

Recognition of Same Sex Marriages in India

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Abstract

Homosexuality and same-sex marriage are considered taboo in Indian society. People in India often hesitate to discuss these topics openly, although there has been a recent shift in attitudes towards same-sex marriage and homosexuality. Increasingly, individuals are using various platforms, including social media, to express themselves, but more needs to be done. This article examines the current situation of same-sex marriages in India and discusses the challenges faced by same-sex couples, as well as the social stigma surrounding homosexuality. In November 2018, the Supreme Court decriminalized homosexuality by removing certain parts of Section 377 of the Indian Penal Code that were deemed to violate the fundamental rights of the LGBTQ+ community. However, despite this ruling, there are still numerous challenges faced by the community in India. Same-sex marriage is still not legally recognized, and it is necessary to provide legal protection for such unions. Although the Supreme Court struck down parts of Section 377, it did not explicitly permit same-sex marriage. Article 21 of the Indian Constitution, which guarantees the right to life and personal liberty, includes the right to marry and start a family. However, Indian marriage and other laws do not currently have provisions for same-sex marriages, which denies same-sex couples the right to marry and start a family within the scope of Article 21. Some same-sex couples have come together and, with the assistance of various institutions, have filed petitions in high courts and the Supreme Court, seeking the recognition and solemnization of their marriages under the Special Marriage Act of 1954.

KEYWORDS: marriage, rights, LGBTQ, transgender, social

INTRODUCTION

Many developed countries have recognized same-sex marriage in the context of civil rights, while third genders have long faced gender-based discrimination and have fought for legal recognition and protection. Although marriage is considered a human right, there are currently no laws or legislation that specifically enforce these rights for transgender individuals. However, there is hope, as the Supreme Court's NALSA judgment legally recognized the gender identity and fundamental rights of transgender people. Marriage plays a key role in shaping an individual's identity and is governed by personal laws and special acts that formalize relationships. It carries legal significance in areas such as property, inheritance, adoption, and maintenance. In the 21st century, marriage has also become important at an international level and is a state-recognized institution. Under the Indian Constitution, marriage falls under Article 21, which grants individuals the freedom to choose their partner. Courts have interpreted marriage as a fundamental right essential to upholding individual dignity and ensuring a meaningful human existence.

In the case of *Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors.*¹, it was held that Article 21 encompasses the right to life and liberty, not just in terms of physical existence, but in ensuring a dignified and meaningful life. Human dignity is a prerequisite for exercising the rights under Article 21. The right to marry is crucial for maintaining individual dignity and enjoying a meaningful life, which is why courts have interpreted it as a fundamental right under Article 21 of the Indian Constitution.

However, same-sex marriage is currently not permitted in India, creating challenges for the LGBT community. Same-sex marriage refers to the union of two individuals of the same gender, but India does not legally recognize such unions.

Recent legal developments in India could positively influence the future of same-sex marriage. The introduction of the Personal Data Protection Bill in 2020, which recognizes the right to privacy as a fundamental right, offers hope. Legal experts suggest that this right to privacy could be used as a basis to advocate for the legalization of same-sex marriage, as it affirms the importance of personal autonomy. It's important to consider the historical context of LGBTQ+ rights in India, which dates back to the British colonial era. Section 377, introduced in 1860, criminalized homosexual acts and continued to be enforced even after India's independence. However, it's crucial to recognize that this law was based on the societal norms of the 19th century, and the time has come to challenge and change these outdated beliefs.

BACKGROUND: In the late 20th century, the fight for LGBTQ+ rights in India gained greater prominence. In the 1990s, the AIDS Bhedbhav Virodhi Andolan (ABVA) emerged as the first LGBTQ+ organization in Delhi, working to address the discrimination and violence faced by the community. In 2001, the Naz Foundation, an NGO, submitted a public interest litigation (PIL) to the Delhi High Court, contesting the constitutionality of Section 377. Although conservative groups and religious leaders opposed the move, the LGBTQ+ community and their allies persisted in their advocacy. In 2009, the Delhi High Court ruled Section 377 unconstitutional, effectively decriminalizing homosexuality. However, in 2013, the Supreme Court of India reversed this decision, reinstating Section 377. Finally, in 2018, a five-judge bench of the Supreme Court once again ruled Section 377 unconstitutional, decriminalizing homosexuality and representing a significant triumph for LGBTQ+ rights in India. Despite this legal progress, significant challenges persist. Discrimination and violence against LGBTQ+ individuals are still widespread, leading to stigma and marginalization within families, communities, and workplaces. Transgender individuals, in particular, face various forms of discrimination, including limited access to education, employment, healthcare, and other essential resources. Furthermore, same-sex marriage remains unrecognized in India, leaving LGBTQ+ couples without legal protections and increasing their vulnerability to discrimination and violence.

