

Analysis of Legal Barriers to Same-Sex Marriage in India

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Introduction

The issue of same-sex marriage has been highly debated and controversial, and the decision by the Supreme Court to hear the case of legalisation of same-sex marriage now awaits a final verdict. Same-sex marriage is not legally recognised yet in India. Gay couples getting married outside of India through Hindu rituals has been quite a phenomenon. In India, LGBT couples get mocked regardless of marriage status, they also face social ostracisation and are harassed by police officials.

The historic verdict of decriminalisation of Section 377 of IPC brought a ray of hope for LGBT couples. It was introduced during British Rule in India, based on Victorian morality, to criminalise carnal intercourse against the order of the nature and was a law mostly used to prosecute homosexual activity. It was abolished in 2018 by the Supreme Court thus empowering and enabling the LGBT community to fight for their rights. The way forward then became appealing for legal recognition of same-sex marriage, thus several lawsuits have been filed in courts all over India about the legality of Indian same-sex marriages.

The Supreme Court hearing clubbed together about 20 petitions asking for legal recognition of same-sex marriage under secular marriage laws—the Special Marriage Act and the Foreign Marriage Act. Petitioners have argued that not recognising same-sex marriage is a violation of their rights to equality, dignity and freedom of expression— discussions ensued on whether non-recognition of marriage violated their right to dignity and if Special Marriage Act can accommodate same-sex marriage or not. The Centre has appealed to form a committee to address same-sex marriage concerns.

In Indian society, marriage plays an important role, it is emphasised as a way to live a ‘complete’ life. A married couple has an easier time manoeuvring life and is seen as respectable members of society. The social perspectives on same-sex marriage range from support to disapproval to violent persecution. The Madhya Pradesh government urged the Supreme Court not to rush same-sex marriage sanction since it can rip apart the social fabric of the country.¹ The Central Government views same-sex marriage demands as urban and elitist. However, a study by the Centre for the Study Developing Societies (CSDS)-Lokniti in collaboration with Azim Premji University showed rural India had lower rejection than urban— the report also showed people from Uttar Pradesh and Hindus have the highest acceptance rate.

Recognising same-sex marriages would require altering a range of other laws such as adoption, divorce, cruelty, maintenance, property inheritance, etc. Pension, provident fund, gratuity, benefits - all accrue only in a marriage— a range of financial and legal benefits decisions will need amending once same-sex marriages are legalised. India also has personal laws that act as the greatest hindrance to same-sex marriage legalisation, it not only complicates the procedure but also makes it

¹ [“Madhya Pradesh urges SC not to rush into granting legal sanction to same-sex marriage as social fabric will be ripped apart”](#)- Press Trust of India, May 2023

impossible to form a codified law for same-sex marriage. The Supreme Court has thus held that the ruling does not aim to change personal laws and only limits the assessment of the constitutionality of same-sex marriage under the existing Special Marriage Act. So can the Special Marriage Act be amended to facilitate same-sex marriage? Or so should the LGBT community settle for rights under a Civil Union arrangement (short of marriage) instead of full legal recognition of same-sex marriage?

Status of Same-Sex Marriage in India

Marriage between people of the same-sex is an unimaginable concept for more than half of the world, considering only 34 countries have legalised same-sex marriage. Even within India, 5 years post the landmark judgement of decriminalisation of homosexual activity under Section 377 by the Supreme Court of India in the case of *Navtej Singh Johar v. Union of India (2018)*², the momentum on the social and legal front realising marriage rights to same-sex couples has been dilatory.

In India, marriage is largely a religion-driven idea, it is an institution that allows the union of heterosexual couples as per what is permissible under respective religions. The several personal laws are a testament to this very notion. However, it can be argued that personal laws are governed by statutes and often have no scriptural basis, as evident from the 2005 amendment to the Hindu Succession Act to the issue of maintenance under Islamic law and the abolition of triple talaq. The statutes by itself may be secular since they are subject to the limits and mandates of the Indian Constitution, but the various religious sentiments and perspectives on marriage being preserved and codified separately thus act as a hindrance towards marriage equality. The personal laws as well as the Special Marriage Act do not leave any room for gender-neutral interpretations, there is no legal ground for same-sex marriage under existing laws. Now this leaves us with the question of whether the right to marriage by itself is considered a fundamental right and if yes then how it can be extended to same-sex relationships hence laying the ground for the constitutionality of same-sex marriages.

Contrary to Article 16 of the Universal Declaration of Human Rights, the Indian Constitution does not explicitly recognise the right to marriage as a fundamental or constitutional right. Although marriage is governed by several statutory laws, its recognition as a basic right only came about as a result of Supreme Court rulings. According to Article 14 of the Constitution, such a declaration of law has the force of law in every court in India. In 2014, the Supreme Court took notice of press accounts of a panchayat-authorized gang rape of an Indian woman. The woman had a relationship with a man from a different group, thus the community panchayat ordered this "punishment." The Supreme Court ruled unequivocally that "an inherent aspect of Article 21 of

² *Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice, AIR 2018 SC 4321 W. P. (Cri.) No. 76 of 2016*

the Constitution would be the freedom of choice in marriage. Such offences are resultant of the State's incapacity or inability to protect the Fundamental Rights of its citizens. Article 21, which deals with the right to life and personal liberty, is an all-encompassing provision that includes within its fold the inherent right to marry someone of one's own choice.³

The past judgements did not with absolute certainty uphold marriage as a fundamental right nor did it address it in the context of same-sex individuals. Thus it can be argued that the right to marry is only exclusive to heterosexual couples. The inherent right to marry the person of one's choice is included within the scope of Article 21, which deals with the rights to life and personal liberty. However, the constitutionality of the definition of marriage as being limited to one man and one woman can be contested for violating Articles 21 (right to choose a life partner/right to a life with dignity/right to autonomy) or 14 (discrimination based on sexual orientation), or at a sub-constitutional level. Furthermore, it has been deemed outdated and unreasonable for the State to legitimise sexuality within marriage for the sole purpose of procreation. Article 15 does not specifically identify sexual orientation as a prohibited basis for discrimination. But the Supreme Court under the National Legal Services Authority of India v. Union of India case, ruled that all genders are included in the term "person" as defined by Article 14. Additionally, it was decided that "sex" in the sense of discrimination under Article 15 includes "gender identity" and that the term is not only a binary of male or female but rather flexible or a spectrum.⁴

The case of Navtej Johar v. Union of India⁵ is the very foundation for challenging the constitutional provisions that limit marriage to "one man, one woman," it is violative of Articles 14, 15, 19, and 21 of the Constitution.

