

LEGALITY OF HOMOSEXUAL MARRIAGES IN INDIA

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ABSTRACT

This article is about the legal recognition of homosexual marriages in India with respect to existing legislation governing marriages, it touches upon the prevailing scenarios in the country with regard to same sex couples and the insufficiency of the legislation to protect this minor slice of this multicultural Indian society, it also provide for the steps need to be taken by the government and the courts to give this community their due in the form of recognizing their marriage in the eyes of law.

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Introduction:

“Marriage equality is not a choice, it’s a legal right”- Cory Brooker

The Indian Judiciary came up with the most celebrated decision of decriminalizing Section 377 of Indian Penal Code, 1860, in Navtej Singh Johar v. Union of India which gave legal position to homosexuals, this decision is symbolic of the reverence that our constitution gave to the LGBTQ community of our country. Despite of such landmark decision, we cannot say that equality is actually upheld by the decision makers, this is because of the insufficiency that lies in this judgment. This judgment gave right to LGBTQ people to be together and to have sexual intercourse between the same sex couples, however this does not gave them right to marry each other, so even if they could cohabit together there is nothing which provide for legality of their marriages.

Marriage being the starting point for a new family and family being a cherished blessing in itself, Why does LGBTQ people are deprived of this privilege? Why after recognizing them as a gender and giving them right to be with anyone whom they want irrespective of the gender, they are not given right to legalize their marriage?

This is the ambiguity that lies in the judgments and the legislations of our country that after giving them certain rights and privileges, there is still something lacking, so if a particular class is given certain rights as the other classes, it will be considered equality only when all the privileges that are attached with such rights are also given to them.

Right to marry: a fundamental right

“The three most important events of human life are equally devoid of reasons: birth, marriage, death” – Austin O’Malley

Marriage is a universal social institution, considered as a human right of every person under customary as well as international law. The Universality and Non-discrimination principles are inherent to the applicability of international human rights law, as also stipulated in [article 1](#)¹ of the Universal Declaration of Human Rights “*all human beings are born free and equal in dignity and rights*”.

¹ https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf

“All human beings” involve people from LGBTQ+ community as well, and thus are entitled to enjoy every other right which is available to the people of binary gender group, without any discrimination.

[India adopted Universal Declaration of Human Rights in 1948](#)², yet discrimination on the basis of sexual orientation has resulted in denial of basic human rights such as equality, right to live with dignity, right to freedom or liberty.

The Indian legislature has failed completely to give effect to such right by providing proper legal recognition and remedy in the form of statute (esp. regarding marriage) of LGBTQ+ community. But Indian judiciary, on the contrary, has done quite a commendable job in upholding the constitutional principles of fundamental importance. Over time, judiciary has proved again and again that fundamental rights of any individual will not be sacrificed at the expense of the societal customs. As the secretary general of UN has also stated in his speech on Human Rights day, 2010: *“Where there is a tension between cultural attitudes & universal human rights, rights must carry the day”*.

Though right to marry is not expressly mentioned as a fundamental right of individual in constitution of India, but it was only via the decisions of Supreme Court that it has been established as a fundamental right.

It paved its way in the year 2006 in the case of [Lata Singh V. State of UP](#)³, when the apex court in its judgment stated that the petitioner being a major is free to marry anyone she likes.

The petitioner’s liberty to choose a spouse was expressly recognized by the court. However, the decision was only limited to the fact of the case and did not constitute an *“assertion of law”* by the court.

Further in 2014, a [suo moto](#)⁴ cognizance was taken by the Supreme Court of India of a newspaper report of an Indian woman gang-raped on orders of village court, as a punishment of having relations with a man from different community. The court held that the right to marry a

² <https://in.one.un.org/wp-content/uploads/2019/03/Shri-Miloon-Kothari-UDHR-Chapter-12.pdf>

³ <https://main.sci.gov.in/jnew/judis/27831.pdf>

⁴ <https://main.sci.gov.in/judgment/judis/41349.pdf>

person of one's choice is an inherent aspect of [Article 21](#)⁵ of constitution of India and this liberty and individual autonomy guarantees the ability to take such decisions.

In 2014, the Supreme Court in its most celebrated judgment of [National legal services authority v. UOI](#)⁶ upheld the constitutionally provided fundamental right prohibiting the discrimination on the basis of sex. The court also held that the term 'sex' under [article 15\(1\)](#)⁷ of the constitution of India does not refer to only biological characteristics but also mean '*an innate perception of one's gender*', thus upheld the right of each individual to self-identify their gender.