Following are some institutions and judgements which shaped the battle of Rights of LGBTQ + community

- Founding of LGBTQ+ organizations: In the late 1990s, the first LGBTQ+ organization, the AIDS Bhedbhav Virodhi Andolan (ABVA), was founded in

¹(1985) 3 SCC 545.

Delhi to fight against discrimination and violence faced by the LGBTQ+ community.

- Naz Foundation's PIL: In 2001, the Naz Foundation, a non-governmental organization, filed a public interest litigation (PIL) in the Delhi High Court challenging the constitutionality of Section 377. (Naz Foundation vs Government Of Nct Of Delhi And ors)².
- In 2009, the Delhi High Court declared Section 377 unconstitutional and decriminalized homosexuality.
- Supreme Court's 2013 decision: In 2013, the Supreme Court of India overruled the Delhi High Court's judgment and reinstated Section 377, criminalizing homosexuality once again.
- In 2018, a five-judge bench of the Supreme Court of India declared Section 377 unconstitutional, overturning the previous decision and decriminalizing homosexuality once again.
- In 2019, the Indian Government passed the Transgender Persons (Protection of Rights) Act, which aimed to protect the rights of transgender individuals and provide them with legal recognition.

The LGBTQ+ community in India is grappling with a multitude of issues that persist despite gradual progress in recent years. It is disheartening to witness the social discrimination and exclusion that individuals belonging to this community regularly face. The significance of legal recognition cannot be overstated, as it serves as a catalyst for societal acceptance and the protection of their rights.

Transgender individuals, in particular, bear the brunt of discrimination and exploitation in Indian society. Consequently, they are forced to confront multifaceted challenges in their personal and professional lives. Fortunately, a ray of hope emerged with the historic 2014 NALSA judgment, which recognized their right to self-identify and ensured legal recognition of their chosen gender identity.

Notably, the Protection of Women from Domestic Violence Act of 2005 takes a commendable step forward by including same-sex couples, thereby addressing gender neutrality. This inclusive legislation attempts to safeguard the rights and well-being of LGBTQ+ individuals within the confines of the home.

Certainly, the decriminalization of homosexuality in 2018 marked a watershed moment for the Indian LGBTQ+ community. This groundbreaking decision, striking down Section 377 of the Indian Penal Code, has paved the way for increased acceptance and visibility, fostering a more vibrant and inclusive society. It has undoubtedly emboldened individuals to assert their rights and campaign for comprehensive legal recognition and protection.

While these developments are encouraging signs of progress, it is imperative that the government and society as a whole continue to strive for greater equality, understanding, and support for the LGBTQ+ community. By empowering and embracing the LGBTQ+ community, India can flourish as an inclusive society that recognizes the fundamental rights and dignity of all its citizens.

²WP(C) No.7455/2001

Opponents of same-sex marriage argue that marriage is a sacred institution traditionally defined as a union between a man and a woman. They believe that expanding this definition to include same-sex couples would erode traditional family values and weaken the institution of marriage. Their main contention is that marriage is intended for procreation and raising children, which same-sex couples cannot do, making their unions inherently different from those of opposite-sex couples. Additionally, they claim that children raised by same-sex couples are more likely to face emotional and behavioral issues, asserting that a balanced upbringing requires both a mother and a father. These opponents further argue that legalizing same-sex marriage would undermine Indian society's deeply rooted traditions, which are structured around cultural and religious values, and would lead to increased westernization. They also highlight that the majority of the Indian population opposes same-sex marriage as it contradicts their traditional beliefs.

Currently, several same-sex couples have filed petitions seeking the legalization of their marriages under the Special Marriage Act, which are under consideration by the Hon'ble Supreme Court. The Indian Psychiatric Society, a leading mental health body, played a key role in the Supreme Court's 2018 ruling decriminalizing homosexuality, emphasizing that it is not an illness. In a recent statement, they pointed out the potential for discrimination against children adopted by same-sex couples but stressed the importance of providing a supportive and nurturing environment for these children.

In, *National Legal Services Authority (NALSA) v. Union of India & Ors.*³, The Supreme Court declared that transgender individuals have the right to self-identify their gender and are entitled to the same constitutional protections as other citizens. The court further emphasized that the right to life under Article 21 encompasses the right to dignity and personal autonomy, including gender identity, reinforcing that human dignity is an essential aspect of Article 21.