Lastly, in the ongoing Suprio v. Union of India⁶ and other connected cases, the Supreme Court at the hearings of same-sex marriage pleas said the fundamental components of marriage are protected by constitutional norms and disagreed with the claim that there is no right to marry under the Constitution. According to Chief Justice of India D Y Chandrachud, who is in charge of a five-judge Constitution bench hearing petitions for same-sex marriage legal recognition, "To state...that there would be no fundamental right to marry under the Constitution would be far-fetched. What are the core elements of marriage? If you look at each of these elements, they are protected by Constitutional values..."⁷

³ SUO MOTU WRIT PETITION (CRIMINAL) NO. 24 OF 2014

⁴ National Legal Services Authority of India v Union of India, (2014) WRIT PETITION (CIVIL) NO.400 OF 2012

⁵ Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice, AIR 2018 SC 4321 W. P. (Crl.) No. 76 of 2016.

⁶ Supriyo v. Union of India. W.P.(C) No. 1011 of 2022.

⁷ [Can't say marriage not a fundamental right: Supreme Court. Indian Express. May 10, 2023](#)

Section 377 and its History

Section 377 of the Indian Penal Code was introduced in 1860 by the British Rule of India. The entire code was burdened by the then-current British legal framework and was full of onerous provisions, like section 377.

In order to legalise LGBT relations between consenting people, in 2001, an NGO Naz Foundation based in Delhi, proceeded to the Delhi High Court and raised concerns about Section 377. Then, in 2009, the Delhi High Court declared the penal clause "illegal," decriminalising sex between consenting individuals of the same sex.

This ruling was soon contested by a number of individuals and religious organisations, and in 2013 the Supreme Court, in *Suresh Kumar Koushal v. Naz Foundation*, overruled the Delhi High Court judgement, stating that the matter should be handed over to the Parliament.⁸ Shri Shashi Tharoor introduced a private member's Bill in Parliament in 2015 to decriminalise homosexuality, but it was voted against by the Lok Sabha. In the case of *Suresh Koushal*, five individuals from the LGBT community, hoteliers Aman Nath and Keshav Suri, journalist Sunil Mehra, chef Ritu Dalmia, businesswoman Ayesha Kapur, and dancer Navtej Singh Johar filed a petition to the Supreme Court again challenging the constitutionality of Section 377 and the ruling by the two-judge bench. The petition stated that their "rights to sexuality, sexual autonomy, choice of sexual partner, life, privacy, dignity, and equality, along with the other fundamental rights guaranteed under Part-III of Constitution, are violated by Section 377." They contested the part of the section that was "punishing adults with sexual intercourse and making it an act against nature's order."

The Supreme Court then declared in 2018 that it would reevaluate its ruling in *Suresh Kumar Koushal v. Naz Foundation*⁹. In *Navtej Singh Johar v. Union of India*, the Supreme Court finally overturned Section 377, declaring it as a violation of Articles 14, 15, 19 and 21; and proclaiming portions of the law criminalising consensual sexual acts between adults as unconstitutional.¹⁰ However, other parts of Section 377 that deal with having sex with children, extramarital affairs, and bestiality are still in effect.

According to Article 14, everyone must be treated equally, without being discriminated against before the law. Section 377 requires the Government to explain the distinction between specification and "nature-related intercourse" for it to be maintained as constitutional. In *Suresh Kumar Koushal v. Naz Foundation*, the government was unable to create a standardised test to distinguish between activities that were "intercourse against the order of nature" and those that

⁸ *Suresh Kumar Koushal v. Naz Foundation* Civil Appeal No. 10972 OF 2013

⁹ *Suresh Kumar Koushal v. Naz Foundation* Civil Appeal No. 10972 OF 2013

¹⁰ *Navtej Singh Johar & Ors. v. Union of India* thr. Secretary Ministry of Law and Justice, AIR 2018 SC 4321 W. P. (Cri.) No. 76 of 2016.

were "ordinary intercourse."¹¹ The Court came to the conclusion that Section 377 is unconstitutional because it classifies and discriminates against LGBT people arbitrarily, which violates their right to equality.

The freedom of speech and expression guaranteed by Article 19 of the Constitution safeguards the right to unrestricted expression of one's ideas and beliefs. Individual autonomy is safeguarded by the implicit right to privacy found in Article 21 of the Constitution's right to life and liberty. Here, Section 377 here seeks to restrict consenting adults to engage in private acts. These private actions do not harm human decency or morals or cause the general public distress. Therefore, Section 377 is against Article 19 of the Constitution.

The court decided that "criminalising carnal intercourse was irrational, arbitrary, and manifestly unconstitutional," according to the then-Chief Justice of India Dipak Misra. The court determined that Indians who identify as LGBT are entitled to all constitutional rights, including the freedoms guaranteed by the Indian Constitution. The court also said that members of the LGBT community are entitled to equal citizenship and unrestricted legal protection.¹²

Same-Sex Marriage Legal Battle: How it started and the journey so far

In 1987, two policewomen from Madhya Pradesh, Urmila Srivastava and Leela Namdeo got married according to Hindu customs, marking the first known case of same-sex marriage. Since then, there have been countless same-sex marriages published in the media. Few were successful in their causes, and several were prevented from doing so by the law or by society. However, as times have changed, people have grown more courageous to recognise their homosexual relationships in public. In 2020, Indian sprinter Dutee Chand urged other LGBT people to show more bravery by publicly embracing her same-sex relationship. Following the Navtej Singh Johar v. Union of India case¹³, eminent lawyers Arundhati Katju and Menaka Guruswamy developed "The Marriage Project." This project aims to legalise same-sex marriages in India by taking the voices of the LGBT community to the court, ensuring their stories, experiences and sufferings as a marginalised group are heard.

