
SAME-SEX MARRIAGE: THE LACUNA IN MARRIAGE PROVISIONS IN INDIA

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ABSTRACT

Same-sex marriage is a new dimension of social change that Indian society has not accepted yet. Article 16 of the Universal Declaration of Human Rights states that:

“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution” and that “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.¹

Yet, the human right to marry the person whom you love is not guaranteed to the homosexual citizens of India.

This article talks about the way that homosexuality has evolved in India over the past five centuries, mainly in a legal aspect. From the prohibition of homosexuality in the Portuguese empire to the decriminalization of homosexuality and the current ongoing case for the recognition of same-sex marriage, the persistent fight of the LGBTQIA+ community for recognition has come a long way. The article talks about the fundamental rights guaranteed by the Indian Constitution – Articles 14, 19, and 21, that are violated by the absence of provisions for marriage for homosexual couples. It then deals with the different religious perspectives on homosexual relationships. It also discusses the various other rights that laws should be amended to safeguard the rights of homosexual couples.

Keywords: Homosexuality; Same-sex marriage; Constitution; Section 377

¹ Universal Declaration of Human Rights, 1948, art. 16

INTRODUCTION

“Equality means more than passing laws. The struggle is really won in the hearts and minds of the community, where it really counts.” – Barbara Gittings, American activist for LGBT equality.

LGBTQIA+ defines as Lesbian, Gay, Bisexual, Trans, Queer, Intersex, and Asexual respectively.² The spectrum of sexuality does not end with the limitations of vocabulary since it is difficult to confine its essence in this paper recognizing its complexity and brevity. It might be difficult to confine it in this paper for it is so complex. Unlike the popular belief of LGBTQIA+ being a Western propaganda, a new generational idea, or an elitist concept, homosexuality, and the LGBTQIA+ community have existed for as long as humans have existed. So has the fight of the community for basic rights that heterosexual people enjoy, such as the right to love the person they want to, to marry that person, and to build a life with that person. Even though homosexual marriages were given recognition in India, the evils of homophobia still prevail in Indian society.

Marriage is considered to be an important institution in India. It is considered to be a sacred bond between two people. It is the marital wedlock between two people who has a mutual understanding and love towards each other. In India, there are various legislations under which two people can marry such as The Hindu Marriage Act, 1955, The Indian Christian Marriage Act, 1872, Muslim Personal Law (Application) Act, 1937, The Special Marriage Act, 1954, etc. But all these legislations only provide for the marriage between a man and a woman and hence, completely ignore the basic right of a person in the LGBTQIA+ community to marry the person they want to. This is a violation of the fundamental rights of Article 14, Article 15, Article 19, and Article 21 which are expected to be guaranteed, preserved, upheld, and protected by the State in Part III of the Constitution of India, 1950.

EVOLUTION OF HOMOSEXUALITY IN INDIA

The struggle against homophobia and recognition for the LGBTQIA+ community dates back as early as the 16th century. In the 1500s, homosexuality was prohibited in most of the

² LGBTQIA+ Basic Terms and Definitions, United States of America, *available at*: <https://www.sdstate.edu/office-multicultural-affairs-accessibility/lgbtqia-basic-terms-and-definitions>, (last visited on May 23, 2023)

Portuguese empire in India.³ In the 1660's the Fataw-e-Alamgiri, a sharia that regulated the laws during the Mughal Empire, had assigned punishments for people who engaged in homosexual activities.⁴ In 1791, homosexuality was decriminalized in the French Indian territories of Pondicherry through the French Penal Code of 1791.⁵ During British rule in India, the punishments and offences of Fataw-e-Alamgiri were replaced by the Indian Penal Code of 1862, and homosexuality was considered a criminal offence under Section 377 of the IPC.⁶

The 1900s were filled with recognition of homosexuality through stories, poems, films, etc. In 1994, the AIDS Bhedbhav Virodhi Andolan (ABVA), an organization with the aim of spreading awareness of HIV/AIDS, filed a Public Interest Litigation (PIL), challenging the constitutional validity of Section 377 of IPC. The case was dismissed as ABVA failed to make a legal representation.

After the dismissal of a lawsuit and a Public Interest Litigation filed by the NAZ Foundation in 2001 and 2002, respectively, in 2009, with the case of Naz Foundation vs. Govt. of NCT

Delhi, the Hon'ble High Court of Delhi declared that Section 377 criminalising consensual sexual acts of adults in private, is violative of Articles 14, 19 and 21 of the Constitution. But this decision was overruled by the Hon'ble Supreme Court in the case of Suresh Kumar Kaushal vs. NAZ Foundation where it was held that Section 377 was not unconstitutional and stated that the decision to decide whether to repeal Section 377 must be left to the Parliament.

