eyes of their family and society as well as provide them with economic benefits including tax breaks, inheritance rights and access to spousal health insurance etc. Through this same-sex marriage can contribute to a shift in societal norms and values, promoting the idea that love and commitments should be celebrated regardless of gender. Legalizing same-sex marriage would be a significant step towards upholding principles of equality and human rights.

On the other hand, the legalization of same-sex marriage in India could also have negative implications for certain segments of society. It may face resistance from conservative cultural and religious groups who argue that it contradicts traditional values and religious teachings, leading to potential social conflict. Even post the legal recognition, LGBTQIA+ individuals may continue to face family and societal disapproval. Families holding traditional and conservative values may react negatively to their LGBTQIA+ family members. India is known for its rich cultural and social values so accepting same-sex marriage could be seen as a challenge to these social and religious

⁹ Law Trend (2023) Same-sex marriage can erode the social and cultural systems of India, Law Trend. Available at: <https://lawtrend.in/same-sex-marriage-can-erode-the-social-and-cultural-systems-of-india/> (Last visited: 08 November 2024).

beliefs, leading to social unrest. If the community does not accept it may lead to social tension and division which would result in discrimination and marginalisation of LGBTQIA+ community leading to negative mental health and bad quality of life. Same-sex marriage challenge the traditional notion of marriage, lead to corrosion of traditional family structure. This could lead to family conflicts and alienation if families are not accepting the LGBTQIA+ relationships. Moreover, according to society, marriage is to procreate which again goes against legalisation of the marriage.

Legalising same sex marriage can have many positive effects on families, however it does not guarantee universal acceptance.

LEGAL IMPLICATIONS

Same-sex marriage has been in the spotlight due to the present case of *Supriyo v. Union of India*. The case was decided on 17th October 2023 and the final 3:2 verdict denied marriage equality to non-hetrosexual marriages.

The legalization of same sex marriage is a complex process which would require a lot of amendments and this incorporation will impact the entire legal system.

India has a long and varied history of diverse sexual and gender identities. The societal attitudes towards the LGBTQIA+ community has evolved over time over the years and the legislation regarding the same has evolved over the years. In 1861, the Indian Penal Code was enforced during the British era. Through IPC, the british introduced laws criminalizing sexual acts between people of same sex under Section 377 as an unnatural offence. However, over the years the circumstances and the legislation has evolved.

In 2009, Delhi High Court held that the part of Section 377 which criminalised consensual homosexual acts was unconstitutional, becoming the first court in India to decriminalise homosexuality. In 2014, the Supreme Court recognised transgender persons as a third gender.¹⁰

¹⁰ National Legal Services Authority Vs. Union of India, 2014 INSC 275

Further in 2017, the Apex Court gave LGBTQ+ community the freedom to express their sexual orientation and held that sexual orientation is an essential attribute of privacy. The Court also described discrimination on the basis of sexual orientation as “deeply offensive to dignity and self-worth.”¹¹ In September 2018, the Supreme Court, in the landmark judgment of *Navtej Singh Johar v. Union of India*, partially struck down Section 377, effectively decriminalising consensual same-sex relationships.¹² The part of the Section that criminalised consensual homosexual relationships was viewed as irrational, arbitrary and violative of Article 14. This was a significant step forward for rights of homosexual couples as it changed the legal landscape for same-sex couples in India by affirming their rights. Subsequently, in the recent case of *Supriyo v. Union of India*, concerning the legal recognition of same-sex marriage, the Supreme Court delivered a 3:2 verdict declining to confer constitutional validity on such unions. Advocates of legal recognition argue that extending marriage rights would provide numerous benefits, including formal recognition of marriage, legal parentage for children, adoption rights, inheritance and property rights, access to healthcare decisions, immigration benefits, and other associated legal protections.

In order to incorporate same-sex marriage into the legal framework of India, there are several legal changes and amendments required. The legal changes required would include either making a separate legislation for same-sex couples or incorporating them by interpreting the existing legislation differently. However, as observed in the present case, amending existing legislation poses significant legal challenges.

