

# THE TRENDS AND CHALLENGES OF HOMOSEXUAL MARRIAGE IN INDIA

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## ABSTRACT

In India, the Indian Constitution gives its citizens the power to lead a dignified life and the freedom to choose. If so, the Indian constitution should have given its citizens the freedom to choose their sexuality and act accordingly. But up until 2017, certain laws criminalized homosexuals for their expression of their sexual orientation. This paper is going to analyse the previous predicaments and current situation of homosexuals regarding marriage with respect to law and should homosexual marriage be allowed in India and if so, what changes can be proposed to accommodate homosexual marriage.

**Keywords-** homosexual marriage, non-heterosexual marriage, LGBTQ+ community, Indian Laws, Human Rights, right to marriage, same-sex marriage, Indian Constitution.

## I. INTRODUCTION

In the year 2017, the case of Navtej Singh Johar Vs Union of India, it has been declared that homosexuality is not a punishable offence under S.377 of IPC but it is an expression of one's sexual orientation that is protected under the Art.19 of Indian Constitution. After this declaration by the supreme court homosexuality was legal. Now comes the matter of homosexual marriage, in particular the legal recognition of the homosexual marriage following consequent changes in the aspects that follow the marriage such as adoption laws, divorce laws, inheritance laws, maintenance laws, etc.,<sup>1</sup> As of 2022 India does not legally recognize the homosexual marriage but the individuals in the same-sex relationship can attain certain welfare and rights as a live-in couple.<sup>2</sup> Currently, some efforts are being made to make homosexual marriage legal in India on the basis that India provides its citizens with the liberty to choose their lifestyle to lead a dignified life<sup>3</sup> and that comes with the right to choose a partner of their choice for their marriage irrespective of the gender of the partner. Before we can answer that question we must first understand about the previous struggles and problems faced by the people of LGBTQ+ community, what are the current laws or acts that are obstructing the legal recognition of the homosexual marriage, what is the current situation of the LGBTQ+ community and their fight for legal recognition of non-heterosexual marriage and what are some of the proposed changes / amendments that can be made to accommodate the legal recognition of the homosexual marriage.

## II. PREVIOUS JUDICIAL ACTIONS IN CASES OF HOMOSEXUALITY

In Indian history, we can observe homosexual couples started to come out into society since 1980. The majority of the people in Indian society consider homosexuality as immoral and wrong and majority of the individuals who come out to their family as homosexual tend to be disowned by the family (cut off from inheritance, etc.,) or in some unfortunate cases, they are violently persecuted in the name of protecting family honor. Even when these individuals try to seek help from police officers, they are often harassed by them. The courts in India are there to establish justice for the people and the courts have stated that the individuals, as adults can choose who to live with.<sup>4</sup> In the year of 1987, two policewomen married each other by Hindu rites and this caused quite a stir in the society. And in the year 2000, "Same-Sex Love in India" a book written by Ruth Vanita, she explains the numerous cases of homosexual marriage, and the unfortunate suicides that had taken place due

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<sup>1</sup> Live-in couples are people who are not married to each other but live as cohabitating couples. Since August 2022 the supreme court said LGBTQ+Q community can attain rights equal to married couple as a live-in couple. This can be said as doctrine of separate but equal since the homosexual couples are denied of their right to marriage but are only recognized as constitutionally equal group.

<sup>2</sup> Around 18 homosexual couples have petitioned in the supreme court for legal recognition of non-heterosexual marriages.

<sup>3</sup> Reasonable restrictions are applied as mentioned in Art.19(2).

<sup>4</sup> In this case many such homosexual marriage cases were reported and it was found out that most of the homosexual marriages were happening between young women belonging to lower-middle class families and moreover these women have no idea about any kind of gay movement happening around the world.

to the individuals feeling oppressed, and she also analyzed the legal, historical and religious aspects of the non-heterosexual marriages. She strongly argued that many of such marriages can be recognised as legally valid because according to the Hindu Marriage Act, 1955 any marriage performed between two Hindus in accordance with the customs, rites, and rituals prevalent in the community is legally valid. Since then, the LGBTQ+ community has been struggling to live a dignified life and are continuously fighting for their rights ever since then.