In January 2020, Nikesh and Sonu, a gay couple, petitioned the Kerala High Court for the recognition of their union. Four LGBT individuals, Abhijit Iyer Mitra, Gopi Shankar M, Giti Thadani and G. Oorvas moved to the Delhi High Court in September 2020 by filing a PIL arguing that they should be permitted to get married under the Hindu Marriage Act. The petitioners claimed that these limitations deprive them of their constitutional rights. On November 14, 2022,

¹¹ Suresh Kumar Koushal v. Naz Foundation Civil Appeal No. 10972 OF 2013

¹² Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice, AIR 2018 SC 4321 W. P. (Cri.) No. 76 of 2016

¹³ Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice, AIR 2018 SC 4321 W. P. (Cri.) No. 76 of 2016

Supriya Chakraborty and Abhay Dang, a lesbian couple, submitted a petition to the Supreme Court of India asking for the court to recognise their marriage.

High courts were instructed to transfer nine comparable petitions—eight from the Delhi High Court and one from the Kerala High Court—to the Supreme Court for consideration alongside the original petitioners by a bench of Chief Justice of India D.Y. Chandrachud, Justice P.S. Narasimha, and Justice J.B. Pardiwala. The Supreme Court accepted 20 related petitions submitted by 52 queer people, including 17 queer couples, on March 15, 2023.

The majority of petitioners demanded acknowledgement of the right to get married under the Special Marriage Act and the Foreign Marriage Act, two secular marriage statutes. Some of the petitioners are devout Hindus who contend that gay marriage is not against Hinduism. They claimed that the Hindu Marriage Act should be changed to include LGBT marriage because doing so would violate their right to practise their religion.

What are the Petitioners saying?

1. Grounds for approaching the Courts

The petitioners say that the Special Marriage Act that holds all over India for the solemnisation of marriage between any two persons outside of personal laws excludes queer couples from getting married. The Section 4 along with Schedules I, II, III, IV violate the fundamental rights of the petitioners under Articles 14, 15, 19, 21.

Since the Right Constitutional Remedies is guaranteed under Article 32, the petitioners are well within their rights to move to the Supreme Court.

2. Constitutional Morality

The law governs interpersonal interactions and establishes behaviour norms by reflecting society's ideals. Laws are subject to change as social circumstances do. But occasionally, and even intentionally, a legal reform emerges before a societal change. The Supreme Court has noted these dynamics and stated that the court should use discretion in assessing the right relationship between the subjective and objective aims of the law.

3. Right to life and personal liberty (Article 21)

The freedom of choice of marital partner and family life is at the heart of the personal liberties protected under Article 21, and it extends to same-sex couples as well. The

Supreme Court has in the past upheld that adult citizens have the right to choose their own partners to marry.

4. Freedom of Expression (Article 19)

The right to express individuality, love, and live a life with one's expression of choice applies equally to LGBT individuals and is protected under Article 19. One's sexuality is an integral part of identity, dignity and freedom.

5. Right to Equality (Article 14)

The law is cognizant of the fact that changes in society have ushered in significant changes in family structure, thus unconventional couples are equally deserving of not only protection under the law but also benefits under various legislations. Equality is not limited to the decriminalisation of same-sex marriages but also should be extended to all spheres of life including home, marriage, workplace, etc.

6. Anti-Discrimination (Article 15)

The exclusion of same-sex couples from the Special Marriage Act is discriminatory and violates the petitioners' rights. The Supreme Court has recognised that sexual orientation and gender identity are protected under Article 15.

7. Freedom of Conscience and Religion (Article 25)

Freedom to choose a marital partner is an essential component of freedom of conscience. Hinduism does not prohibit same-sex marriages thus exclusion of the same from the Hindu Marriage Act violates the right to practise religion.

Ancillary Rights to Married Couples

Married couples enjoy a host of legal, financial and welfare benefits as well as entitlements, privileges, and obligations– all as a virtue of being a near relative and recognised as part of the family. Same-sex couples despite being in a long-term stable and committed relationship would not be able to avail such benefits due to non-recognition of spousal relation between them.

1. Finance

Same-sex couples do not have the right to inherit property, maintain it, share in joint ownership of assets, pay taxes, or get benefits. LGBT people encounter extra challenges and

scrutiny when applying for privately supplied life insurance, holding joint bank accounts and lockers, mutual funds, and savings plans because these benefits do not extend to LGBT families.

India's succession and inheritance laws are governed by a combination of personal and secular laws. All of these laws divide inheritors into two gender categories of Male and Female. For instance, Hindus are governed by the Hindu Succession Act of 1956 with regard to inheritance of both joint and separate property. Transgender people and those with alternative sexual orientations are not covered by the Act. Most transgender people identify as females and can only assert their rights in this way. Considering the "guru-chela parampara" of the Hijra community, the Himachal Pradesh High Court recognised the appellant Sweety "guru" claim over her deceased chela's property regardless of religious identity in the case of *Sweety(eunuch) V. General Public* in 2016. The appellant was acknowledged by the court as the deceased's family and the legitimate heir.¹⁴ This was in accordance with the Madhya Pradesh High Court's 1990 ruling in the matter of *Ilyas Ors. V. Badshah*, which said that according to Hijra community custom, the property should not be left to those outside the Hijra community.¹⁵ The succession for Muslims is governed by their personal laws i.e. Shariat, and just like Hindu Act, Muslims too recognize only males and females as inheritors of property.

The consortium recognised as 'spousal consortium' is given the right to monetary compensation on claims the events including injury or death in Motor Vehicle Act.

2. Healthcare

Legally unrecognised spouses are not permitted to make healthcare decisions for patients who are unable to articulate their wishes because they are unconscious, in a prolonged vegetative state, suffer from a dementia-like illness or a comparable condition, or are under anaesthetic. Even to donate organs to each other, same-sex couples need the approval of the Authorisation Committee under the Transplantation of Human Organs and Tissues Act (TOHA) where their proof of "attachment" to the proposed recipient is evaluated before permitting donation. Married couples do not need approval since they are near relatives.