The biggest challenge lies in introducing such reforms while simultaneously safeguarding the rights of all stakeholders. One of the biggest argument against same sex marriage is the potential for legal complications arising from the restructuring of gender-specific provisions. Many existing laws, particularly those relating to maintenance, spousal rights and marital offences, are framed on gender-based distinctions. The process of transitioning these provisions to a gender neutral framework may raise concerns about unintended consequences for heterosexual victims and couples. However, all of this can be addressed through careful legislative drafting. Moreover, as held in *Supriyo v. Union of India*, the judiciary cannot read additional terms into, or reinterpret,

¹¹ *K.S. Puttaswamy Vs. Union of India*, (2017) 10 SCC 1

¹² *Navtej Singh Johar v/s Union of India*, (2017) 9 SCC 1

the Special Marriage Act to include same-sex marriages. The responsibility for such reform therefore rests with the legislature, which must take proactive steps to formulate appropriate laws.

While the need for reform to ensure equality is evident, critical questions regarding the manner, timing, and authority responsible for implementing such change remain to be addressed.

The change needs to be made to ensure equality but the question of how, when and by whom needs to be addressed.

SUPPORTING ARGUMENTS

The advocates for same sex marriage have put forth a compelling case based on principles of equality, human rights and social progress. The major arguments can be summed up in the following way:

1. Violation of fundamental rights: The proponents of same sex marriage argue that Article 19 and 21 of the Constitution guarantees all people right to marry a person of their choice. Right to marry is a fundamental right as held in *Shafin Jahan vs Asokan KM*¹³, which is being violated by not providing the same to homosexual couples. However, this right was denied by the court.
2. Equality: Same-sex couples stand on equal footing with their heterosexual counterparts and post the decriminalisation of Section 377 relating to same-sex couples, they are entitled to access the same social institutions as others. The absence of legislation recognising same-sex marriage is violative of Article 14 as it shows unequal treatment by denying LGBTQIA+ persons equal protection of the law and equal rights.. The thread of the Constitution is equality and justice to all and the homosexual couples are a part of all.¹⁴
3. Discrimination: The lack of recognition of union of homosexual couples is discriminative and violative of Article 15. Sexual orientation is a part of sex mentioned in article 14 and

¹³ AIR 2018 SC 1933

¹⁴ Argument by Adv. Mukul Rohatgi in *Supriyo vs Union of India*, 2023 INSC 920

15 which means that discrimination on the basis of sexual orientation amounts to discrimination under this Article.¹⁵

4. Human rights: From a human rights perspective, every person is entitled to marry a person of their choice. Denying homosexual couples the freedom to marry causes tangible harm and exclusion, whereas legal recognition of same-sex marriage aligns with and reinforces broader human rights principles.
5. Constitutional supremacy: India is a constitutional democracy and not a parliamentary democracy. In our country, the Constitution is supreme and equality is a part of basic structure.¹⁶ Thus, any denial of rights must therefore be tested against constitutional guarantees of equality and justice.
6. Diversity and change: India is a diverse country due to its vast size and the incredible range of cultures, languages, religions, and ethnic groups it encompasses. India's strength has always been its ability to evolve while preserving the essence of its rich diversity. Thus, accepting changing social realities and including homosexual couples allows us to move forward in the same direction.
7. Tolerance and acceptance: The legalising of same sex marriage would lead to building of a more tolerant and inclusive society. It would help dismantle social stigma and foster greater understanding among those who continue to oppose equal rights.
8. Curb violence against LGBTQIA+ community: Despite queer relationships being decriminalised, members of the community still face violence and ridicule in their daily lives. Legal recognition of same sex marriage, along with comprehensive protective laws, is a necessary step toward ensuring their safety and dignity.
9. International Standards: India is signatory to the Universal Declaration of Human rights and other international covenants which provide that family rights of all persons without

¹⁵ Supra note 13

¹⁶ Indra Sawhney & Others v. Union of India, AIR 1993 SC 477

discrimination must be protected.¹⁷ Thus, recognising same-sex marriage would bring India's domestic laws in closer alignment with these international commitments.

