

THE LEGALITY OF SAME SEX MARRIAGES & HOMOSEXUALITY: THE CURRENT CONFLICT & THE WAY FORWARD IN THE 21ST CENTURY**¹Saurabh Sharma and ²Savneet Kaur**¹Assistant Professor, Lloyd Law College²Assistant Professor, Campus Law Centre, Delhi University, Delhi**ABSTRACT**

There are numerous nations¹ in the world that supports same-sex marriage, apart from civil and human rights. Third genders have experienced discrimination based on gender for a very long time. They have fought tenaciously to have their rights recognized by the law. It is increasingly desirable to have legal protection for same sex relationships to serve equality at par with other relationships. When we see, right to life and various human rights, the right to marriage is impliedly and expressly covered.² Nevertheless freedom for transgender people lacks basic legal recognition, when it comes to relationships. The NALSA³ ruling, given by honorable Supreme Court was the initial step to formally give legal recognition to both genders and the fundamental rights that are accorded to everyone, regardless of sex. This paper will try to analyze the legality of same sex marriages while stating the significance of legal recognition of LGBT unions with the help of various landmark judgements. Additionally the researcher, will try to suggest a plausible solution towards the current social climate and the condition of homosexuals in India.

Keywords: Homosexuals, discrimination, marriage, LGBT, right to life, dignity, NALSA, Third gender.

1.1 INTRODUCTION

In political, legal, and socioeconomic terms, one of a person's key defining characteristics is the essence of marriage. It is a structure that has been formally recognized by a number of personal laws as a means of recognizing a couple's connection. Due to its relevance in relation to rights and obligations including property, inheritance, and other associated rights, it is of enormous public importance. Marriage is the source of these privileges. The marriage as a foundation is not merely a right of civil nature but is recognized on a global scale as well. The state should grant everyone with equal opportunity to marry. In India, the right to marriage is officially acknowledged as a right that is implied in the constitution, allowing an individual the ability to have the spouse, according to the individual's will.

1.2 Historical Background

In a case⁴, it was decided that "Article 21 grants freedom of life and liberty, which goes beyond simple physical survival to include a meaningful life that is lived with dignity. A vegetative life is not life. It is more than mere animal existence. A requirement for establishing the rights guaranteed by Article 21 of the constitution is inherent human dignity. Marriage has been understood by courts to be a significant right under Article 21 of the Constitution since it is essential for maintaining personal dignity and for living a fulfilling life."

¹ Pew Research Centre, "Same-Sex Marriage Around the World", available at <https://www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world/> (last visited on June 20, 2023)

² Universal Declaration of Human Rights, art. 16.

³ NALSA v. Union of India, (2014) SCC 438

⁴ Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors [1985] 2 Supp SCR 51

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Although the freedom to choose one's spouse has been acknowledged as a fundamental right, LGBT community lacks these rights to choose same sex partners.⁵ LGBT people encounter obstacles when trying to exercise even the most fundamental rights. Their fundamental right to marriage is not being protected by the legislators. In order to ensure that same-sex couples have the same level of legal protection & social protection as other couples, most developed countries have legislation that officially accept same-sex unions.⁶ The rights to succession, maintenance, and pensions that are accorded to heterosexual spouses are not accorded to couples that are of the same sex.

1.3 Legality of Same-Sex Marriages

The majority of the debate with respect to the Supreme Court's decision in case⁷ referring to section 377 of the Indian Penal Code, which criminalizes carnal intercourse against the laws of nature as constitutionally valid and has focused on effective ways to overturn the ruling. Unquestionably, discrimination based on sexual orientation violates our fundamental rights that are mentioned under Article 15 of the Constitution. Sexual preference is one of the component of right to life, therefore discrimination against someone based on their sexual orientation is wrong against the acceptable standards of civil as well as criminal law. Due to the fact that the present personal laws exclusively recognize heterosexual unions. However, homosexual couples are surely denied the legal, social, and financial privileges that these laws provide to married people of different sex.

However there are many debates to change personal laws, but changing laws that are personal in nature to permit genders with same sex unions may not be a practical choice because it might offend some people's religious beliefs, which would have unfavorable consequences. Therefore, amending the Special Marriage Act is a practical option for recognizing the rights of homosexuals. One could make the case that denying homosexuals the ability to get married violates their fundamental rights and unfairly discriminates against the LGBT population.

