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**DOES LEGALIZING SAME SEX MARRIAGE IN INDIA HAVE A  
LONG WAY TO GO?**- Shalini Sureshababu<sup>1</sup>**ABSTRACT**

The ongoing discussion around the legalization of same-sex marriage in India does show a significant societal shift in the insight of human rights, individual liberties, and aspects of love and commitment irrespective of gender. India being one of the fastest-growing countries, finds itself in a dilemma where the values of inclusivity and equality must be embraced, surpassing historical biases and religious influences. This debate has shown the urgency for India to update its traditional framework which allows individuals to choose their partners regardless of gender while balancing the individual rights and rights of public welfare and safety. This essay talks about the responsibility of the judiciary, government, and citizens to move towards a more inclusive society and align itself towards the global equality movement by casting out the outdated belief.

**DOES LEGALIZING SAME-SEX MARRIAGE IN INDIA HAVE A LONG WAY TO  
GO?**

The nuance of the legalization of same-sex marriage has initiated debates and discussions in India. The idea of marriage has been celebrated as an essential pillar of society. While few countries worldwide have recognized that the right to choose their life partner irrespective of gender is a fundamental right, India as a nation stands at a pivotal crosspath while dealing with the issue of same-sex marriage. Within the ambit of marriage in the Indian context<sup>2</sup>, it was held that every individual is entitled to choose their life partner. Yet, the definition of a life partner was limited to a man and woman.

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<sup>2</sup> Anshika Rastogi, Legalisation of Same Sex Marriage in India, 5 INDIAN J.L. & LEGAL Rsch. 1 (2023).

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In 2018, the Hon'ble Supreme Court diluted a part of section 377 of the Indian Penal Code<sup>3</sup>; when half of the country rejoiced, the other half was still against the same. One key argument the Defense Council put forward is that homosexuality is an urban concept, and the same would only be restricted to the dominant class and caste of society. But it's not at all true. There have been various events when couples from small villages have expressed their sexuality. Still, the freedom to profess their sexuality and gender varies in rural and urban settings.

Moreover, it would be a myth to state that Indian history was utterly absent from the presence of homosexuality, and one of its most significant examples that it's not is the Khajuraho temple. After the arrival of the British, the concept of sexuality and gender has been restricted to a smaller subset. Justice Indu Malhotra has rightly pointed out that history does owe an apology to the members of the community and their families for the atrocities and discriminations that they had to go through due to the ignorance of the law and the society of its natural trait and in turn going to this harsh extent of criminalizing it.

In *Supriyo v Union of India*<sup>4</sup>, the Hon'ble Supreme Court of India filed and heard a collection of cases. One of the main issues was the legalization of same-sex marriage. First, it should be emphasized that there is no universal definition for marriage; the institution of marriage is looked at through different eyes under the trajectory of law, religion, and culture. In India, marriage is more of a public affair than a private one, which should be. In a way, external agencies interfering with the same would violate their Privacy, which would, in turn, lead to a breach of Article 21<sup>5</sup> of the Indian constitution as upheld in *Justice K.S Puttuswamy v. Union of India*<sup>6</sup>. The sole objective of marriage is not just to procreate, but it's more that the union of the people would also provide Emotional and spiritual support.

As rightly propagated, marriage is not just a benefit of privilege. It's a facilitator for the couple to be part of the society. When marriage acts as a source of social validation and

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<sup>3</sup>IPC, 1860, & 377, No. 45, Acts of Parliament, 1860 (India)

<sup>4</sup>Supriyo v Union of India, W P (C) No. 1011/2022

<sup>5</sup>INDIA CONST. art. 21.

<sup>6</sup>Justice K.S Puttaswamy V. Union of India, AIR 2017 SC 4164.

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respect for other legal and civil benefits, why is there a double standard for the same? The people themselves believe how important marriage can be for two people, yet they deny it for people of the LGBTQI+ Community. Marriage does remain a vital aspect of the functioning of society and also to avail important schemes under the modern nation.

By not allowing individuals to choose their life partner, it is not just a violation of Article 21<sup>7</sup> but also Article 14<sup>8</sup>, 15<sup>9</sup>, and Article 19(1)<sup>10</sup>. Article 14 allows reasonable classification based on intelligible differentia, but not allowing an Individual to choose their life partner is not a reasonable classification, and it's just a pure form of discrimination. One set of the society can choose their life partner, but the other set is not. Homosexuality is a natural trait in an Individual. If looked into it, the situation got so worse that they had to form a community to represent themselves. For a very long time, Straight Cisgender individuals never had to come out, but people from the community were constantly pressured to come out. At the same time, the oxymoron that could be seen is that they are usually not given a safe environment to talk about it.