In the Navtej Singh Johar Case, the Apex Court of India consisting of the bench (5) of Chief Justice Dipak Misra, Justice Rohinton Fali Nariman, Justice A. M. Khanwilkar, Justice D. Y. Chandrachud, and Justice Indu Malhotra unanimously declared that section 377 of the IPC was criminalizing the sexual acts between two consenting adults and hence it was unconstitutional as it is in violation of the Article 14, 15, 19, 21 of Indian Constitution.<sup>5</sup> On the day of 6 September 2018, the Supreme Court of India declared that the people of India can freely express their sexual orientation and it is protected by the Article 21 of the Indian Constitution. This was a landmark judgment in India and a huge moment for the LGBTQ+ community. Up until this declaration was made by the apex Court,<sup>6</sup> Section 377 of the IPC had the power to punish those involved in carnal intercourse. As of 2023, this law has been repealed as it is criminalizing the LGBTQ+ community on the characteristic of their sexual orientation, contradicting the fundamental rights of the people and were being punished because of their sexual orientation which is an integral part of who they are. It can be clearly observed that homosexuality is neither immoral nor does it threaten the security or integrity of the nation that which are termed as an exception for the provisions given under Article 19.

### III. CURRENT JUDICIAL PREDICAMENT

While looking into the case of homosexual marriage in India it raises many questions. One such question is, can the equality provided by the constitution be abridged to different rights for different groups that are established on the grounds of subjective classification and social norms that are accepted by the majority? In the Navtej Singh Johar Case, Constitutional equality was established by emphasizing that everyone including the LGBTQ+ community has a constitutional right to equal citizenship in all its forms irrespective of the notions of heteronormativity by state and society and that these cannot regulate or dictate the regulations and constitutional liberties based on the sexual orientation of the individual. We can also see that the Supreme Court has unequivocally dismissed the idea of majority opinion (ideals) should triumph over the right to liberty and the right to dignity of the individual belonging to a minor community. The apex court also said that sexual orientation is a connatural segment of individual autonomy, liberty, equality, dignity, and privacy.

Another question is why the members of the LGBTQ+ community want to be legally recognized by law (Special Marriage Act, 1954). When we look into the Special Marriage Act, <sup>7</sup>Section 4(c) of the act recognizes only marriage between "female" and "male" and thus it is discriminatory in nature to the homosexual couples and it denies them the matrimonial benefits such as adoption, surrogacy, employment and retirement benefits. We can also find such enactments in the Hindu Marriage Act, 1955 and the Foreign Marriage Act, 1969. The people of the LGBTQ+ community should not be denied these rights because of their sexual orientation which is an integral part of one's way of life.

India is a country that is deeply rooted in its traditions and cultural norms and hence any changes that are contradicting the traditions even though they are constitutional and will help the people, will be difficult to incorporate. But nonetheless, the Courts are established for such matters. There is the unbending opposition from the government on the same-sex marriage that has its roots in the majoritarian social values and norms. In any situation like this politics are always involved. The government may consider that the votes from the LGBTQ+ community are minor and hence they won't gain anything significant from the LGBTQ+ community by supporting them and in fact, if the government does support the same-sex marriage it will upset the majority of their voters that deeply believe in traditional values that oppose the same-sex marriage and hence they will be at the chance of compromising their votes from the majority community. The government argues that the authority of recognizing the homosexual marriage should come under the legislature. But this argument doesn't represent any constitutionalism because of the political powerlessness of the LGBTQ+ community (minority community). But the country cannot turn a blind eye to the problems faced by the LGBTQ+ community since whether it be majority or minority each individual's rights are equally important. Hence the Supreme Court has found some administrative solutions to the LGBTQ+ community's grievances that are of a compromising nature for the LGBTQ+ community and the government. This is why until now the Indian government and the Supreme Court have tried to establish constitutional equality and non-discrimination on the basis of sexual orientation by following the discriminatory Separate but Equal doctrine.<sup>8</sup> They declared the section 377 of the IPC to be unconstitutional but they still haven't completely come to a decision in legally recognizing non-heterosexual marriage.

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<sup>5</sup> Art. 21 right to protection of life and personal liberty.

<sup>6</sup> Section 377 has been declared unconstitutional and has been voided. 377. Unnatural offences.-Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

<sup>7</sup> Conditions relating to solemnization of special marriages. 4(c) the male has completed the age of twenty-one years and the female the age of eighteen years.