1.4 Same-sex Marriages: A Global Perspective

The LGBT community has waged a protracted and exhausting fight for making their rights in resonance with other laws and against social prejudice.⁸ However, there are many nations that have succeeded in respect of decriminalizing consensual sex between people who share the same sex gender either through legislation or by making amendments to such restrictions through court of law.⁹ However, some 76 countries in West Asia and Africa still have such strict regulations.¹⁰ When the Supreme Court affirmed section 377 of the Indian Penal Code in Koushal, India joined them. In doing so, it overruled the High Court of Delhi's judgement in a case¹¹, which decriminalized consensual sex between adults. The paper's main argument is that, in order to properly recognize and guarantee the homosexuals prerogative, their respective legal rights must also be accorded to them in addition

⁵ Editorial, "India government opposes recognizing same-sex marriage, *The Print*, available at <https://theprint.in/india/india-government-opposes-recognising-same-sex-marriage/1437578/> (last visited on June 9, 2023)

⁶ *Supra* note 2

⁷ Suresh Kumar Koushal v. Naz Foundation (2014) 1 SCC 1

⁸ Paul J. Angelo and Dominic Bocci, *The Changing Landscape of Global LGBTQ+ Rights*, Council on Foreign Relations, available at <https://www.cfr.org/article/changing-landscape-global-lgbtq-rights> (last visited on June 17, 2023)

⁹ *Supra* note 2

¹⁰ Isaac Kaledzi, *Why do LGBTQ rights face so much opposition in Africa?*, available at <https://www.dw.com/en/why-do-lgbtq-rights-face-so-much-opposition-in-africa/a-65441709> (last visited on June 1, 2023)

¹¹ Naz Foundation v. Govt. of NCT of Delhi (2009)

to the decriminalization of same-sex actions. Additionally, it offers a number of potential recognition possibilities. The fundamental rights have an impact on many people's real lives, the issue is more than just one of law. When we talk about various diverse cultures and traditions in India, there are numerous views that are also expanding alongside modernization. Therefore, resistance based on conventions, practices, religion, or tradition serves as a barrier to liberal legislation. The High Court of Delhi initially denied Naz Foundation's plea, ruling that there was no basis for the case. It was then contested in a special leave petition, and the Supreme Court through the special leave petition reviewed the judgement. Hence, it is not to be assumed that a progressive strategy cannot be evolved when the case¹² is taken into account.

1.5 Homosexuality and the Indian perspective

When we talk of the word homosexual, it can be defined as a sexual or romantic feeling between people who are of the same gender. In other words it can be said to have a desire to engage in sexual intimacy with individuals of the same sex. Scientists have conducted a number of studies to try to determine why homosexuality exists in humans.¹³ Only a few biological ideas propose that attraction towards the same gender is influenced by their genes, their early environment, or both of these variables combined. According to research, it is an uncontrollable, natural variety that is part of life. However, a portion of society still feels this way in the twenty-first century.

It has long been considered taboo in India. The majority of laws that are personal in nature define marriage as a sacrament and the uniting of people that is two persons of opposite sexes.¹⁴ Same-sex partnerships are viewed as being extremely unethical and going against both tradition and religion. Lesbian marriages are regarded as unholy since they are personal and are guided by one's religious beliefs. In India, people frequently think that it is a product of western civilization and a negative foreign influence. However there are scriptures in ancient India and literature that reflects a thought somewhat comparable, and suggests that it is not only a western practise. One of Hinduism's religious texts, the Rigveda, has the phrase "Vikriti Evam Prakriti," which translates as "what appears to be unnatural is also natural."

1.6 Legal Provisions under Personal Laws

The Hindu Marriage Act regulates marriages between any two people who practice the Hindu religion as well as related issues including divorce and other matters. It is applicable to everyone else who resides in India and practises Jainism, Buddhism, or Sikhism. According to the Act¹⁵, marriage is regarded as uniting of two people for sacramental union for the purpose of carrying out religious duties. Recognizing same-sex marriages under personal laws would be the most practical course of action in the current situation.

The bridegroom and the bride must have twenty-one years and eighteen years old respectively, according to the Act.¹⁶ To provide a similar provision, the Christian Marriage Act¹⁷ employs the phrases man and wife. In India, nearly all personal laws define marriage as the union of heterosexuals. However, by carefully looking at the provisions of Hindu Marriage Act, it cannot be considered to be prohibit same-sex marriages expressly. Several approaches, including the following, can be used to acknowledge them under personal laws:

¹² *Supra* note 8

¹³ Alfred C. Kinsey, Wardell R. Pomeroy, et.al., Sexual Behavior in the Human Male, 93(6) *National Library of Medicine* 894–898 (2003), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447861/> (last visited on May 13, 2023)

¹⁴ B. Sivanandy v. P. Bhagavathy Amma AIR 1962 Mad 400.

¹⁵ Hindu Marriage Act, 1955

¹⁶ *Ibid*, s. 5

¹⁷ The Indian Christian Marriage Act, 1872, s. 4.