10. Marriage as a union: Marriage is viewed as a union of two souls. In our country, marriage has always been about more than the laws, it represents emotional bonds and familial connections. Procreation is not the sole purpose of marriage and absence of children does not make a heterosexual marriage void. Thus, extending this institution to same-sex couples is therefore a matter of fairness and equal treatment.
11. Short end of the stick: The absence of recognition of same sex marriage affects more than dignity alone. The couples who are denied the right to marry are excluded from numerous legal benefits and rights, including joint tax benefits, surrogacy rights, recognition of both partners as legal parents, the right to adopt as a couple, and other associated protections.
12. Mental health: A study titled "The Anticipated Impact of LGBTQIA+ Marriage Equality Legislation on Indian Society and Mental Health" showed that legalising same sex marriage would lead to improvement in wellbeing, legal safety and access to legal rights.¹⁸
13. Representation: Legalising same-sex marriage fosters visibility and representation of homosexual relationships. The representation challenges stereotypes and shows that love knows no boundaries. Moreover, representation in legal and societal institutions helps ensure that the unique needs and challenges of the LGBTQ+ community are acknowledged.

OPPOSING ARGUMENTS

On the contrary, the people against same sex marriage argue by giving reasons as to it should not be legalised. Some of these reasons are:

¹⁷ United Nations General Assembly. *The Universal Declaration of Human Rights* (UDHR). New York: United Nations General Assembly, 1948.

¹⁸ Dutta, A. (2023) Study finds legalisation of same-sex marriage to have positive impact on mental health of LGBTQIA+ individuals, *The Hindu*. Available at: <https://www.thehindu.com/news/national/study-finds-legalisation-of-same-sex-marriage-to-have-positive-impact-on-mental-health-of-lgbtqia-individuals/article66745345.ece> (Last visited: 12 November 2024).

1. No “Right to Marry”: The primary argument holds that the Constitution of our country does not recognise the right to marry. It is contended that marriage cannot be derived from the freedom to form associations under Article 19, nor can it be read into the right to life and personal liberty under Article 21.
2. Religious and Cultural belief: Many opponents argue that legalising same-sex marriage would be contrary to religious and cultural traditions of India. According to this view, marriage is traditionally understood as a union between a man and a woman.
3. Procreation: Many argue that procreation is the main aim of marriages. The proponents of this view maintain that the traditional idea of “building a family” is centred on biological reproduction and continuation of lineage, which cannot be achieved naturally by same sex couples making critics view their legal union purposeless.
4. No state interest: One argument is that state only recognises relationships in which it has a legitimate interest, such as reproduction and lineage. Thus, opponents claim that there is no compelling state interest in granting them legal recognition.
5. Family structure: Another argument is that both mother and father have significant roles during the upbringing of a child. It is believed that the absence of either parental role may adversely affect the child’s emotional and psychological development, thereby conflicting with the child’s best interests.
6. Lack of support: While societal acceptance of same-sex relationships has increased over time, opponents argue that it remains insufficient. Marriage has historically been shaped by social acceptance even before legal codification.¹⁹ This makes the lack of widespread awareness and approval a reason to resist legal reform.
7. Social norms: Lastly, it is argued that legalising same-sex marriage could lead to the breakdown of established social norms and would pave the way for more unconventional relationships which can pose as a threat to our old traditions.

¹⁹ Arguments by Adv. Kapil Sibal in *Supriyo vs Union of India*, 2023 INSC 920

INTERNATIONAL COMPARISONS

There are thirty-three countries, including the United Kingdom and United States, where same-sex marriage has been legalised. On one hand, a civil union between same sex couples has been accepted and recognised, but on the other side it is criminalised. The extension of broader LGBTQIA+ rights has been uneven throughout the world.

The Netherlands became the first country in the world to legalise same-sex marriage on April 1, 2001. This reform granted same-sex couples the same rights and responsibilities as opposite-sex couples in matters relating to marriage. Since then, more than 20,000 same-sex couples have married in the Netherlands, according to Statistics Netherlands (CBS).²⁰ The legalisation marked a significant milestone in the global LGBTQIA+ rights movement.