<sup>8</sup> Comes under doctrine of separate but equal.

As of 12 May 2023, 18 Indian homosexual couples have petitioned to make same-sex marriage legal in India, and on 11 May 2023, the Apex Court of India reserved its verdict on the above-mentioned petitions that seek for a right to marriage for the LGBTQ+ community people under the Special Marriage Act, 1954. This has faced rigid criticism from both Central and State government. Over the span of 10 days a bench consisting of Chief Justice D Y Chandrachud and Justices S K Kaul, S R Bhat, Hima Kohli, and P S Narasimha heard 40-hour long arguments from over 12 advocates. The petitioners placed a rejoinder to the Union government's argument stating that the right to marry is not a fundamental right and that any kind of acknowledgment of homosexual marriage by the Supreme Court would be monumental. Following that, senior advocate A M Singhvi lead the rejoinder submission of the petitioners and fortified their essence by stating that the people of the LGBTQ+ community are not solely seeking the pronouncement of their right to marry a partner of their choice but also seeking for a new elucidation of the Special Marriage Act, 1954 that would permit for the solemnization and the registration of the homosexual marriages.

When it comes to the concept of marriage, it is not merely an impressionistic concept but also a social institution that is deeply rooted in the society. It is very valuable in its own right and also as a path to other rights that follow it. And we can observe that the petitioners are seeking their right to access this social institution like all others, on equal stipulations. Singhvi expressed their opinion and said that the people of the LGBTQ+ community should not be discriminated on the basis of their gender identity and sexual orientation in their access to this social institution. This discrimination is negative as it violates the fundamental rights<sup>9</sup> of the people of LGBTQ+ community. Advocate Singhvi has earnestly pleaded to the apex court to give full effect to the cardinal implication of the Special Marriage Act by broadening its essence and incorporating the application to the homosexual couples as well. The advocate also stated that the Supreme Court may be looking forward to announcing that the clauses under the Special Marriage Act with respect to the solemnization and the registration of the marriage are to be perpetuated to the homosexual couples as well with a few exceptions in the provisions of the Special Marriage Act and other laws in force that are of the essence 'wife' against 'husband' and 'woman' against 'man' (i.e., the gender-specific situations).

While many other advocates such as senior advocate Menaka Guruswamy have followed a similar line of thinking as explained above stating that the right to marriage is in line with the basic fundamental right to equality of the people of the LGBTQ+ community, Saurav Kripal has stated that just a mere declaration of the right to marry of the LGBTQ+ community will not be sufficient and it does not define the consequential rights such as adoption, etc., which would not prove much to help the LGBTQ+ community to gain an equal standing with the other members of the society. While it is true advocate Arundhati Katju explained that the declaration of the rights in a constitutional manner will have a salutary effect on the laws that will be further framed that are specific to the LGBTQ+ community which will bring them to equal status in the society and the declaration of the right to marriage of the LGBTQ+ community will be the first step in the path of achieving equality in the society and it will give the LGBTQ+ community a basic foundation for them to further achieve equal rights in the future.

<sup>10</sup>It is a bit ironic that that the majority (the heterosexuals) are having more say in the matters related to homosexual marriage than the involved minority community (LGBTQ+ community). The majority is going to be deciding the rights of the minorities. But there is a crucial aspect to consider. The right to a dignified life is an individual right and individual rights cannot be determined by the majoritarian concept. Here the legal recognition of the homosexual marriage is a way of leading a dignified life and hence it should be determined by constitutional morality and not societal morality.

#### IV. THE DISTINCT PERSPECTIVES AND PROPOSED SOLUTIONS

There are people who support the homosexual marriage and there are those who are against it. First, let us try to understand why some people in India are against the concept of same-sex marriage. Some people consider same-sex relations to be unnatural, barbaric, immoral, and uncouth. This stems from their religious beliefs and what they conceptualise as natural. <sup>11</sup>And many believe that God wanted a relation of the sexual kind to be between a "male" and a "female" for the reproduction of the next generation and hence this same-sex sexual relation is unholy and God didn't want it. <sup>12</sup>The story of Sodom and Gomorrah is often misinterpreted as a biblical condemnation of male homosexuality when in reality it is about the gang rape. Many believe that the culture and society are built on the marriage and partnership between a "man" and a "woman". Say those religious beliefs didn't exist, some people don't find same-sex unions acceptable as it doesn't reproduce children to carry the legacy, honor, and the name of the family.