Based on the extensive expert committee report submitted to the court in the case, the bench has expressly talked about the discrimination faced by the transgender community in various fields. As Indian legal system used to follow the binary notion of gender (male/female) and transgender did not fall within them. Non-recognition of their identity in various legislation lead them to discrimination and the denial of equal protection of law in marriage, adoption, divorce, succession, inheritance and other welfare legislation such as NAREGA 2005.

This judgment provided the transgender community their long due legal identity, thus enabling them to enjoy all the fundamental rights.

The ambit of article 21 was further widened, in respect to privacy regarding personal choices, in the landmark judgment of [Justice KS Puttaswamy \(retd.\) and another v. Union of India](#)⁸. Autonomy is an individual's ability to make decisions, on matters important to their life. The privacy guaranteed as per Article 21 entitles an individual the freedom of thought and self-determination regarding family life, sexual orientation, marriage and procreation. The court in no uncertain terms held that "*the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21*".

⁵ <https://indiankanoon.org/doc/1199182/>

⁶ <https://main.sci.gov.in/jonew/judis/41411.pdf>

⁷ <https://indiankanoon.org/doc/609295/>

⁸ https://main.sci.gov.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf

In 2018, the apex court has adjudged two landmark cases, [*Shakti Vahini v. Union of India*](#)⁹ and [*Shafin Jahan v. Ashokan K.M. and others*](#)¹⁰, pertaining to the question of ‘*right to marry of one’s choice is an inherent part of individual dignity and intrinsic to Article 21 of the constitution*’.

The freedom to choose a spouse is in individual’s personal domain, a part of the case zone of privacy, which is inviolable. The constitution provides the liberty and individual autonomy to take such decisions.

In the case of *Shafin Jahan v. Ashokan K.M. & ors*, the court stated that “*expression of choice is a fundamental right under Article 19 & 21*”.

The court in any of its judgment, concerning right to privacy & freedom to choose a partner has only used gender neutral terms (i.e. individual, person) and has also provided for prohibition of discrimination on the ground of sexual orientation. [Article 141](#)¹¹ of the Indian constitution says that law declared by the Supreme Court shall be binding on all courts and hence becomes the law of land. Nevertheless, it can be argued that this ‘declaration of law’ can only be viewed under Indian domain, and hence does not concern the same-sex marriage.

In The concurring opinion Chandrachud J., in the judgment of [*Navtej Singh Johar & others v. Union of India*](#)¹² cleared all the ambiguity as he stated that the members of the LGBTQ+ community “*are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the constitution*” and have the privilege of equal citizenship & “*equal protection of law*”.

The expression that individuals of LGBTQ+ community “*are entitled to the full range of constitutional rights*” certainly means that they also have the fundamental right to marry a person of one’s choice. And in case of denial or violation of such rights the doors of the constitutional courts are open for enforcement.

⁹ https://main.sci.gov.in/supremecourt/2010/18233/18233_2010_Judgement_27-Mar-2018.pdf

¹⁰ https://main.sci.gov.in/supremecourt/2017/19702/19702_2017_Judgement_08-Mar-2018.pdf

¹¹ <https://indiankanoon.org/doc/882644/>

¹² https://main.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf

In Indian culture homosexual activities are considered to be unethical and immoral. That was partly because of the [section 377](#)¹³ of the Indian Penal Code. But the homosexual activities have been decriminalized in *Navtej Singh Johar and others v. Union of India*. It was easy to do so because section 377 did not enjoy the presumption of constitutionality as it was a colonial rule, and was not passed by the parliament. But it's time to move past the anti-colonial rhetoric.

Marriage of an individual is governed by the personal laws in India, and only marriage of a heterosexual couple is recognized under it, but a marriage between same-sex people is not expressly barred under any personal law.

Conclusively all these rights are also available to LGBTQ+ community but are not recognized by the legislature. Even such rights has the constitutional sanction, if violated such rights, it is not protected by the legislation. There is a need of separate legislation to entitle the LGBTQ+ of such rights, as amending the personal laws would end up hurting the religious sentiments & can be challenged on the ground of infringing the fundamental rights to freely practice their religion.

CURRENT STATUS IN INDIA-

There have been several instances of same-sex marriages that had been witnessed in India post decriminalization of section 377; however these couples are facing difficulties in giving their marriage a legal identity because of the values and principles that governs our country.

Aggrieved by this, many of these couples knocking the doors of the court in the hope that the right which is given to them would be extended to marriage and they would be accepted in the society as legally wedded couple, however the arguments that are given by the state is something which is upsetting, because they think giving them right to cohabit is enough and the role of court ends there.