3. Legal Benefits

- a. Section 80C of Income Tax Act, 1961 provides for deductions of certain sums for computing the total income of assessee when such sums are paid on behalf of spouse, specifically:

- i. Payments or deposits made towards life insurance for wife or husband.

¹⁴ *Sweety V. General Public*. AIR 2016 HP 148

¹⁵ *Ilyas And Ors. vs Badshah Alias Kamla* AIR 1990 MP334

- ii. Payments or deposits made to effect or keep in force a contract for a deferred annuity on life of wife or husband.
 - iii. A contribution to any provident fund set up by the Central Government, where such contribution is to an account standing in the name of a wife or a husband.
 - iv. A contribution in the name of the wife or husband for participation in the Unit-Linked Insurance Plan.
- b. Section 6 of the Payment Gratuity Act, 1972, requires that as long as family members are alive, they have to be nominated by every employee who has completed one year of service. Thus a person cannot extend gratuity benefits to their same-sex partner as long as family members are alive.
 - c. Rule 3(2) of the Payment Wages (Nomination) Rules, 2009 under the Payment of Wages Act, 1936 also provides that as long as family members are alive, they have to be nominated by every employee.
 - d. Clause 61 of Employee's Provident Fund Scheme, 1952, requires the employee to make a nomination only in favour of a family member conferring the right to receive the amount that may stand to his credit in the fund in the event of death.
 - e. Under Section 10A(4) of Employee's Compensation Act, 1923, provides compensation to dependants who are only spouses, children or parents. A same-sex couple would not be entitled to these benefits.
 - f. Section 122 of the Indian Evidence Act, 1872, provides for spousal privilege, i.e. immunity from being compelled to disclose any communication made to them during marriage by their partner. Same-sex partners do not enjoy such crucial protection.

4. Parenthood

Same-sex couples are unable to become parents through adoption, surrogacy, or assisted reproductive technologies if the right to marriage is not recognised.

Couples who are not married or who are living together are not permitted to adopt children as a couple under the Juvenile Justice Act of 2015. According to the Adoption Regulations of 2022, a couple must have been married for at least two years in order to be eligible to adopt a child. The Central Adoption Resource Authority has determined that single prospective adoptive parents who are living with a partner are ineligible to adopt a child in accordance with the Adoption Regulations.

Only married couples are permitted to use surrogates to bear children under the Surrogacy (Regulation) Act of 2021. Only married couples who are infertile are permitted to use an authorised clinic or bank for assisted reproductive technology, according to the Assisted Reproductive Technology (Regulation) Act of 2021.

The child has no legal tie with an unrelated parent because the parents are unable to get married. As a result, the unrelated parent and the child are ineligible for a number of entitlements, privileges, obligations, and advantages. In the event of an emergency, a non-related parent cannot make medical decisions.

Arguments against same-sex marriage

Even before the SC hearing, when petitions were piling up, Sushil Modi, an MP and a prominent lawmaker, told Parliament that "India is the country of 1.4 billion people and two judges cannot just sit in a room and decide on such a socially significant subject. Instead, there should be a debate in Parliament as well as the society at large."

Arguments at the SC hearing:

1. The Union Government's Solicitor General Mehta submitted an affidavit, claiming that the petitions lacked tenability. He reasoned that the questions raised in the Case fell under the purview of the State Legislatures and the Parliament. He argued that the Supreme Court had no jurisdiction over the issues, and he requested the Bench to dismiss the case. Solicitor General Mehta's arguments were promptly refuted by Senior Advocates Rohatgi and Vishwanathan. They vehemently defended their Article 32-guaranteed right to be heard by the Supreme Court, particularly in cases involving the violation of fundamental rights protected by Part 3 of the Indian Constitution. The Solicitor General's move to preempt the petitioners' submissions was denied by Chief Justice DY Chandrachud and Justice SK Kaul. However, the CJI stated during the hearing that the petitioners are asking for the right to marry and that the court is aware that a declaration of the right to marry alone is insufficient unless it is put into practice by a statutory provision that recognises, governs, and grants entitlement to those who are married.
2. According to the Union Government, denying homosexual Indians the right to marry does not infringe against the basic liberties protected by Articles 14, 15, 19, 21, and 25 of the Indian Constitution. They use the Supreme Court's 2018 decision in *Navtej Singh Johar v. Union of India*, which specifically distinguished and excluded married partnerships while reading down Section 377 of the Indian Penal Code for breaching basic rights, to support their argument.¹⁶ They contend that while the Supreme Court decriminalised homosexual behaviour, it did not give it legal status.

¹⁶ *Navtej Singh Johar & Ors. v. Union of India* thr. Secretary Ministry of Law and Justice, AIR 2018 SC 4321 W. P. (Cri.) No. 76 of 2016.

3. The Union Government maintained that the challenge to the Special Marriage Act, Foreign Marriage Act, and adoption rules' notice and objection clauses had nothing to do with same-sex marriage. Therefore, those issues should not be included in the current Case, according to the Supreme Court.
4. The discernible difference between opposite-sex partnerships and LGBT couples is normativity. The goal of this classification is to ensure societal stability by making marriage legally recognised. As a result, Article 14 is not broken by not recognising gay marriage.
5. All citizens have the freedom to form associations under Article 19, but the State is not required to acknowledge them. The State only permits heterosexual couples to be legally recognised as married. Even while the State does not acknowledge all types of unions, marriages, or relationships between people in society, they are also not unlawful.
6. Due to the fact that marriage occurs between two people and has a significant impact on their private life, petitioners are requesting that it be recognised under Article 21 – which includes a fundamental right to privacy – as a legal union. The State cannot, however, treat marriage as a private matter when it comes to the legal acknowledgement of their union and any supplementary rights. Public recognition of a marriage also plays a significant role in acknowledgment of a legal relationship.
7. The Union Government made the case that a more comprehensive legislative framework centred on the legal definition of marriage between opposite sexes shows the state has a legitimate interest in restricting the legal recognition of marriage. The standard throughout history and the basis for both the beginning and continuation of the State is the legal recognition of marriage confined to couples of the opposite sex.
8. Personal laws, whether codified or uncodified, have developed in response to society's ideals, cultural traditions, and religious convictions. The idea of marriage is one that derives from citizens' own laws. Marriage is a ceremony in Hinduism for the reciprocal responsibilities of the cisman and ciswoman. Marriage in Islam is an agreement between a man and a woman. Some facets of marriage were codified by the legislature as jurisprudence developed. In order to give the partnership a formal character and guarantee that all law provisions controlling the relationships, rights, duties, privileges, and consequences are available, opposite-sex marriage must be legally recognised. Despite being legally recognised, marriage nevertheless depends on a number of old traditions.
9. A social institution that offers safety, support, and friendship is marriage. Along with legal obligations, marriage also carries social and moral responsibilities and is very important in raising children. The Supreme Court's decriminalisation of same-sex cohabitation and sexual interactions cannot be compared to the Indian family structure. The Indian family

unit, which consists of a husband, a wife, and any children they have, is the fundamental foundation for the survival and development of society.¹⁷

