

---

**INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH**

---

**SAME SEX MARRIAGE: ITS ACCEPTANCE KNOCKING THE DOOR**- Komal Jain & Aritra Ghosh<sup>1</sup>**ABSTRACT**

The landmark judgment of Navtej Singh Johar v. Union of India<sup>2</sup> decriminalised all consensual sex among adults, including homosexual sex. But it has not paved the way for the LGBTQ+ community in many rights which are available to other members of society. One such right is 'right to marry' the person of one's choice. Despite recent changes in attitudes about same-sex relationships, homosexuality has long been stigmatised in India's traditional society. As of now, approximately 32 countries have recognised same sex marriage. Indian law does not recognise same sex marriage because of cultural diversity, unequal levels of education, tradition and the Indian value system. There are many judicial decisions that recognise the right to marry as a fundamental right under article 21 of the Indian constitution. One's own choice can be the person of opposite sex or same sex. But the Indian society and legislation have limited the definition of one's own choice to opposite sex. Many petitions have been filed in the Supreme court of India to allow same sex marriage which gave a push to this long-going battle. Many of these couples think that legalising same-sex unions would be an important step towards equality, as well as their acceptance at a social level. Excepting and recognising same sex marriage will give Indian society a totally new face not only we will break the stereotypes and take a big step forward but also put an end to the ongoing fight and challenges that are prevalent in our day-to-day life.

**INTRODUCTION**

Love comes in all forms and it would be wrong to say that a person cannot marry someone just because they are not from the opposite sex.<sup>3</sup> Marriage is a relationship between two

---

<sup>1</sup>Students from 3<sup>rd</sup> year, Nirma University.

<sup>2</sup>Navtej Singh Johar v. Union of India Ministry of Law and Justice, AIR 2018 SC 4321.

<sup>3</sup> Same Sex Marriage: Inequality in Marriage, <https://www.legalserviceindia.com/legal/article-7895-same-sex-marriage-inequality-in-marriage.html> (last visited feb 26, 2023).

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

individuals, but the term marriage cannot be confined to marriage between only two opposite sexes namely, a male and a female.

If we talk from the social point of view then marriage only takes place between the opposite sex and couples belonging to same sex socially and legally do not have marriage rights. Even after decriminalising section 377 of IPC, Homosexuality is still looked down upon in Indian society, has Indian society accepted it...? When we talk about Indian society the marital tie is seen as a purpose to take the generation ahead.

This issue of same-sex marriage has long been controversial. While it has become a part of everyday life in the west, same-sex marriage continues to be a point of contention in many more conservative parts of the globe, especially in countries where homosexuality is still a crime.<sup>4</sup> Until and unless we rise above this we cannot progress as a society.

### **RIGHT TO MARRY: AS A FUNDAMENTAL RIGHT**

There are various judgments in which it was held that the right to marry is a fundamental right. If we talk about the prominent case of **Shafin Jahan vs Asokan K.M**<sup>5</sup>, which is also known as Hadiya's case. In this case, the woman converted her religion from Hindu to Islam to marry a man belonging to the Muslim religion. Hadiya's father filed a petition on the ground that she was forced to change her religion and his daughter was likely to be transported out of the country. High Court declared the marriage null and void but the appellant aggrieved by the decision of the High Court, filed an appeal before the apex court.

Justice Dipak Misra, C.J.I. and A.M. Khanwilkar, J in para 55 held "*in the case at hand, the father in his own stand and perception may feel that there has been enormous transgression of his right to protect the interest of his daughter but his view point or position cannot be allowed to curtail the fundamental rights of his daughter who, out of her own volition, married the Appellant. Therefore, the High Court has completely erred by taking upon itself the burden of annulling the marriage between the Appellant and the ninth Respondent when both stood embedded to their vow of matrimony*"<sup>6</sup>. It was also held that the right to marry the person of one's choice is a right under article 21 of the Indian constitution.

---

<sup>4</sup>What is same sex marriage? <https://study.com/learn/lesson/same-sex-marriage-facts-arguments.html> (last visited feb 25, 2023)

<sup>5</sup> Shafin Jahan vs Asokan K.M. 2018 SCC OnLine SC 201.

<sup>6</sup> Ibid.

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

Also, in the case of Justice KS Puttaswamy (ret'd) and another v. Union of India and others. The court opined, "*Privacy represents the core of the human personality and recognizes the ability of each individual to make choices and to take decisions governing matters intimate and personal.*"

In our everyday life, privacy holds an important and essential part. In the above-mentioned case, the court has clearly stated that every individual can make choices related to intimate and personal matters. Following from the above point the term "individual" means each and every person, irrespective of the relationship that they have. Hence, homosexuals as individuals have the right to take their call and safeguard their privacy.

In the case of **Shakti Vahini vs Union of India**,<sup>7</sup> it was opined that the choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is an erosion of choice. True it is, the same is bound by the principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation.