The reform was achieved through the legislative process. The Dutch Parliament passed a bill that amended the country's marriage laws to include same-sex couples. As a result, same-sex couples in the Netherlands are entitled to the same legal benefits and protections as their heterosexual counterparts. This includes rights related to inheritance, taxation, social security, and child custody. The key factors which contributed to this change are:

- The Netherlands has long upheld their commitment and a strong tradition of promoting equality, tolerance, and individual freedoms.
- The Dutch society values individual rights and freedom, and there has been a strong push to ensure that everyone, regardless of their sexual orientation, is treated equally under the law.
- Additionally, the Netherlands has a progressive political landscape with a commitment to human rights. The Dutch government recognised that denying same-sex couples the right to marry constituted a form of discrimination, and legalisation was seen as a necessary step to uphold constitutional and human rights principles.

²⁰ Hart, R. (2021) The Netherlands celebrates 20 years since becoming the first country to legalize same-sex marriage by floating a giant pink cake down Amsterdam's canals, Forbes. Available at: <https://www.forbes.com/sites/roberthart/2021/04/01/the-netherlands-celebrates-20-years-since-becoming-the-first-country-to-legalize-same-sex-marriage-by-floating-a-giant-pink-cake-down-amsterdams-canals> (Last visited: 09 November 2023).

- Furthermore, there was a growing public acceptance of same-sex relationships in the Netherlands. A substantial portion of Dutch citizens supported granting equal marital rights to same-sex couples.
- Lastly, the legislation of same-sex marriage in other countries, such as Belgium and Canada, also played a role in influencing the decision in the Netherlands.

Overall, the legislation of same-sex marriage in the Netherlands was the result of combination of societal progressiveness, political will, and the recognition of equality and human rights. This decision continues to serve as an inspiration for many other countries around the world.

On the contrary, in Saudi Arabia, legal and social landscape surrounding same-sex marriage is completely different. The country follows a conservative interpretation of the Islamic law, which influences its views on various social issues, including marriage. Saudi Arabia follows an uncodified criminal code based on the Sharia law. Under this framework, sexual relations outside marriage are prohibited, same-sex marriage is not recognised, and homosexual acts are criminalised and punishable by law. In certain circumstances, the punishment may extend to severe penalties, including death.²¹ Marriage in Saudi Arabia is strictly defined as a union between a man and a woman. The broader legal system also imposes strict prohibitions concerning homosexuality. In Saudi Arabia, the prevailing cultural and religious beliefs strongly stigmatise homosexuality. Any public displays of affection or any form of advocacy for LGBTQIA+ rights are generally not tolerated. The major reasons behind the non-legalization of same-sex marriage and criminalisation instead, in Saudi Arabia are:

- The primary reason is the country's adherence to a conservative interpretation of Islamic law, under which marriage is considered as a sacred bond between man and woman only.
- Secondly, the cultural traditions as Saudi society has deep rooted cultural traditions that align with conservative views regarding marriage and family. These traditions influence societal norms and expectations, making it difficult to introduce or accept alternative forms of marriage.

²¹ Human Dignity Trust. (2023) *Country Profile: Saudi Arabia* Available at: <https://www.humandignitytrust.org/country-profile/saudi-arabia/> (Last visited: 19 November 2023).

- Additionally, social and religious values is one of the reason for not legalising same-sex marriage. There is emphasis on the importance of traditional family structures, based on the belief that procreation and the continuation of the family lineage are essential.
- Lastly, the legal framework of Saudi Arabia is based on the islamic law called sharia law, which informs legislation and has a conservative stance on matters related on homosexuality. This framework shapes the country's approach to same-sex marriage and LGBTQIA+ rights.

In comparative context, India occupies an intermediate position where same-sex relationships are no longer criminalised yet same-sex marriages are not legally recognised. Marriage equality in India has made significant progress in recent years. A significant milestone was achieved in September 2018 when the Supreme Court of India decriminalised homosexuality by striking down part of Section 377 of Indian Penal Code which had criminalised consensual same-sex relations. This landmark judgment marked a major step toward affirming the rights of the LGBTQIA+ community and underscored the constitutional values of equality and dignity.

However, despite decriminalisation, same-sex marriages remain unrecognised under Indian law. The definition of marriage under Indian law still adheres to the traditional concept of union between a man and a woman. As of now, there is no legislation or binding judicial pronouncement granting marriage equality.