Can the Special Marriage Act be amended to make them LGBT inclusive?

While exploring the options pertaining to marriage equality of LGBT couples, reinterpreting and amending the existing Special Marriage Act seems to be one of the proposed solutions. The petitioners have argued that the Special Marriage Act came into existence to provide an all-pervasive legal basis to interfaith and inter-caste marriages with no limitations. However, though several provisions are gender-neutral, there are plenty of legal hurdles that can arise when considering modification of these laws. Some of these problems are discussed below:

1. Rigid terminologies and lack of consistent gender-neutral language–

a. ‘Husband’ and ‘Wife’

A male in a marriage is considered as *husband* and a female is considered as *wife* and all marriage laws follow these terms rigidly making it impossible to implement them for same-sex couples where it is confusing as to who is the husband and/or wife in the marriage. For example, Section 27(1A) of the Special Marriage Act, 1954, renders the wife with grounds for which divorce can be taken, however in the LGBT couple there is ambiguity regarding the term wife.

b. Prohibited Relations

There are specific prohibited degrees of relations within which the marriage cannot occur, according to the Special Marriage Act (including the personal laws as well). But for both men and women, the degree of these relationships differs. Since LGBT marriages do not happen between a male and female, these relations also do not apply to them.

c. Sodomy

Sodomy is a basis for divorce under the Special Marriage Act, as well as under Hindu and Parsi law. But these phrases need to be reinterpreted in light of the repeal of Section 377.

d. Grounds for Divorce

Even though grounds like adultery, desertion, and cruelty are available to both genders, men and women perceive these grounds differently. Therefore, this power disparity in same-sex marriages is difficult to establish properly.

2. Consummation of Marriage–

Since consummation is a crucial requirement for a legal marriage. It must be redefined in the case of homosexual marriages because its lack can make a marriage voidable, such as in cases of impotence. It will thus declare every LGBT marriage voidable because this idea of

¹⁷ Supriyo v. Union of India. W.P.(C) No. 1011/2022

consummation is predicated on a relationship between a cisgender male and a cisgender female.

3. Gender Identity–

The gender assigned at birth is not always fixed and may change over time as a result of the National Legal Services Authority of India V. Union of India ruling, as each person now has the freedom to identify as a member of the third gender and to undergo sex reassignment. Therefore, it is important to specify the legal rights and obligations of those affected by legislative changes.

Modifying and amending the existing framework of the Special Marriage Act is not an impossible task but the problems arise with respect to the consequential rights which are based on personal laws. The challenge is not only limited to marriage laws but extends to other legislations that specify spousal relations. There are still two alternatives to legalise same-sex relations– first is enacting a separate law for LGBT couples and second is establishing a separate status such as a civil union. While evaluating the first option of drafting a new law, it is important to take into consideration the social, legal and political preparedness of the nation. Although it is the ideal way to make marriage inclusive of LGBT couples, it is still a distant dream. The next option is settling for something short of a marriage like a civil partnership, which is discussed in detail in the next section.

Should the LGBT community settle for a Civil Union?

Considering the fact that marriage is an institution derived and dependent on religions and India gives a nod to this norm with its several personal laws, it seems accommodate same-sex marriage within existing legal purview of personal laws. Marriage is a legalised religious institution that permits the union of two people (a man and a woman). Since same-sex marriage is not included in the religious definition of marriage, civil unions were developed as a method to provide the same level of legal protection to couples who choose same-sex unions. Discussions have arisen about whether a civil union could be a viable option for LGBT couples demanding the right to cohabit.

A civil union or civil partnership is a legally recognised arrangement that is comparable to a marriage and was largely developed to give same-sex couples legal recognition. With the exception of child adoption, which is frequently an exception, and the title itself, civil partnerships can grant some or all of the rights of marriage. To give legal recognition to relationships formed by unmarried same-sex couples and to grant them rights, benefits, tax breaks, and responsibilities similar to or identical to those of legally married couples, civil unions have been established by law in a number of, primarily developed, countries.

But same-sex couples do not have the same legal protections and societal acceptance through civil unions as they do through marriage equality. They repeatedly fall short of legal requirements for equal treatment. They have been discovered to exacerbate discrimination and stigma, cause forced

outings, and cause other problems in daily life. Other nations that offer civil unions or divorce to same-sex couples prefer marriage.

Civil unions actually promote stigma and deepen prejudice since they don't offer the same social approval or status as equality in marriage. The opinions globally on civil unions are very divided: LGBT rights activists see civil unions as a "first step" towards legalising same-sex partnerships since they consider them to have a "second class" or "separate but equal" status. While some LGBT individuals think that a civil union programme is a step towards marriage, others think otherwise. While some think it increases recognition, others think it only perpetuates discrimination. Some people think it mimics marriage too closely, while others think it doesn't mimic it closely enough. In India, largely LGBT couples have expressed that they want to get married to their same-sex partner and live a married life like heterosexual couples. Senior Advocate Dr Guruswamy stated that after speaking at several gatherings, she discovered many young queer couples desire marriage in order to stop being viewed as "second-class citizens." Civil unions and other similar arrangements are a halfway house that neither provide a complete set of rights to LGBT couples nor do they aid in social acceptance of the community. Further, the difficulty of acquiring legal recognition through a civil union is comparable to that of achieving legal recognition through same-sex marriages. It is obvious that denying same-sex couples the option of marriage further institutionalises discrimination by treating them differently. The most gratifying course of action in a culture that values marriage so highly is to permit same-sex marriages.