Until 2018, Homosexuality was a criminal offence in India through Section 377 of the Indian

Penal Code. Through the case of Navtej Singh Johar vs. Union of India, the Hon'ble Supreme

Court of India struck down Section 377, marking a huge milestone in the fight of the LGBTQIA+ community for equal rights and recognition. In 2020, a writ petition was filed at the Kerala High Court seeking the legalization of same-sex marriage by LGBTQIA+ rights activists, Nikesh Usha Pushkaran and Sonu M S. In the landmark 2023 judgement of the Supriyo @ Supriya Chakraborty vs. Union of India, the Supreme Court of India rejected the

³ J. M John Marshall, "Homosexuality In The Early Modern Goa: Carmelite & Protestant Perspectives", 9, NCC Review, 35, (2022)

⁴ Neil B.E Baillie, *A Digest of Moohummudan Law*, (Smith, Elder & Co, Waterloo Place, 1875)

⁵ French Penal Code, 1791

⁶ Ankit Srivastava & Dr. Vivek Kumar, "Section 377 And LGBT Activism In India", VOLUME 6, *IJRAR*

plea of queer persons right to marry in India and held that there is no fundamental right to marry and that marriages between queer persons cannot be read into the Special Marriage Act, 1954. However, this judgement was also an important milestone in the struggle of the LGTQIA+ community for equal recognition as the court struck down Section 5(3) of the Adoption Regulation Act, 2022 which states that:

“No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship in the cases of relative or step-parent adoption”⁷

This provision restricted homosexual and unmarried couples from adopting.

THE INDIAN CONSTITUTION AND HOMOSEXUALITY

Article 14: Equality before the Law

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth”⁸

Article 14 of the Indian Constitution guarantees “equality before the law” and “equal protection before the law”. The article requires the citizens of the country to be treated equally in front of the law. This is in contradiction with the denial of marriage equality to homosexual couples and discrimination against them before the law. Rule of Law requires that no person shall be subjected to harsh, uncivilized, or discriminatory treatment even when the object is securing paramount exigencies of law and order. Therefore, even the non-existence of a law for the protection of the rights of a minuscule fraction of the society itself results in inequality before the law as there is a need for special legislation for that special community.

Article 19: Freedom of Expression

Article 19 (1) (a) of the Indian Constitution guarantees all its citizens the freedom of speech and expression. The love and compassion that homosexual couples share are restricted to a

⁷ The Adoption Regulations, 2022, S. 5(3)

⁸ The Constitution of India, art. 14

dating lifestyle and are not allowed to freely express their bond through the sacred institution of marriage.

Article 19 (1) (e) of the Indian Constitution guarantees the right to reside and settle in any part of the territory of India. Homosexual couples are often denied residential properties based on the mere fact of their sexuality.⁹ They are often forced to rent, buy, and lease properties under the garb of being friends or siblings. This can again be considered a violation of Article 19 (1) (a) as homosexual couples are forced to hide their sexuality, which is a form of expression of their identity, for basic needs and rights that heterosexual couples enjoy.

ARTICLE 21: RIGHT TO LIFE AND PERSONAL LIBERTY

Article 21 of the Indian Constitution guarantees that:

“No person shall be deprived of his life or personal liberty except according to procedure established by law”¹⁰

The right to choose to marry is guaranteed under Article 21 of the Indian Constitution. In the case of Shakti Vahini vs Union of India, the Hon’ble Supreme Court of India upheld this by stating that,

“It has to be sublimely borne in mind that when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution.”¹¹

In the case of Shafin Jahan vs Ashokan K M, famously known as the Hadiya case, the Supreme Court said that,

“The right to marry a person of one’s choice is integral to Article 21 of the Constitution” and “Society has no role to play in determining our choice of partners”¹²

In the case of Justice. K. S. Puttuswamy vs Union of India, Justice. Dr. D. Y. Chadrachud, on behalf of (on behalf of three other Judges) and five concurring judgments of the other five

⁹ The Constitution of India, art. 19 (1) (a), (e)

¹⁰ The Constitution of India, art. 21

¹¹ 7 SCC 192

¹² 16 SCC 368, AIR 2018 SC 1933

Judges, have declared, in no uncertain terms and most authoritatively, the right to privacy to be a fundamental right. From a close reading of the judgment, it can be derived that :

- (a) privacy is a concomitant of the right of the individual to exercise control over his or her personality.
- (b) Privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III.
- (c) The fundamental right to privacy would cover at least three aspects – (i) intrusion with an individual's physical body, (ii) informational privacy, and (iii) privacy of choice.
- (d) One aspect of privacy is the right to control the dissemination of personal information. And that every individual should have a right to be able to control exercise over his/her own life and image as portrayed in the world and to control the commercial use of his/her identity.