While those are the arguments of the persons who oppose the same-sex marriage, here are the arguments presented by the LGBTQ+ community as a part of their fight for homosexual marriage recognition. They argued that an individual should have the liberty and freedom of expression, in their case particularly freedom of expression of sexual orientation, and not be bound to the "social norms" or "tradition". They should not be denied of rights based on their sexual orientation when it is

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<sup>9</sup> Article 14 Right to Equality, Article 15(1) non-discrimination, Article 19(1)(a) Right to freedom of speech and expression, and Article 21 Protection of Life and Personal Liberty

<sup>10</sup> Justice Indu Malhotra extended their apology to the sexual minorities for the discrimination they faced in the Navtej Singh Johar case.

<sup>11</sup> Biblical references to the holy book bible.

<sup>12</sup> The details of the story are that the men of Sodom planned to rape the visitors (angels in disguise) and Lot who is the host of the visitors offers his virgin daughters to those men to be raped in the protection of his house. Here the god destroyed that town because of the rape and sexual violence and not because of homosexuality.

harming nobody, literally nobody. There has never been a case where society has been harmed because of a heterosexual marriage then why would a homosexual marriage cause "harm" to the society? They argue that they are asking for the freedom of expression of love to their partners which in no way is a threat to society, hence why deny them of such right. As of 2023, there are 34 countries that legally recognize marriage between homosexual couples and there has never been a disaster caused by this declaration. And to counter the fact that same-sex couples cannot reproduce there are many ways to reproduce a child such as IVF and there is also the option of adoption and surrogacy.

Here are some proposed methodologies that may aid in the recognition of same-sex marriage

- i. <sup>13</sup>Introduction of Unified Civil Code (it has not yet been fully disclosed regarding the exact contents of the UCC, but in essence, it aims to remove the inconsistencies in the matters of marriage, divorce, adoption, inheritance, and succession that are different for each religion by introducing common law in these matters to all the people irrespective of religion) may help the LGBTQ+ community get uniform recognition in the matters of marriage equally with others. (It is a plausible solution if the UCC considers gender-neutral terms and situations)
- ii. The present legislation can be explicated in order to legally recognize the unions of the same sex.
- iii. The laws which deny the right to marriage to the LGBTQ+ community can be amended to allow the same-sex marriage.
- iv. Make a separate act that recognises the union of individuals of the same gender
- v. <sup>14</sup>The marriage acts specific to the religion can be amended to allow the same-sex union.
- vi. Amend the Special Marriage Act to have gender-neutral terms and allow the recognition of homosexual marriage.

## V. CONCLUSION

The whole point of analyzing the situation of homosexual marriage and its conflict with the current laws is to try and answer the question should homosexual marriage be legal in India. After covering all the points, it is safe to say that the constitutional justice for the LGBTQ+ community would be to legally recognise the same-sex marriage. While marriage is a crucial part of the social construct it more importantly about the love, honor and commitment shared by the couple and relationship between them. Marriage is a form of expression of love and we as people of India have the freedom to express whether it be our opinions or sexual orientation. <sup>15</sup>A person's liberty should not be restricted because of traditional societal norms but instead, be determined in a constitutional way. In a way, this can be interpreted as <sup>16</sup>Transformative constitutionalism. The legalization of homosexual marriage will be a monumental change and the courts are working on the matter by slowly incorporating the change in an incremental manner as to allow the society to adjust and accept the change. We have already come a long way from punishing the LGBTQ+ community for who they are to accepting them and making changes in the law that are unconstitutional for them. So, in the future, we can expect the legalization of homosexual marriage and the society to gradually accept and welcome the LGBTQ+ community and celebrate equality.

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<sup>13</sup> UCC comes under Art.44 of the Indian constitution

<sup>14</sup> It is important to point out that in the Hindu Marriage Act, the terms bride and groom were used to describe the individuals in the marriage but it was nowhere mentioned the definition of a bride and a groom hence an individual can be interpreted as a bride or a groom.

<sup>15</sup>. This is an issue of individual rights Vs group rights.

<sup>16</sup> It elicits inculcating principles of equality, fraternity, liberty, and dignity into the society. It gives utmost importance to constitutional morality over societal morality and is focused on the betterment of the society as a whole.