If we analyse these three cases mentioned above, the judges have stated that every person has a right to marry the person of one's own choice. One's own choice can be the person of opposite sex or same sex. But the Indian society and legislations have limited the definition of one's own choice to opposite sex. On one hand, the Supreme court has clearly given the right to marry the person he/she wants and on the other hand, the restriction has been made only to marry a person of the opposite sex. What if the person doesn't want to marry a person of the opposite sex? What about his or her own choice? Hence, the same can be challenged under article 21 and article 14 of the Indian constitution that not allowing same sex marriage is violative of the fundamental right which is available to everyone.

### **BENEFITS OF ACCEPTING SAME-SEX MARRIAGE**

---

<sup>7</sup> Shakti Vahini vs Union of India, (2018) 7 supreme court cases 192.

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

**No one is harmed by its acceptance:** The issue of accepting and giving not to same sex marriage has been going on for a very long time. Moreover, various countries approximately 32 countries around the globe also have given it a go ahead and have recognised same-sex marriage as an established way of marrying the person of your own choice. So if you look at the countries where it has been accepted, the term that Hetero marriage in any structure is harmful is not acceptable. This fact can also be white evidently through from all the countries that have accepted this kind of marriage.

**Joint property:** The term property rights can be understood as an individual having a legal right to hold and no property in his or her name. As of now since same-sex marriage has not been accepted and legalise in our country yet so the legal right of holding property for same sex couples has also been restricted and put on hold joint holding property rights is also an essential right that specifies that both husband and wife having the ownership of a single property, which can be divided among them equally. Until the legalisation of same-sex marriage, that right is also not permitted.

**Tax benefits and government benefits:** Married couples in India get to enjoy a lot of benefits but those are exclusively provided to married and recognised legal couples across the country. Some of the benefits include health care, packages paid leave in case of emergency Provident fund and life, insurance and many more. Married couples can also get tax benefits in terms of tax, exemptions and tax concessions in various ways.

**Adoption of child:** When we talk about some sex couples apart from existence in the society, the other big challenge that they face is giving life to a child not only they don't have the ability to do it at their disposal but since they are not recognised as of yet in our country, the route for adoption is also closed for them so legalising. This kind of marriage will also pave the way for the adoption of children. So, they can also see the dream of having a child of their own And helps in its upbringing with the one they wish to choose.

**Not accepting same sex marriage can also be a ground for discrimination:** Discrimination is rightly used all over the world starting from discriminating against black and white discrimination in terms of sex and religion. So confined marriage only to the opposite sex is also in a way discriminatory. It again gives rise to the long-drawn problem, not allowing marriage to the same sex also falls in the category of discrimination, which in

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

<https://www.ijalr.in/>

terms restricts a person's choice and puts a question mark on his or her decision to choose her life partner.

### **IMPACT ON INDIAN SOCIETY**

Giving a nod to same sex marriages would have a heartfelt, from bottom to top effect being felt in the societal structure, starting from the individual position and couple position, followed by the family, community, and eventually at the position of society. The immediate impact would be seen on the position of the individual existence where there would be improved health issues like bringing down cerebral torture and rates of self-murder. The existent would now have the freedom to marry the person of his or her choice or preference. In the position of couples, there would be a lesser sense of security associated with fiscal, healthcare, property rights and legal(e.g., child upbringing) benefits and reduced stress while traveling and immigration. It would raise marriage rates significantly, reduce revocations and reduce the chance that children grow up in single-headed homes. Marriage being legalized will give the same-sex couple's relationship more legality in the eyes of the family members, egging them to feel more comfortable, therefore leading to raised support due to changes in perceived social morals. There would be both direct (making probative commentary to the couple, attending marriage observances) and circular(same-sex consorts being incorporated into the family network) increases in the social addition of sexual nonages at the community position. From societal position, there would be a significant reduction in anti-gay groups. There would be lesser support for the rights of non-sexual ages and possible unborn expansion of rights and protections. Still, the legalization of same-sex marriage would be followed by shocking policy changes which may alternately centralize the public, strengthening and widening the differences between sympathizers and opponents. Homosexually wedded couples may not be handed all the same insurance benefits as heterosexual wedded couples. Real estate planning and withdrawal planning might also be tricky for homosexual wedded couples because the partner in this case isn't permitted to make opinions or inherit property automatically. It must be specifically stated in a will. Problems of common formal relinquishment of a child might be tricky. The courtrooms will submerge with cases analogous to the Goodridge. Department of Public Health case of the USA. Research conducted in countries where same-sex marriage has formerly been legalized reports incidents where some individuals who disassociated after the institutionalization of the right to same-sex marriage reported cases of public shame followed by guilt and

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

<https://www.ijalr.in/>

disappointment. This may beget disjuncture in connections with their family of origin. There might be arising challenges on the part of policymaking by legalizing same-sex marriages, but the chances of negative externalities are low. Thus, programs need to be formulated through the lens of equivalency, diving the profitable and judicious legal frame. Media can play a huge part in erecting mindfulness among the millions. India being a signatory to the 2030 docket for Sustainable Development, is thus committed to upholding the Sustainable Development thing (SDG)- 5 of gender equivalency. The legitimization of same-sex marriages aims to right a far bigger wrong the rejection of some sections of society from important social institutions. Although there's a need for brainstorming and community-position planning for homosexual rights, at least the first way toward equivalency have been formerly taken.