At the societal level, progress has been gradual. LGBTQIA+ activists and organisations continue to advocate for legal recognition and broader social acceptance. Some cities in India have witnessed symbolic same-sex marriages, and certain religious as well as social organisations have shown support for LGBTQ+ rights. However, others oppose to the legalization of same-sex marriage as it goes against traditional belief and values.

India plays a neutral role after declaration of homosexual relations being decriminalised. The judgement recognized the importance of equality, privacy, and dignity for all individuals regardless of their sexual orientation. It also highlighted that LGBTQIA+ community has the right to live with dignity, free from stigma and discrimination. Additionally, a few individual states in India have taken steps towards recognizing same-sex relationships. For example, Kerala has

introduced a “Cohabitation Bill” that provides legal recognition and protects same-sex couples. The societal attitude towards same-sex marriage is gradually evolving in India. Thus, while India has moved beyond criminalisation and embraced constitutional principles of equality and dignity, the legal recognition of same-sex marriage remains an unresolved question as the same was denied in the latest judgement of *Supriyo vs Union of India*.

SUPRIYO VS UNION OF INDIA²²

The most recent case related to same-sex marriage was decided by the Supreme Court of India on 17th October, 2023 in *Supriyo v. Union of India*. In a 3:2 majority verdict, the Constitution Bench declined to grant legal recognition to same-sex marriages. It was held that such recognition falls within the domain of Parliament rather than the judiciary. The Court observed that while it has the power to interpret laws, it cannot create new legislation. It further held that the Special Marriage Act, 1954, could not be interpreted in a manner that extends marriage rights to LGBTQIA+ couples.

Ratio decidendi:

- In a 3-2 verdict, the constitutional bench refused to grant legal recognition to same-sex marriage in the country and left it for the Parliament to formulate necessary legislation on the matter.
- All five judges held that the “Right to marry” is not a fundamental right in itself.
- The Court observed that there is no universal or static concept of marriage. It was held that marriage has attained significance because of the regulation of the state as the state grants material benefits exclusively upon married couples.
- The Court held that it cannot interpret or read into the Special Marriage Act provisions that were neither intended by Parliament nor supported by simple reading of the statute. It

²² *Supriyo vs Union of India*, 2023 INSC 920

cannot add or strike down words to include “spouses” in place of “man/woman” to include same sex couples.

- The Court affirmed that all individuals, including queer couples, have the freedom to enter into a union. These unions deserve protection and recognition by the state.
- The Court clarified that transgender persons in heterosexual relationships and intersex individuals who identify as male or female, retain the right to marry under existing legal frameworks.
- The Court declined to extend joint adoption rights to same-sex couples.
- The Court directed that the Union Government will constitute a committee chaired by the Cabinet Secretary for the purpose of defining and elucidating the scope of the entitlements of queer couples who are in a union. The former Chief Justice of India, D.Y. Chandrachud, also suggested guidelines for the functioning of this committee.

Obiter dicta:

The verdict of the case was not in favour of the same sex marriage. However, the court made several observations, some of which are:

- The legislature addresses unique challenges of the heterosexual marriage and so, a new legislative regime must be introduced to regulate marriage of non-heterosexual couples²³.
- Queerness is a natural phenomenon and it is not an urban or elite concept.²⁴
- There is no material on record to show that only a married heterosexual couple could provide stability to a child.²⁵

²³ *ibid.*

²⁴ *ibid.*

²⁵ *ibid.*

- Gender is not the same as sexuality.²⁶
- Choosing a life partner is an integral part of choosing one's course in life.²⁷
- All queer persons have the right to choose their partner but the state cannot be obligated to recognise the bouquet of rights flowing from such union.²⁸
- Non-heterosexual and heterosexual unions must be seen as both sides of a coin.²⁹
- Legal recognition of non-heterosexual unions can challenge culturally ordained gender roles even in heterosexual relationships.³⁰
- The capacity of non-heterosexual couples for love, commitment and responsibility is no less worthy of regard than heterosexual couples. Let us preserve this autonomy, so long as it does not infringe on the rights of others.³¹
- The Discriminatory impact – cannot be ignored by the State, the State has a legitimate interest necessitating action.³²
- State shall ensure - consistent with the previous judgement of this Court in K.S. Puttaswamy, Navtej Johar, Shakti Vahini and Shafin Jahan - that the choice exercised by queer and LGBTQ couples to cohabit is not interfered with and they do not face any threat of violence or coercion.³³

²⁶ ibid..