Same-Sex Marriage legislation: The Experience of European Union

Now, we consider the lawmaking aspect of same-sex marriages drawing mainly from the experience of countries of the European Union, the largest group of nations of western hemisphere that have legalised same-sex unions over a period of five decades. It can be argued that a European experience is not an accurate benchmark for a country like India, thus drawing from their experience leads to a discursive dilemma. But the intention here is not to mimic legal path followed by European nations, rather it is an attempt to observe discernible patterns and sequences that can perhaps help decide where to start with the legalisation of same-sex marriage or accelerating them or possibly slowing them down.

"What First, What Later? Patterns in the Legal Recognition of Same-Sex Partners in European Countries" is a section by Kees Waaldijk under the book "Same-Sex Families and Legal Recognition in Europe" that makes observations on patterns experienced in European countries based on surveys. The book combines several disciplines, it explores the social perspectives, public attitude, changing life of homosexuals and how laws evolve as people who use them evolve.

The book recognises the typical sequences in the legalisation of same-sex marriage, they are listed as follows:

- Rights before status
- Partnership before marriage
- Bad-times rights before good-times rights
- Individual partner rights before couple rights
- Responsibilities before benefits
- Immigration rights among the first to be gained
- Parenting rights among the last to be gained

1. The book also emphasises on the correlation observed between public attitudes towards homosexuality and the legal position. The two possible explanations provided are– (a) public opinion is a key factor influencing legal rights (it's possible that the legal process begins with rights, but it seems highly likely that non-legal factors (including public opinions) often pave the way for extending such rights to same-sex couples); (b) international trend can have an influence on national lawmaking even when public attitudes were hesitant on the topic. The legal acknowledgment of same-sex partners appears to be made easier by favourable social attitudes towards homosexuality, and this legal recognition in turn appears to increase the social legitimacy of same-sex families.

In essence, the following two typical sequences appear to be strengthening one another:

- Attitudes before rights
- Legal recognition before social legitimacy

In India, surveys have shown that public opinion has become more positive, however the majoritarian view still opposes such unions.¹⁸

2. Rights and responsibilities for same-sex couples, as previously noted, frequently come up before status, and these rights and responsibilities speak more to a person's actual legal situation than the (marital or other) status through which they become available. In India too, the striking down of Section 377 (i.e. non-discrimination on the basis of sexual orientation) paved the way for conversations about marital rights. What rights and responsibilities normally come first is the next issue.
3. The European experience has shown that among all rights and responsibilities, the ones relating to situations relating to death (such as inheritance, tax relief, pension, insurance) or bad times (sickness, accident, domestic violence) are given highest recognition. It appears that lawmakers in the vast majority of nations today hold the view that it would be unreasonable, unfair, and unjust to deny same-sex spouses the legal protections intended

¹⁸ ["Data Point: Situating the debate on same-sex marriage"](#)-TheHindu

for such tragic circumstances. The issues with the least consensus are all related to sharing life in the good times: sharing each other's names, properties or tax benefits, or parental responsibilities.

4. Lawmakers in Europe have been less reluctant in extending responsibilities to the individual partners than extending benefits to the couple as a unit. The rationale behind this is that it is easier to recognise responsibilities than benefits since responsibilities are typically between the partners (such as domestic violence, alimony) and the benefits are usually a relationship between a couple and the society (such as lower income tax).
5. It was also observed that individual rights precede couple rights i.e. to extend benefits to an individual partner is easier than to extend benefits to a couple as a unit. This is because individual rights and responsibilities are apropos in difficult situations such as taking a partner's critical healthcare decisions, whereas a couple's rights are associated with happier times such as parenthood, echoing the "bad-times rights before good-times rights" pattern. A couple's right being recognised is extending a family status thus echoing rights before status.
6. In countries where marriage is seen as a foundation of a family, the legal focus on parenting takes the backseat. India is a country where marriage is a central focus of one's life, thus parenting rights can be granted on a later stage.

Many countries are reluctant to extend the rights and responsibilities that come with different-sex marriage to same-sex couples at the beginning of this process. Given this resistance, if not outright hostility, in such nations, it makes sense for activists, legislators, and judges to prioritise specific rights first. This will already require considerable legal and political wrangling in many nations. This process has started in India, thus, even small legal changes might pave the path for more by protecting some fundamental rights for same-sex couples. On societal attitudes and the social legitimacy of same-sex families, even a limited legal recognition can be beneficial. And all of this may open the door for more to grant same-sex partners more equal rights.

Recommendations

The laws in India governing marriages are a complicated and complex patchwork with three crucial layers of legal bases. The first layer is of the codified and uncodified personal laws such as Hindu Marriage Act, Muslim Personal Law, etc. The second layer is the non-personal laws which consist of Special Marriage Act and Foreign Marriage Act, the prior providing marriage rights to persons unable or unwilling to marry under personal laws whereas the latter governs marriages conducted abroad. The third and final layer is of the range of associated laws that ensure rights and assign

duties to married couples. It is important to note that all three are inter-connected and cannot be assessed in an isolated manner when addressing the same-sex marriage issue. The ongoing *Supriyo V. Union of India* hearings in the Supreme Court are regarding whether to extend the right to marry and establish a family to queer Indians. Even if the SC is sympathetic to same-sex couples' rights, Parliament has the authority to pass laws governing marriage, thus the following recommendations are offered to address the lawmaking aspect.