### **THE PATH AHEAD**

When we talk about modernisation, we take the United States as the benchmark of it following its activities, we adapt ourselves and change accordingly. So if our modernisation idle can adapt to those changes while as a country, we are behind.

When it comes to change or adopting something that has not been done, the country of India has always been lethargic in its approach. No denying the fact the huge population of India has to play a key role and offers some unforeseen hindrances but there are other factors also contributing to it.

### **REASONS OF INDIAN SOCIETY BEING BEHIND**

**Population:** No denying the fact the huge population of India has to play a key role and offers some unforeseen hindrances but there are other factors also contributing to it.

**Education:** education determines and directs the way you behave in day-to-day life. Education does not restrict itself to only helping you learn a new topic or password examination but it also helps us get acquainted with the knowledge and skill that helps us make those life changing decisions. The lack of education is quite evident among the people of India. The survey data also highlights the same. The amount of education received by the Indian population. There seems to be a fast contrast among the equal level of education received by an individual so when there is a disparity in the amount and quality of education received. This essentially results in this lethargic approach of being in the back seat. Instead of steering the car. Proper education opens some minds of people to think forward.

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

<https://www.ijalr.in/>

**People thinking cause of different diversity and culture:** India has been known for its rich culture and diversity among people are looking at your right to left. When we go from east to west from People's appearance to food, everything changes, this chain together brings change in the mindset of the people.

**Rituals and customs** followed by each and every region differ from one another note this also in a way defines and district decision making power of people

Change the need of the hour now and then someone has to break the stereotypes and come forward and accept changes and new procedures that will give a new perspective to our society.

India is considered and termed as the biggest democracy in the world which Simply flies that individual. Each individual in the country has equal right and say to choose the people by whom there to be rude and govern in the same way as we have top above article 21 of the Indian constitution include the right to marry to the person of one's own choice has been given a place which does not restrict itself.

Excepting and recognising the same sex marriage will give Indian society a total new face not only we will break the stereotypes and take a big step forward but also put an end to the ongoing Fight and challenges that are prevalent in our day-to-day life.

Same-sex marriage has to be excepted countrywide. For this. There are a few additional steps that we need to take. For example, creating new laws that have been in existence for a long time or amending existing laws. Doing this can be challenging as marriage laws in India are into place for a very long time and has been followed since the time in memorial. Elaborate on how laws can be amended or created.

## **CONCLUSION**

This ongoing debate on the recognition of same sex marriage needs to be addressed soon so as to grant homosexual people same rights i.e., right to marry, property rights, adoption right, etc. which are available to the rest of the people. Right to equality i.e., article 14 and right to life and personal liberty i.e., article 21 are the rights that are already granted to all persons by the Indian constitution. It is just that it has not been expressly recognised for the LGBTQ+ community and was never discussed before decriminalisation of section 377 IPC. In India, the laws can only work if they are according to people thinking and attitude. As we can see Indian society has started to accept LGBTQ+ community then they will also start accepting same sex marriage as recognising same sex marriage is doing no harm to others. Recognising

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

<https://www.ijalr.in/>

their marriage will give them societal acceptance and preference in society. They will have their own identity as a married couple and will get all the rights and benefits which are available to all couples.

### References

- Riya Gupta & Rishika Bagaria, Embracing Same-Sex Nuptial Ceremony, 4 INT'l J.L. MGMT. & HUMAN. 1757 (2021).
- Abhinav Sandeep Khadikar & Rohit Ajay Deoras, Same-Sex Marriage Rights in India: An Overview, 4 INT'l J.L. MGMT. & HUMAN. 1123 (2021).
- Riya Jariwala & Sheetal Kiri, Parenting Rights of the LGBTQ+ Community: A Critical Introspection of the Legal Framework in India, 4 INT'l J.L. MGMT. & HUMAN. 1465 (2021).
- Debasrita Choudhury & Avik Sarkar, Love Has No Gender and Compassion has No Religion, 4 INT'l J.L. MGMT. & HUMAN. 3418 (2021).
- Impact of same-sex marriages on society, [Impact of same-sex marriages on society - By Rush Guha \(indiacsr.in\)](#)
- In India, couples begin their legal battle for same-sex marriage, <https://www.npr.org/2023/02/03/1154085262/in-india-couples-begin-their-legal-battle-for-same-sex-marriage>

For general queries or to submit your research for publication, kindly email us at [editorial@ijalr.in](mailto:editorial@ijalr.in)

<https://www.ijalr.in/>