The Delhi Commission for Protection of Child Rights informed the Supreme Court that a couple's sexuality does not affect their ability to parent, stating that numerous studies have shown same-sex couples can be just as effective or ineffective as heterosexual couples in raising children. During the hearings, Chief Justice of India (CJI) DY Chandrachud noted that the state cannot discriminate against individuals based on characteristics beyond their control, challenging the notion that same-sex marriage is an "urban elitist concept," as the government lacks data to support this claim.

In one petition, the Solicitor General of India argued that recognizing same-sex marriages is a legislative matter, as it involves broader social considerations like adoption and the psychological well-being of children raised by same-sex parents. He emphasized that Parliament must reflect the will of the people when making such decisions. In response, CJI Chandrachud remarked that the sexual orientation of same-sex parents does not determine the sexual orientation of their adopted child.

In, *Navtej Singh Johar v. Union of India*⁴, The Supreme Court decriminalized homosexuality, holding that Section 377 violated the right to privacy, dignity, and equality of LGBTQ+ individuals. The court emphasized that the right to privacy and

³(2014) 5 SCC 438

⁴(2018) 10 SCC 1

dignity, under Article 21, are fundamental to human life, and consensual sexual relations between adults in private cannot be criminalized.

Similarly in *Shakti Vahini v. Union of India*⁵, The Supreme Court reaffirmed that the right to choose a life partner is a fundamental right under Article 21 and that societal norms or family objections cannot override this right. The judgment supported the freedom of marriage as a part of individual dignity and autonomy.

Given these observations, there is optimism that the judiciary will continue to support LGBTQ+ rights. However, significant legislative action is required to establish new laws. While the government has already introduced the Transgender Act, granting legal status and protections to the transgender community, it must also address the rights of gay, lesbian, and bisexual individuals. Parliament must pass bills that safeguard the civil rights of the LGBTQ+ community, offering them social and legal protections for a more equitable life. Legalizing same-sex marriage in India would not only mark a victory for LGBTQ+ civil rights but also influence other South Asian countries like Thailand, Malaysia, China, and Russia, where same-sex marriage remains prohibited

COMPARISON BETWEEN OTHER COUNTRIES

By the end of 2022, more than 30 countries around the world had legally recognized same-sex marriage, primarily in Western Europe and certain American states. In contrast, Asia presents a more varied picture. Taiwan stands out as the only Asian nation to allow same-sex marriage, while other countries in the region maintain different approaches. For instance, Hong Kong does not permit same-sex marriage domestically, though it grants dependent visas to expatriates' same-sex spouses. Thailand is gradually moving toward legalizing civil unions. On the other hand, some countries are tightening restrictions, such as Indonesia, which not only rejects same-sex marriage but has also recently banned all forms of extramarital relations. Singapore, while lifting its ban on intercourse between men, has resisted progress toward marriage equality. Should the Indian courts approve same-sex marriage, India would surpass the United States as the largest democracy to grant marriage rights to LGBTQ couples.

CHALLENGES FACED BY THE LGBTQ+ COMMUNITY

The reinstatement of Section 377 of the Indian Penal Code initially gave the LGBTQ+ community hope for change. However, this has had little impact on India's entrenched heteronormative cultural norms. The judicial system still fails to recognize the rights of homosexuals, leading to numerous civil challenges, such as difficulty obtaining identity documents and denial of rights like voting, access to public services, inheritance, legal action, education, and marriage. Transgender individuals, in particular, face widespread discrimination in essential areas such as education, healthcare, relationships, and employment. While younger generations in India are becoming more accepting of queer identities, societal struggles persist, especially within the family, home, and school environments.

Conditions for Homosexuals in India:

1. **Urban India:** The situation for homosexuals in urban areas is complex, with increased awareness driven by social media and corporate initiatives, but also the rise of a hostile environment.