1. Amendments to Special Marriage Act:

As discussed in the paper, the gendered language of the Special Marriage Act limits marriages to opposite sex couples. The following amendments can be made to re-interpret the Act to be inclusive of LGBT couples:

- a. Section 2(b) of the act defines degrees of prohibited relationships separately for a man under Part I and for a woman under Part II of the First Schedule. To define the same for same-sex marriage, a new sub-section, Section 2(c) may be added as: "degrees of prohibited relationship for same-sex marriage"-a man and any of the persons mentioned in Part II of the First Schedule and a woman and any of the persons mentioned in Part I of the said Schedule are within the degrees of prohibited relationship.
- b. Section 4 of the Act relates to conditions for the solemnisation of a marriage, though declares marriage being between 'any two persons' without mentioning gender, an explanation to suggest that each party to the marriage could be of any sex or gender can be added.
- c. Section 4(c) sets the minimum age of marriage for a male as 21 years of age and female as 18 years of age, the differential age is not an inconvenience for same-sex marriage but it is recommended to set a lower age (18 years) for same-sex couples given the parental pressures. The amendment would require adding an exception for marriage other than between a man and a woman wherein each party should have completed 18 years of age.
- d. Section 5, 6, 7, 8 and 9 of the Act provide a complex framework of filing public notice and inviting objections which create unnecessary hurdles for marriage under this Act. In accordance with Section 5 of the Act, parties intending to get married must submit a written notice to the marriage officer of the district where at least one party has resided for at least 30 days immediately preceding the date on which the notice is given. Section 6 of the Act requires that this notice also be published in a "conspicuous place" and made available for inspection by anyone at any time. Additionally, Section 7 enables people to object to the marriage within 30 days of the notice's publication, and Section 8 gives the marriage officer the authority to halt the ceremony if the objection is upheld. These provisions make the marriages

under this act to be examined through the lens of societal morality, and in addition to the couple, include the general public as a shareholder and interested party. The 30-day residence and objection requirement was inserted with the primary goal of informing the general public and the parties' families at the time of its passage. It is now a provision that restricts inter-caste and inter-faith marriages, it is an erosion of personal choice and liberty guarded under Article 21 as well as the position held by the Supreme Court in *Lata Singh vs State Of U.P.*¹⁹. In the same-sex marriage hearings, the Supreme Court expressed its disapproval of the notice requirements under the Special Marriages Act. The timing is right to strike these provisions from statutes given the developments in law concerning decisional autonomy, even though this particular case may not be the appropriate one to decide on these provisions. Given the social realities of discrimination and violence suffered by couples marrying under the Act, these clauses must be removed from the Act so that same-sex marriages can be recognised.

- e. Section 27 of the Act mentions grounds for divorce common for both parties in the marriage and it is gender-neutral so the same can be interpreted for same-sex couples as well. However Section 27(1A) details grounds for divorce the wife solely and refers to "husband" at various instances; this cannot be interpreted for same-sex couples. It is thus recommended to uphold this subsection only for marriages between a man and a woman.
 - f. Section 36 (Alimony pendente lite) and 37(Permanent alimony and maintenance.) of the Act enables the court to order the husband to pay the wife the expenses of the proceeding when she has no independent and sufficient income and pay for her maintenance and support. Since in a same-sex marriage there is no clarity as to who is "wife" or "husband", it can be added that in case of a same-sex marriage, the more disadvantaged party not having sufficient income as per court's discretion can claim expenses and maintenance from advantaged party with sufficient income.
 - g. Schedule 3 outlines the declarations that the "bride" and "bridegroom" must make when getting married and Schedule 4 utilises the terms "bride" and "bridegroom" to describe the format of the certificate of marriage that will be issued at the time of the marriage. In this case, the court might rule that the gender-neutral term "celebrant" shall be used in place of the phrases.
2. Granting marriage rights to same-sex couples would require amendments in many provisions that provide ancillary rights to married couples. It is thus befitting to take an incremental approach in framing and amending these provisions. The legislature also has to take into account the fact that the majority of the society opposes homosexuality even though public opinion has become more positive in the past few years.

¹⁹ *Lata Singh vs State Of U.P. W.P (cr.) 208 of 2004*

Minor and Consequential Amendments to selected Ancillary Rights:

- a. The Employees' Provident Funds Scheme, 1952

Regulation 2(g) defines "family" as—

(i) in the case of a male member, his wife, his children.....

(ii) in the case of a female member, her husband, her children...

To make it inclusive for same-sex couples an exception can be added to refer to marriages other than those between a man and a woman and spouse is mentioned instead of husband/wife.

- b. The Payment of Gratuity Act, 1972

Regulation 2(h) "family", in relation to an employee, shall be deemed to consist of -

(i) in the case of a male employee, himself, his wife, his children.....

(ii) in the case of a female employee, herself, her husband, her children...

To make it inclusive for same-sex couples an exception can be added to refer to marriages other than those between a man and a woman and spouse is mentioned instead of husband/wife.

- c. The Employees' Compensation Act, 1923

The definition "dependant" under section 2(d) means any of the following relatives of a deceased [employee], namely:—

(i) a widow, a minor [legitimate or adopted] son, and unmarried [legitimate or adopted] daughter, or a widowed mother....

A minor amendment of adding "widow or widower or surviving spouse" will suffice.

- d. Pension, Insurance and other related financial laws (such as Section 80(c) of Income Tax Act, 1961) define nominees/dependants in a liberal manner, post legalisation of same-sex marriage, most of these laws will follow and be applied to LGBT couples. The only concern is non-discriminatory implementation for the same.

3. Inheritance and Succession Laws

For marriages under the Special Marriage Act, separate inheritance laws apply depending on the faiths of the spouses. Section 21A states that when the marriage is solemnised under this Act of any person who professes the Hindu, Buddhist, Sikh or Jain religion with a person who professes the Hindu, Buddhist, Sikh or Jain religion, the Hindu Succession Act 1956 applies to the couple. Whereas for marriage solemnised between Hindu, Buddhist, Sikh or Jaina and Parsi, Christian, Muslim or Jew, the Indian Succession Act 1925 applies.

While there is a different scheme of inheritance for males and females in the Hindu Succession Act, in the Indian Succession Act, regardless of the heir's gender, the law provides a standard system, with closeness to the deceased serving as the determining factor. This indicates that the major heirs, irrespective of gender, are the surviving spouse and lineal descendants.

Adapting a gender-neutral framework under Indian Succession Act is much easier compared to Hindu Succession Act. Chapter II of the Indian Succession Act contains the legislation governing succession for the two types of marriages covered by the Special Marriage Act: marriages between Hindus and non-Hindus and marriages between non-Hindus. This law shall be effectively applicable to same-sex unions as demonstrated for sections 33 and 35. The law is rather straightforward and reads as follows:

Section 33(a)– In the presence of widow and lineal descendants, the former takes a one-third share, and the latter take two-thirds collectively;

Section 33(b)– In the absence of lineal descendants, but the presence of widow and kindred, the former takes one-half, while the latter take the remaining one-half collectively.