²⁷ ibid.

²⁸ ibid.

²⁹ ibid.

³⁰ ibid.

³¹ ibid.

³² ibid.

³³ ibid.

WAY FORWARD

India is a remarkably diverse country due to its vast size, varied population and incredible range of cultures, languages, religions, and ethnic groups. The peaceful coexistence of such diversity is sustained by the principles of acceptance and inclusivity.

In the current scenario where the Supreme Court of India has denied marriage equality and has left the matter to legislation, the way forward needs to be inclusive and it must reflect the needs of this diverse population and tackle the complexities of the legal framework. “Though the Supreme Court has refused to legalise same-sex marriage, the Constitution Bench judgment is a formidable step to silence hostile voices who claim that homosexuality and gender queerness are un-Indian.”³⁴ The Union Government must remain mindful of the Constitution’s basic structure, particularly its commitment to equality, dignity, and justice. The way forward may include the following:

1. **Parliamentary Action:** The Parliament must take initiative and clearly communicate its position on the matter. A definitive legislative stance would provide clarity to stakeholders and ensure that any reform proceeds through a constitutionally appropriate process.
2. **Anti-discrimination laws:** The Parliament should consider strengthening anti-discriminatory laws and policies to protect the LGBTQIA+ community from discrimination and violence. Protection must extend to areas such as employment, housing, healthcare, education, and access to public services.
3. **Constitution of a Committee:** The court, as per the Union Government’s proposal in their submission during the case,³⁵ advised the government to set-up a high-powered Committee headed by the Cabinet Secretary to address the concerns of same-sex couples.

³⁴ Rajagopal, K. (2023) Supreme Court’s same-sex marriage verdict acts as a formidable document upholding the Indianness of homosexuality and gender queerness, *The Hindu*. Available at: <https://www.thehindu.com/news/national/scs-same-sex-marriage-verdict-acts-as-a-formidable-document-upholding-the-indianness-of-homosexuality-and-gender-queerness/article67449610.ece#:~:text=Though%20the%20Supreme%20Court%20has,gender%20queerness%20are%20un%2DIndian> (Last visited: 18 November 2023).

³⁵ *ibid.*

4. Awareness and Education: Greater public awareness and education are necessary to foster better understanding in the minds of the public about the LGBTQIA+ community. An informed society is paramount, irrespective of the ultimate legislative outcome. It is only through awareness and education that we can bridge the knowledge gap and make informed decisions. As per the latest Pew survey in June³⁶, 53% of Indian adults said that same-sex marriage should be legal, while only 43% opposed it. The growing public support demonstrates the positive impact of awareness and evolving social attitudes.
5. Legal Challenges and Constitutional Interpretations: Legal scholars should continue to examine constitutional principles of equality, dignity, and non-discrimination to ensure that future interpretations and reforms are aligned with constitutional values.
6. Research and data collection: Conducting research and collecting data on the social, psychological, and legal implications of same-sex marriage can provide an evidence based foundation for law making. These findings can help with the legislative process as well as dispel prevailing misconceptions.
7. Amplifying voice: Members of the LGBTQIA+ community and their families can play a crucial role by sharing their personal experiences that humanise the issue and illustrate the impact of marriage equality on their lives.

Although the decision by the Supreme Court not to legalize same-sex marriage is a setback, it also opens up opportunities for constructive dialogue, legislative action, and societal change. At present, queer couples who do not fall within heterosexual frameworks remain without full marital recognition, while transgender persons identifying within the gender binary and in heterosexual relationships retain the right to marry under existing laws. Several other judicial observations affirm commitment to dignity, equality, and protection of queer unions. Thus, it is believed that “There May Be a Silver Lining in the Supreme Court’s Marriage Equality Judgment”.³⁷

³⁶ Gubbala, S. (2023) How people around the world view same-sex marriage, Pew Research Center. Available at: <https://www.pewresearch.org/short-reads/2023/06/13/how-people-in-24-countries-view-same-sex-marriage/> (Last visited: 19 January 2024).