- I. It is possible to interpret current legislation to permit same-sex unions.
- II. The term LGBT (lesbian, gay, bisexual, and transgender) refers to a community whose traditions allow unions of same genders. The Act should be interpreted reasonably along the lines that permits marriage between same sexes; otherwise, it would be against the law.
- III. Last but not least, alter the Act as necessary by looking towards the basic structure of the Act.

The Act does not discriminate based on gender, save from the use of the terms "bridegroom" and "bride." When a homosexual couple marries, it is legal as long as one of them is termed as the bride and the other as the groom. A couple who is lesbian once used the same strategy, with one of them posing as the bride and the other pretending to be the groom.¹⁸ The interpretation makes an attempt to combine marriages between same genders with other forms of matrimony that is conventional in nature, even though it goes against the statute's norms of interpretation and is also inconsistent with how people typically perceive the terminology employed (bride and groom). The second approach could be to recognize the LGBT community as a different group with its own customs and practises that allow same-sex partnerships.

The third strategy is interpreting the Act to permit same-sex unions. If not, the Act can be declared unconstitutional because it violates their fundamental rights and discriminates against them based on their sexual orientation. After Koushal Judgement¹⁹, the court might not be as willing to favour these opinions.

According to the Bombay High Court's ruling in the case²⁰, personal laws cannot be judged by the standard of basic rights. Making the necessary changes to the relevant personal legislation is the final strategy. Of all the alternatives, it is the one that will actually work. Due to some groups in society's negative attitudes towards the LGBT community, it can turn out to be the most challenging and contentious issue at the same time.

1.7 Analysing Provisions of Hindu Marriage Act

The critical analysis of the Act²¹ specifies the essential conditions that are required for a legal marriage:

Association of persons- The Act avoids using gender-specific terminology like man or woman. Therefore, same sex couple can easily be integrated into it. A marriage may be solemnized between any two Hindus, according to the Act. There is no explicit prohibition in the Act that marriages can only be solemnized between people who are the opposite gender. The Act²² outlines who is eligible to marry under it.

Ceremonies & customary rites: According to Act²³, marriages can be solemnized in accordance with either party's customary rituals. If the rites are not carried out correctly, the marriage is void. For a marriage to be recognized under these laws, these rites must be proven.

The terms "bride and bridegroom" are only used in section 5(ii) and section 7(2). The other provisions use neutral terminology like "person" or "party." The terms "bride" and "bridegroom" can be interpreted as roles that various parties may value in a union. The Act is therefore neutral outside of these two provisions, which use the terms

¹⁸ Susan Donaldson James, Gay Marriage Quandary: Am I the Bride or Groom?, available at <https://abcnews.go.com/Health/sex-weddings-bride-groom-relationship/story?id=14014446> (last visited on June 12, 2023)

¹⁹ Supra note 8

²⁰ State of Bombay v. Narasu Appa Mali AIR 1952 Bom 52

²¹ Supra note 16

²² The Hindu Marriage Act, 1955, s. 2.

²³ Supra note 16, s. 7.

bride and bridegroom. So it stands to reason that if one person plays the part of the bride and another the part of the bridegroom, they can legally consider to be in a union.

1.8 Analysing Special Marriage Act

The Act²⁴ permits a certain kind of union between individuals that do not correspond to the laws of their personal religion or belief system. Additionally by amending some provisions of the Act²⁵ to support same-sex marriages is an option that shouldn't provoke belief and faith of the religion. Contrary to marriages under Act²⁶, marriages under this Act are not required to follow certain practices in order to be legally binding.

However, the Act's current format only applies to heterosexual couples because it refers to the age requirements as "male" and "female" when describing them. It is necessary to change section 4(c) of the Act in order to explicitly include homosexual weddings, or a new clause may be added. Some parties' manifestos for the Lok Sabha elections referenced decriminalization of homosexuality, but were unequivocal in their support for the verdict, with some parties leader noting that it is against the nature and it cannot be acceptable in any way.

The Naz Foundation ruling emphasised on Article 15 of the Constitution, "which forbids discrimination on the basis of gender, race, caste, religion or place of birth." The court observed that the term "sex" in Article 15 encompassed sexual orientation. Several foreign judgements²⁷ were mentioned in this case to back up the propositions. If legislation and personal laws barred homosexual couples based on their sexual orientation, it would be discriminatory and a violation of Article 15.

Many nations now have laws that recognise same-sex unions. In 2001, the Netherlands became the first country to make same-sex marriage lawful. However, there were also a number of laws that were opposed to same-sex relationships. The constitutional court in South Africa ruled that same-sex weddings are against the law there. Its section²⁸ states that "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including pregnancy, gender, marital status, sex, ethnic or social origin, colour, race, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth."