Section 35– A husband surviving his wife has the same rights in respect of her property, if she dies intestate, as a widow has in respect of her husband's property, if he dies intestate.

While the term "widow" is used to refer to the spouse in Section 33, Section 35 equalises the rights of the widow and the widower. Therefore, if the rights of a widow are mentioned, the widower's rights are also mentioned as well. The fact that a reference to a male's "widow" can be understood as a reference to their widower under the current statutory framework already makes things fairly simple. The same goes for references to a female's "widower" rights, which can also be taken to refer to their "widow".

As for Hindu Succession Act, apart from anomalies and complications of highly gendered framework of the law, another trouble is the political, religious and societal outrage that may arise due to amendments that would be adopted to make the law gender neutral for same-sex couple, it can be seen as a violation of Article 26(b) which ensures the freedom to manage the affairs of religion. It is thus suggested as an interim solution that Hindu

same-sex couples solemnising marriage under Special Marriage Act be governed under Indian Succession Act but this will lead to extinction of their coparcenary rights and create a disqualification from inheriting the property of their Hindu Undivided Family's members. The matter of succession is one of property and pertains to civil, not religious rights, when a Uniform Civil Code or legislature of similar character is adopted which is gender just and held up to standards of constitutional morality, the inheritance and succession rights of the LGBT community will follow.

4. Parenthood

In countries where marriage is seen as a foundation of a family, the legal focus on parenting takes the backseat. India is a country where marriage is a central focus of one's life, thus parenting rights such as adoption and surrogacy can be granted on a later stage.

5. Anti-discrimination Laws

Lastly, passing anti-discrimination legislation to outlaw discrimination based on gender equality and sexual orientation also becomes crucial. The society's pervasive discrimination and violence against homosexuals is a worrying phenomenon. The state must pass anti-discrimination legislation that forbids prejudice based on sexual orientation and gender identity. India needs an Equality Bill to promote equality and to prevent and prohibit all forms of discrimination against persons on the grounds of caste, race, ethnicity, descent, colour, sex, sexual orientation, gender identity, gender expression, tribe, nationality, disability, marital status, pregnancy, health (including HIV / AIDS status). It should address multiple and intersectional discrimination. Discrimination in areas such as housing, employment, healthcare, and education should be discussed at length. The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redress) Act, 2013, which addresses sexual harassment, solely recognises women as victims and ignores the fact that harassment can occur to anybody, regardless of gender. In other words, the party who suffers injustice can also be a male, a transgender person, or any other member of the LGBT community. Therefore, gender-neutral regulations regarding workplace harassment are more necessary than anything else.

Conclusion

The hearings on LGBT marriage rights have sparked a national conversation about the subject with a range of perspectives. The LGBT community has cited the rights guaranteed by Articles 14, 15, 19, and 21 as justification for their demand for marital equality. They have also raised legitimate concerns about the ancillary rights, benefits and security that come with a marriage that is legally binding. The respondent in the case has emphasised that denying the right to marry for queer

Indians does not violate the fundamental rights, they point to the ruling under *Navtej Singh Johar v. Union of India*, where the Supreme Court explicitly distinguished and excluded marital relationships while reading down Section 377 of the Indian Penal Code for violating fundamental rights²⁰. While the Supreme Court is yet to decide the fate of queer marriages, the State has expressed its legitimate interest in limiting legal recognition of marriage to opposite-sex couples given the historical and religious norms and social value of marriage in the country. No uncodified personal or codified statutory laws acknowledge or accept marriage between two people who are the same gender. The legislative goal to restrict the legal recognition of marriage to opposite-sex couples is made apparent through specific references to the sexes. The Supreme Court ruled in *Mr. X v. Hospital "Z"*²¹ and *Reema Aggarwal v. Anupam*²² that marriage is a valid union between a man and a woman. If Indians with LGBTQ identities were granted the right to marry, rules controlling marriage, auxiliary rights, and particular provisions for married women would become otiose. The legal ground for same-sex marriages is incongruous with respect to existing frameworks wherein the ancillary rights such as inheritance and succession are still under personal laws, it can also be argued that it is inopportune given the religious, social and institutional perspectives on marriage and LGBT relations. Recognising marriage and granting supplementary rights with legal consequences and benefits is a legislative function, it would need to be taken into consideration and debated by the legislature. If the Supreme Court's ruling is in favour of same-sex marriage then it can set out constitutional guiding principles and necessitate the legislature to bring in the legislation for the same. A similar course of action has followed in the past with the 1997 Vishakha guidelines introduced by the Court with the enactment of The Sexual Harassment of Women at Workplace Act, 2013 finally done by the legislature. The Supreme Court may as well adopt this approach for same-sex marriage legalisation, drawing from other countries' experience. For instance, the South African Constitutional Court ruled that same-sex marriages are constitutionally acceptable in 2005. The Civil Union Act of 2006 was subsequently passed by the South African legislature, legalising civil unions for all individuals, including same-sex couples. The Act made it clear that, going forward, "marriage" under any applicable legislation would be construed to include "civil unions," with "husband," "wife," or "spouse" including the "civil union partner." The Indian Supreme Court still has a similar option available. Be it a civil union or a full legalisation of queer marriages, only a legislature, which represents the collective wisdom of the country, has the authority to create laws that govern, regulate, permit, or forbid human relationships, including matters like marriage, adoption, divorce, and maintenance, based on society's values, beliefs, and acceptance as well as cultural history.

²⁰ *Navtej Singh Johar & Ors. v. Union of India* thr. Secretary Ministry of Law and Justice, AIR 2018 SC 4321 W. P. (Crl.) No. 76 of 2016.

²¹ *Mr. 'X' vs Hospital 'Z'*, Appeal (civil) 4641 of 1998

²² *Reema Aggarwal v. Anupam and Ors*, Appeal (crl.) 25 of 2004

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