When contentions were made for alteration in the Special Marriage Act<sup>11</sup>, the court had stated that if the judiciary would alter the Special Marriage Act, then it would be stepping itself into the domain of the Legislature, which would be a fraud to the constitution, as rightly pointed out by Justice D.Y Chandrachud which is also known as the doctrine of Colourable legislation. But then, it's not that this has never happened. Indian Constitution does propagate strict distinction of separation of power, but that doesn't mean that the Legislature and judiciary do not perform various roles together. They do, and one of its finest examples is the Vishaka Guidelines for Prevention of Sexual Harassment, which the Legislature then passed to prevent sexual harassment in the Workplace (Prevention, Prohibition and Redressal).

Indian Constitution is a living document, and when looking at the intentions of the forefathers and mothers who created the constitution, they also emphasized that change is inevitable; hence, changes need to be made accordingly. It could be contended that the Indian

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<sup>7</sup>INDIA CONST. art. 21.

<sup>8</sup>INDIA CONST. art. 14.

<sup>9</sup>INDIA CONST. art. 15.

<sup>10</sup>INDIA CONST. art. 19, cl. 1.

<sup>11</sup>Special Marriages Act, 1954, No.43, Act of parliament, 1955(India).

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constitution was made by looking at the future ahead and not just the contemporary. Hence, this is one of the reasons why the Indian constitution is a powerful document. And as emphasized before, the concept of marriage also changes with time. Hence, changes in the same should be allowed to be made. India is a country that has suffered under colonization, and it openly condemns colonization. Then why are we still following the demonic clause of not letting two individuals marry irrespective of gender? But then, in the UK, same-sex marriage is legalized, and they have introduced the Marriage (Same Sex Couples) Act 2013, which not only talks about the legalization of Same-Sex marriage but also protection against discrimination, parental rights, adoption, and so on.

Contentions were made on the aspect that all the laws need not be mentioned in the texts, and there are the rules that are followed from time to time and from generation and generation. This was one of the significant arguments submitted by the counsel for the defense in the case *Shayara Bano and others v Union of India*<sup>12</sup> that the Quran is silent about the triple talaq but there was nothing that otherwise stated that it went against it. In this case, triple talaq was considered unconstitutional because it did not satisfy the Essential Religious Practices test. Similarly, when the arguments were made that it went against the religious sentiments of most of the nation's citizens and that the religions prohibit being homosexual, it is not valid. There have been religious texts that mentioned homosexuality, and it was considered to be expected as it should be. Marriage is a private affair, and just because two individuals want to marry should not affect the third party as long as they are not forced to do anything.

LGBTQ+ is a broad spectrum hence, significant changes need to be made in the concept of marriage to make it more inclusive. Historically speaking, the institution of marriage said only about men and women, but in today's world, it should be between two humans. A lot of developed countries have legalized Same-Sex Marriage, and India is one of the fastest-growing countries, progression should be made in all arenas and not the hand-picked areas.

Moreover, one of the main reasons why A lot of people migrate to other foreign countries is because of this, which will directly affect the economy as it's the Human resource that is

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<sup>12</sup>Shayara Bano V Union of India, (2017) 9 SCC 1

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being transferred, which will lead to a scenario where developed countries would prosper more, and the growth of the developing countries would remain stagnant. India is a country that has suffered under colonization, and it openly condemns colonization. Then why are we still following the demonic clause of not letting two individuals marry irrespective of gender? The Colonizers themselves have changed that rule in their country.

It is an underlying fact that legalizing same-sex marriage would open a floodgate of arguments.

India is a religiously diverse country in which most of the dominant religions are against the concept of homosexuality. Hence, it would be tough to bring in Laws that would support them as they are the majority population. Therefore, the Legislature is represented by the will of the people.

When there is a union of two individuals belonging to the same gender, then there would be a lot of questions concerning provisions of divorce; if the marriage is between two men, for instance, who would have to pay the maintenance? There will not be applicability of section 125 of the Crpc<sup>13</sup>. One of the other questions that would be posed in front of the lawmakers is that if two Individuals of opposite gender marry each other. One among them wants to change their religion, would the marriage be considered void, or will there be procedures to change the gender and name in the marriage certificate, will the marriage registration need to be done again? Will introducing new legislation like the same in the UK bring changes, or will it be just in papers and not taught in real life?

The ongoing debate on whether same-sex marriage should be legalized in India mainly represents a significant societal shift on how there is a basic understating of Human rights, personal freedom, and the acceptance of love and commitment regardless of gender. India, as one of the fastest-growing countries, is at a stage where it should wholeheartedly embrace inclusivity and equality irrespective of its colonial past and different religious prejudices. The discussion of the same within different thresholds highlights the significant need for India to adjust its age-old framework to allow an individual to choose their life partner irrespective of gender and orientation to bring a balance between Individual rights and rights of public

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<sup>13</sup>CRPC, 1973, & 125, No. 2, Acts of Parliament, 1973 (India)

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welfare and safety. This change can not only be brought by bringing changes in the concept of marriage. It should be understood that getting changes is not just the responsibility of the judiciary or the government, but the citizens as well. All are the three wheels of the society, if one among them falls, it is difficult to make changes. This is a chance for India to join the global movement towards equality and inclusivity by leaving behind religious constraints.



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