Additionally, it is obvious that a case might have been established if the Act²⁹ had legalised same-sex unions. However, it may be argued that the Act³⁰ is constitutional because it was passed after the constitution entered into force based on the judgement.³¹ There have been numerous cases of homosexuals coming out to claim their rights status since the Supreme Court decriminalized section 377 of the Indian Penal Code. In the case³², the court ruled that the right to choose a partner is a fundamental right.

²⁴ Special Marriage Act of 1954

²⁵ Ibid.

²⁶ Supra note 16

²⁷ Oliari and Others v. Italy, Applications Nos. 18766/11 & 36030/11 (July 21, 2015), HUDOC

²⁸ Constitution of South Africa, 1996, s. 9(3).

²⁹ Supra note 25.

³⁰ Ibid.

³¹ Supra note 8.

³² Shakti Vahini v. Union of India (2018) 7 SCC 192

1.9 The NALSA Decision Has a Silver Lining

In addition to denouncing gender-based discrimination, the judgement³³ also brought a glimmer of hope and the promise that had been left outside the legal framework. The division bench of Justices K.S. Panicker Radhakrishnan and Arjan Kumar Sikri granted legal identification to all persons whose gender does not match with norms that exists in the society.

The decision turned out to be a game-changing decision that had a significant impact on current laws relating to adoption, marriage, inheritance, and other topics. These laws will now evolve away from the traditional binary system of male and female in order to extend these legal and social rights to third genders. Just a few months prior, a regressive ruling³⁴ upholding the legality of section 377 of the Indian Penal Code had been rendered.

The courts in India acknowledged the discriminatory aspect of section 377 but made it plain that it does not affect the Koushal judgement and exclusively concentrates on the recognition of third genders. The court noted that the third gender community had access to fundamental rights in the same way that men and women do. The hijras population is currently seen as belonging to the third gender, therefore transgender people will have to decide whether to identify as male or female, or they will remain in this category. Due to their eligibility as a socially underprivileged and disadvantaged class, they would get the benefits provided by government policies under the minority area. The court primarily issued these directives, directing the federal and state governments to:

- i. **Analysing the legality of Third Gender:** Third genders now have the same fundamental rights as every other citizen of the nation. Discrimination against the community is evident when they are not taken into account in laws (civil or criminal) governing divorce, adoption, and marriage.
- ii. **Social and economic rights:** The federal and state governments will provide the community with a number of social welfare programmers. In order for the community to receive reserves, they will be treated as "socially and economically backward classes" (SEBC).
- iii. **Public health and sanitation:** Both governments are mandated to give the people access to proper medical care, as well as separate restrooms in public areas.
- iv. **Public Education:** Both governments tasked with promoting proper community integration into society by raising public knowledge of the issue.

1.10 CONCLUSION

The reason why same-sex marriages shouldn't be permitted except from a lack of understanding of their requirements and prejudice is difficult to analyse. The legislature needs to execute the changes to the current laws and should pass a separate piece of legislation to address these problems, in order to serve equality to all genders irrespective of the religion.

Depending on the culture, various people have varied ideas on marriage. It is primarily a place of recognition for a person's intimate relationships, including those with their family and partners in sexual activity. Homosexuals experience prejudice, intolerance, and isolation from mainstream society, as is plainly evident. Personal or social factors could be at play. Right now, when we talk of the wedding between same genders it is legal in 29 of the 195 nations.

As their relations are referred to as unnatural and evil, it is still considered taboo in India. For Koushal to be overturned and same-sex marriages to be accepted legally as well as socially, the ruling in the Naz Foundation and NALSA needs to be reviewed again. The best approach would be to include homosexual marriages under personal laws. However, revamping laws that are personal in nature to acknowledge the legitimacy of same-sex

³³ Supra note 4.

³⁴ Supra note 8.

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couples is a challenging issue. This will leads to raising a presumption of interfering with the laws of personal nature. The second plausible solution is to revise the Special Marriage Act with the equitable ground that it discriminates against same gender by formally rejecting the "right to marriage" of the society and is therefore unconstitutional.

If the Koushal decision is overturned, then there is a strong likelihood that the Naz Foundation case's ruling, which forbade discrimination based on sexual orientation, will stand as a vindication of Article 15 ban on such discrimination. Through several rulings³⁵ the judiciary, the Naz Foundation, and NALSA have made small but important first efforts towards reducing the stigma associated with the LGBT population and now it is up to the people of the nation to address and uphold the values outlined in these judgements. It is an insult to mankind to continually throw money at the hijra population and put them down. The LGBT community will face more challenges as a result of these kind of behaviours and treatment. As a result, it is imperative that rules for them be written in clear, unambiguous terms and that they be strictly upheld in order to appropriately recognize the human dignity of the community in question.

³⁵ Navtej Singh Johar v. Union of India AIR 2018 SC 4321