These judgments upheld the fact that the right to marry a person of one's choice is upheld under Article 21 of the Constitution.

RELIGION AND HOMOSEXUALITY

Religion is one of the biggest reasons for homophobia around the world. Many people choose to condemn homosexual relationships as their religion is against them. It depends on the way different people decide to interpret it. Common interpretations of homosexuality in the 3 most practiced religions across the world are:

Hinduism and Homosexuality

Hinduism is the third largest religion practiced around the world and the most practiced religion in India. It does not explicitly condemn homosexuality or the LGBTQIA+ community. Hinduism has shown that homosexuality has existed since the Vedic times through scriptures, sculptures, paintings, poems, stories, etc.¹³ In the Valmiki Ramayana, there are descriptions of Rakshasa women who kiss women on Ravana's bed on whose lips linger the taste of their

¹³ Homosexuality is not a sin in Hinduism, *available at*: <https://www.youthkiawaaz.com/2022/10/homosexualityhinduism-and-the-concept-of-sin/>, (last visited on May 20, 2023)

master.¹⁴ Krittivasa Ramayana, a Bengali mythical literature, composed by Mahakavi Krittibas Ohja, tells the story of two queens who conceived a child together. The demigods were concerned when the famed Sun Dynasty emperor, Maharaja Dilip, died without an heir. “You two make love, and with my blessings, you will bear a magnificent son,” Shiva assured the king’s two distraught queens. The two queens, one of whom has a child, carry out Shiva’s instructions. When they fall in love, Kamadeva, the deity of love, bestows a child on them, according to some versions of the story. The child was born boneless, but with the help of the sage Ashtavakra, he was able to recover fully.¹⁵

Christianity and Homosexuality

Bible is well known to condemn homosexuality and has even said it to be an abomination. But liberal, affirming Christians have contended that this was nothing more than a misinterpretation. The passages - Genesis 19:5; Leviticus 18:22; Leviticus 20:13; Romans 1:26–27; 1 Corinthians 6:9; and 1 Timothy 1:10, from the Bible, are the ones that are known to condemn homosexuality.¹⁶¹⁷ But verses such as Romans 13:8- 10, Matthew 19:11-12, Galatians 5:14, Proverbs 17:15, and Galatians 5:16-25 (New International Version) preaches to “Love your neighbor as yourself” and that Lord detests condemning the innocent.¹⁸

Islam and Homosexuality

Christianity and Islam are two religions that have similar views about certain aspects, one of them being homosexuality. The punishment for homosexuality in Muslim countries such as Saudi Arabia among other middle eastern countries can go up to capital punishment.

According to Quran 53:3, the prophet, Muhammad’s words are considered to be the words of Allah. Muhammad had instructed, “*If you find anyone doing as Lot’s people did, kill the one who does it, and the one to whom it is done.*”¹⁸ Here Lot’s people refer to homosexual men who

¹⁴ Homosexuality in Ancient India: 10 instances, available at: <https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10>, (last visited on May 20, 2023)

¹⁵ Homosexuality is not a sin in Hinduism, available at: <https://www.youthkiawaaz.com/2022/10/homosexualityhinduism-and-the-concept-of-sin/>, (last visited on May 20, 2023)

¹⁶ Matthew Vines, *God and the Gay Christian*, 19, (Convergent Books, New York, 2014)

¹⁷ Bible verses about Homosexuality, available at: <https://www.biblestudytools.com/topical-verses/bibleverses-about-homosexuality/>, (Last visited on May 20, 2023)

¹⁸ Islam and Homosexuality, available at: https://wikiislam.net/wiki/Islam_and_Homosexuality#, (Last visited on May 20, 2023)

wanted to have intercourse with the angels that had come to Lot's house.

ADOPTION

The Indian legislations that have provisions for adoption are the Juvenile Justice (Care and Protection) Act, of 2015, the Hindu Adoption and Maintenance Act, of 1956, and the Adoption Regulations, of 2022. A homosexual couple cannot adopt a child under any of these legislations. Granting adoption rights to homosexual couples will only be possible if they are given equal marital status as heterosexual couples. According to a survey conducted by the Ministry of Women and Child Development of India, there are around 2 lakh orphaned children in India.¹⁹ If homosexual couples are allowed to adopt, so many orphaned and abandoned children will be able to find a secure home and family.