A gay couple has filed a petition to recognize homosexual marriages under Special Marriage Act in the [Kerala High Court](#)¹⁴. Two similar petitions, filed by a lesbian and gay couple, are pending

¹³ <https://indiankanoon.org/doc/1836974/#:~:text=377..also%20be%20liable%20to%20fine.>

¹⁴ https://www.livelaw.in/pdf_upload/pdf_upload-369544.pdf

in Delhi High court for registration of their marriage under the [*Special Marriage Act, 1954*](#)¹⁵ and [*Foreign Marriage Act, 1969*](#)¹⁶.

This is evident from the argument of Tushar Mehta, who represented Centre [in Delhi High Court](#), against the petition that was filed by several homosexual couples to seek recognition of their marriage in the eyes of law, he said that “the judgment of 2018 merely discriminates homosexuality, nothing more nothing less, and marriages in India is permissible only between biological man and woman, any other interpretation would run contrary to the statutes.”

Such arguments on the part of Government sing a different tune, because when our Indian courts have accepted live-in relationships on one hand, and have allowed LGBTQ to live together, then what is preventing them to give legal identification to homosexual marriages.

There is still some hope from the judiciary since the [High Courts of Punjab & Haryana](#)¹⁷, [Orissa](#)¹⁸ and [Uttarakhand](#)¹⁹ have lately acknowledged and enforced the rights of homosexual couples to have a live-in relationship.

STEPS NEED TO BE TAKEN:

1. In the normal understanding the definition of marriage is considered as union between only man and woman, however it is the need of an hour to give broad interpretation to this definition so as to make it inclusive for LGBTQ community, the Hindu personal laws are gender neutral laws as it does not make use of specific words like male and female, rather it use the words like bride and bridegroom, husband and wife and hence it could accommodate LGBTQ community in its definition of marriage by replacing these words with the spouses which would provide uniformity for all the person irrespective of their genders.

¹⁵ https://legislative.gov.in/sites/default/files/A1954-43_1.pdf

¹⁶ <https://legislative.gov.in/actsofparliamentfromtheyear/foreign-marriage-act-1969>

¹⁷ <https://lawstreet.co/judiciary/ph-high-court-protection-same-sex-live-in-couple?refuid=OTg5NXw1MC42My4xNjAuMjE3fHNvb2x1Z2FsLmNvbQ%3D%3D>

¹⁸ <https://www.theleaflet.in/orissa-hc-green-signals-same-sex-live-in-relationships/>

¹⁹ <https://www.hindustantimes.com/india-news/same-sex-couples-can-live-together-uttarakhand-hc/story-WDjvNH3JzJvaGDtpfzZOxL.html>

2. Another step that could be taken is that if the government is not ready to accept amendment in the existing personal laws because social and moral stigma then the LGBTQ shall be given recognition as a separate community which would have its own custom and rituals to marry, like the [Arya Samaj and anti Brahmins self respect movement in Tamil Nadu](#)²⁰ which made their own marriage customs by amending Section 7 of Special Marriage Act, 1954.

In the like manner if LGBTQ will be treated as entirely different community then it would not interfere in the personal laws of existing communities and will have their own rites and rituals to marry among themselves.

3. Nevertheless, the best option available to protect the rights of LGBTQ+ community is to draft a separate legislation for them. Since, amending the personal laws would be argued as a violation of fundamental right to freedom of professing religion. The formation of separate statute is also better as maintenance, inheritance, and various other conjugal rights arising out of marriage cannot be governed by the existing personal laws and amending them all would be a arduous task. The initial part of the statute shall contain the definitions of the terms of LGBTQ+ hence providing the legal recognition to them.

CONCLUSION—

Though guaranteed by the constitution & repeatedly established as the law of the land by the Supreme Court. The basic rights are still due to them unless a proper statute is drafted by the legislature to protect them.

By way of sanctioning the social institution of the marriage for the LGBTQ+ community and entitling them, to form a family to live a more socially inclusive life the other aspects of fundamental rights would also be more enjoyable to them such as right to education, expression, equality in various opportunities, health, etc.

²⁰ <https://www.sconline.com/blog/post/2020/10/31/is-decriminalisation-of-homosexuality-enough/>

A proper legal identity must be given to the members of LGBTQ+ community as it will not leave them vulnerable for discrimination and denial of equal rights. Our collective effort (as a lawyer, member of judiciary, student, social activist etc.) can help in bringing justice to the LGBTQ+ community and the most vital role we can play here is to bring the matter of queerness and sexuality in the public domain, open for discussion without any fear of reprisal by the authorities.

‘Right to marry a partner of one’s choice’ will not be judged flawlessly and in the most appropriate manner unless each individual irrespective of their sexual orientation can legally enjoy this right guaranteed.



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