³⁷ Singh, A. and Ramkumar, M. (2023) *There may be a silver lining in the Supreme Court’s marriage equality judgement*, The Wire. Available at: <https://thewire.in/law/there-may-be-a-silver-lining-in-the-supreme-courts-marriage-equality-judgement> (Last visited: 16 November 2024).

The steps outlined above represent a comprehensive approach to moving forward with the legislative process for marriage equality in India. Through thoughtful legislative reform, inclusive dialogue, and continued commitment to constitutional principles, India can move closer to becoming a more equitable and inclusive society while upholding democratic values and fundamental rights.

CONCLUSION

In the timeless tapestry of human existence, love has always been the thread that binds humans together. For centuries, it has been the gentle force that transcends boundaries and embodies kindness. It allows one to unconditionally care for another and reminds us to look beyond selfish desires and material gains. Love is a universal language which deserves to be expressed freely by every individual irrespective of their sexual orientation, gender identity or any other distinction. As we acknowledge the fact that sexual orientation is not a choice, we must confront the poignant question: who are we to withhold acceptance and deny equality? Tolerance is imperative. Every human possesses basic rights and denying these rights amounts to discrimination.

This paper has explored the issue of same-sex marriage from historical, legal, social, and comparative perspectives. It is evident that progress has been made yet it is clear that challenges continue to persist. The social and legal implications highlight the need for a shift in collective understanding. Arguments both for and against same-sex marriage reflect the broader societal discourse and demonstrate the importance of dialogue and education in fostering inclusivity.

The recent Supreme Court judgment in *Supriyo v. Union of India* represents a pivotal moment in our analysis and serves as a testament to the evolving legal landscape. While the judgement did not legalise same-sex unions, it recognised the dignity and rights of homosexual couples. The court has recognised the need for legislation and how even though the right to marry is not a fundamental right, not letting homosexual couples marry is directly in violation of Article 14, 15 and 21. *“The court gave many directions but ultimately and sadly they won’t have any effect in law, the government of India is not duty bound to follow it.”* (Swajita, Lawyer)

The bench agreed that introducing a law is beyond their jurisdiction and emphasised that the issue ultimately falls within the legislative domain. The fact that several legislative proposals relating to LGBTQIA+ rights have not progressed in Parliament highlights the challenges that lie ahead. At the same time, the judgment clarified that transgender persons in heterosexual relationships, as well as intersex individuals who identify within the gender binary, retain the right to marry under existing laws. These observations, along with the directions issued to the Union Government to examine the rights and entitlements of queer couples, indicate that the legal discourse surrounding marriage equality is still evolving.

As we contemplate the way forward, it is crucial to recognize that the recognition and acceptance of same-sex marriage extend beyond legal frameworks. The path ahead involves not only legislative reforms but also a cultural shift towards empathy, understanding, and inclusivity.

This paper serves as a contribution to ongoing dialogue surrounding marriage equality by urging us to envision a society where all individuals are afforded the same rights and dignity regardless of their sexual orientation. The belief that every individual deserves love, dignity, and equal rights is not merely a legal principle but a deeply human one. As society works toward removing taboos and dismantling stereotypes, the central idea is of respect – respect for the diverse ways in which love manifests itself and respect for the individuals who navigate a world where acceptance is not granted freely.

The question that ultimately remains is this: How can we, as advocates of equality, proponents of non-discrimination, and champions of the right to live with dignity, justify denying individuals the right to marry the person they love? How can our Constitution which offers these rights as “fundamental” justify denying it to people merely due to their sexual orientation?

It is therefore essential that both the judiciary and the legislature continue to promote inclusivity and work toward securing equal rights for all citizens. By embracing the principles of justice, equality, and fairness, India can move toward enacting comprehensive legislation that recognises and protects the rights of same-sex couples. Only then can the promise of equality truly become a reality for everyone.