⁵(2018) 7 SCC 192

2. **LGBTQ Acceptance:** The LGBTQ+ community continues to face significant challenges in seeking acceptance and equal rights. Transgender individuals, in particular, face hurdles, with pervasive negative judgments and social prejudices viewing LGBTQ individuals as inherently different.
3. **Rural LGBTQ Voices:** LGBTQ+ individuals in rural or remote areas face even greater difficulties, including lack of exposure, limited internet access, and fewer opportunities to express their identities. Refusing to marry in these regions can lead to a higher risk of physical violence.
4. **Homelessness:** Many LGBTQIA+ youth face homelessness after being rejected by their families or fleeing violent situations. Without stable housing, they struggle to access education and social support, often turning to risky behaviors such as unsafe sex or substance abuse. Social exclusion and derogatory labels also hinder their acceptance.
5. **Social Circles:** Non-conformity to traditional gender norms is often not acknowledged in social circles, manifesting in areas such as school uniforms, dress codes, and public facilities. LGBTQIA+ individuals often find themselves having to justify their gender identity in public settings.
6. **Employment Barriers:** Difficulty obtaining gender-accurate documentation can lead to unemployment for transgender individuals, as some jobs impose discriminatory requirements based on gender.
7. **Parental Support:** Parents have a crucial role in embracing their LGBTQ+ children and fostering societal acceptance. By embracing diversity and their child's identity, parents can help transform society and create a more inclusive environment.

HOMOSEXUALITY AND SOCIAL STIGMA

Negative attitudes toward the LGBTQ+ community can have far-reaching consequences, including rejection by family and friends, discrimination, violence, and the impact of hostile laws and policies. For individuals identifying as gay, bisexual, or otherwise LGBTQ+, stigma, homophobia, and discrimination can negatively affect multiple areas of life:

- **Income and Employment:** They may struggle to find or maintain employment and face barriers in accessing health insurance.
- **Healthcare Access:** Discrimination can limit access to healthcare services tailored to their specific needs.
- **Mental Health:** Persistent stigma can worsen mental health, contributing to harmful behaviors such as substance abuse, risky sexual activities, and even suicide.
- **Relationships:** Social stigma may hinder the ability to form and sustain long-term same-sex relationships, increasing the risk of HIV and other sexually transmitted diseases.
- **Coming Out:** The fear of stigma makes it difficult for LGBTQ+ individuals to come out, leading to higher stress, restricted social support, and reduced overall well-being. Stigma, and discrimination against individuals identifying as gay, bisexual, or other sexual orientations can create significant challenges, particularly for young men. These negative attitudes greatly

increase the likelihood of these individuals facing acts of violence compared to their peers in educational settings. Examples of such violence include bullying, teasing, harassment, physical assault, and behaviors linked to suicide. Moreover, young people who identify as homosexual, bisexual, or other sexual orientations are more likely to face family rejection, which increases their vulnerability to homelessness. Alarming studies show that about 40% of homeless youth identify as LGBT. A 2009 study revealed that gay, lesbian, and bisexual youth who experienced strong familial rejection had dramatically worse outcomes compared to those who received more support from their families.

Schools have the potential to reduce stigma and discrimination against young gay, bisexual, and other men who have sex with men. A positive school environment is associated with lower rates of depression, decreased suicidal tendencies, reduced substance use, and fewer unexcused absences among LGBT students. Schools can foster safer, more supportive environments by adopting policies and practices such as anti-bullying measures, promoting connectedness, and encouraging parental involvement. This can be achieved through strategies like:

- Promoting respect for all students and implementing zero tolerance for bullying, harassment, or violence.
- Creating "safe spaces" like counselors' offices, specific classrooms, or student organizations where gay and bisexual youth can seek support.
- Supporting student-led clubs that advocate for a safe, inclusive, and accepting environment, such as gay-straight alliances that welcome youth of all sexual orientations.
- Ensuring health classes and materials address HIV and STD prevention in a way that meets the needs of gay and bisexual youth, using inclusive language.
- Encouraging school staff to attend training on creating safe and supportive environments for all students, regardless of sexual orientation or gender identity.
- Facilitating access to community-based health providers experienced in offering HIV/STD testing, counseling, and social and psychological support for gay and bisexual youth.

CONCLUSION

In many parts of the world, there is growing recognition and acceptance of LGBTIQ+ individuals, though it will take time to fully normalize their existence and eliminate the use of LGBTIQ+ labels as slurs. Fortunately, more people are beginning to understand and acknowledge the rights of these individuals. After years and decades of struggle, many parts of the world have removed barriers to LGBTIQ+ rights and granted them equal status with others. Every person, regardless of their sexual orientation, deserves to be treated with equality, as we are all part of the same humanity and should not be discriminated against based on sexual characteristics.

The Indian Constitution guarantees fundamental rights to all citizens, including those in the LGBT community. These rights include equality, protection from discrimination based on sex, the right to life, freedom of speech and expression, the right to privacy, and various religious and cultural rights. While these rights are not explicitly labeled for the LGBT community, they apply to them as Indian citizens. It is crucial that the LGBT community in India and worldwide be granted equal treatment, dignity, and respect.