Under the Juvenile Justice (Care and Protection) Act, 2015, any person who is physically fit, financially sound, mentally alert, and highly motivated to adopt a child for providing a good upbringing to him, any couple with the consent of both the spouses for adoption and any single or divorced person subject to fulfillment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority (other than a single male who wants to adopt a girl child) are eligible for adoption.²⁰

Under the Hindu Adoption and Maintenance Act, of 1956, any male Hindu who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption, provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the word or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind and any female Hindu who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption: Provided that, if she has a husband living, she shall not adopt a son or daughter except with the consent of her husband unless the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.²¹

¹⁹ Lancet Article Sophisticated Trickery Intended To Create Panic Among Citizens, Divorced From Truth And Ground Reality: Ministry Of Women And Child Development, available at: <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1802393>, (Last visited on May 20, 2023)

²⁰ Juvenile Justice (Care and Protection) Act, 2015, s. 57

²¹ Hindu Adoption and Maintenance Act, 1956, s. 7,8

Under the Adoption Regulations of 2022, the prospective adoptive parents should be physically, mentally, emotionally, and financially capable and shall not have any lifethreatening medical condition and they should not have been convicted of a criminal act of any nature or accused of any case of child rights violation and the couple should have at least two years of stable marital relationship except in the cases of relative or step-parent adoption and the prospective adoptive parents should meet certain other criteria given under Section 5 of the Adoption Regulations of 2022 in order to be considered eligible for adoption.²²

SURROGACY

Surrogacy is an Assisted Reproductive Technology (ART) procedure that can help couples who cannot have a child. It is a procedure where the embryo of a couple is planted in the womb of the surrogate mother, she nurtures the baby in the womb and hands it over to the biological parents after delivery. When India was becoming a hub for commercial surrogacies and when women were exploited for this, certain legislations were made to regulate surrogacies such as The Surrogacy (Regulation) Act, of 2021 which prohibits commercial surrogacies, only allowing altruistic surrogacy. The Surrogacy (Regulation) Act, of 2021, discriminates heavily against homosexual couples. Section 4 (c) of the act requires the intending couple to be married and between the age of 23 to 50 years in case of females and between 26 to 55 years in case of males on the day of certification,²³ hence prohibiting homosexual couples from opting for surrogacy as the intending couple needs to be married, even though homosexual couples with cisgender partners are the ones in dire need of such a procedure to help them start a family.

MISCELLANEOUS RIGHTS

The discrimination doesn't end here. The denial of marriage equality to homosexual couples also denies simple rights to them that heterosexual couples enjoy. Things such as opening a joint bank account with your partner, nominating your partner as the nominee for life insurance, having the joint ownership of a property, inheritance, and the right to make a medical decision for one's partner as the next of kin and social security benefits such as pension, survivor benefits, and disability benefits which are commonly enjoyed by heterosexual couples are still a utopia for homosexual couples.

²² Adoption Regulations, 2022, s. 5

²³ Surrogacy (Regulation) Act, 2021, s.4

CONCLUSION

India is a country that sanctifies marriage that, where any other relationship between two people with love and mutual understanding other than marriage is not socially recognized. Every individual should have the freedom to love and marry the person of their choice and call them their spouse. Legalizing same-sex marriages would help to foster a more inclusive and accepting society.

As of February 2024, same-sex marriage has been legalized in 39 countries.²⁴ These include developed countries such as the United States of America, the United Kingdom, Canada, Australia, etc. The homosexual citizens of India shouldn't have to feel the need to leave and migrate to another country where they would be more socially and legally accepted and marry the person they love.

The right to marry for homosexual couples can be guaranteed through certain amendments in the Special Marriage Act of 1954. The Act was created with the purpose of recognizing the freedom of choice and providing provisions for non-conventional marriages. Replacing words such as 'husband' and 'wife' with gender-neutral terms such as 'spouse', would help in recognizing homosexual marriages. Measures should be taken to sensitize the public about the spectrum of sexuality through sex education at schools and colleges and by conducting awareness camps amongst the public.

In the case, *Shafin Jahan vs Ashokan K.M*, it was stated by the then Chief Justice of India, Justice. Dipak Mishra about the right to marry:

*"It is obligatory to state here that expression of choice in accord with the law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right."*²⁵

²⁴ Same – Sex Marriage legalization by Country Available at: <https://www.usnews.com/news/bestcountries/articles/countries-where-same-sex-marriage-is-legal> (Last modified February 26, 2024)

²⁵ 16 SCC 368, AIR 2018 SC 1933

Hence, it is important to remember that the fundamental rights that are guaranteed to every individual in Part III of the Indian Constitution are above social norms and values.