

Same-Sex Marriage: Imposition of Decision vs. Need of Society

Amit Kumar Ghosh ¹

¹ Post-Graduate Student of Human Rights Course at Ballygunge Science College, University of Calcutta, Kolkata, West Bengal, India

Abstract:- After four years of Article 377 being revoked, the same-sex couples still do not have legal permission to marry. In a very recent verdict, Supreme Court denies to make separate laws or amend the existing marriage laws. The court stated that there is no fundamental right to marry. But with time, discrimination of LGBTQ+ people keep on increasing. This paper aims to describe the need of legal recognition of same-sex marriage ensuring the LGBTQ+ rights.

Keywords: Same-sex couples, legal permission, marriage laws, fundamental right, LGBTQ+ rights.

1. Introduction

On 14 November 2022, two same-sex couples filed a petition in the Supreme Court seeking legal recognition of same-sex marriages in India. The petitions focused on the constitutional nature of the Special Marriage Act 1954 (SMA Act). The first one was filed by Supriyo Chakraborty and Abhay Dang. Another petition was filed by Parth Phiroze Merhotra and Uday Raj Anand.

The petitioners claim that Section 4(c) of the SMA Act recognizes marriage only between a "man" and a "woman". It discriminates against same-sex couples by denying them marital benefits such as adoption, surrogacy, employment and retirement benefits. The petitioner asked the court to declare Section 4, Clause c of the SMA Act as unconstitutional. The suit is marked by several other petitions challenging other personal laws on similar grounds. The controversial statutes include the Hindu Marriage Act, 1955 and the Foreign Marriage Act, 1969. The petitioners claim that the non-recognition of same-sex marriage violates the right to equality, freedom of expression and human dignity. They relied on *NALSA v. Union of India*¹ and *Navtej Singh Johar v. Union of India*², which recognized non-binary gender identities and guaranteed equal rights to homosexual individuals. On November 25, 2022, a Supreme Court bench comprising Chief Justice D.Y. Chandrachud and Justice Hima Kohli directed an order to the union to respond to the petitions. Similar petitions are pending in the Delhi and Kerala High Courts. On November 25, 2022, a Supreme Court bench comprising Chief Justice D.Y. Chandrachud and Justice Hima Kohli directed an order to the union to respond to the petitions. Similar petitions are pending in the Delhi and Kerala High Courts.

On January 3, 2023, senior advocate Menaka Guruswamy and advocate Karuna Nundy sought a two-judge bench comprising CJI Chandrachud and Justice P.S. Narasimha is moving two similar petitions pending in the Delhi and Kerala High Courts to the Supreme Court. On January 6, 2023, the court agreed to list the transfer requests with the main application. On January 6, 2023, a three-judge bench comprising Chief Justice D.Y. Chandrachud along with Justices P.S. Narasimha and J.B. Pardiwala referred 9 petitions pending in Delhi and Kerala High Courts on similar issues. On March 13, 2023, a three-judge bench headed by CJI D.Y. Chandrachud referred the case to a five-judge Constitutional Court. This panel began hearing the case on April 18, 2023. On May 11, 2023, a 5-judge panel deferred sentencing after a 10-day hearing. On October 17, 2023, the 5-judge court will issue its decision

¹ National Legal Services Authority v. Union of India (2014) INSC 275

² Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice (2018) INSC 790

on LGBTQIA+ marriage petitions. The court unanimously found that there is no fundamental right to marry and the court cannot recognize the right of LGBTQIA+ persons to marry under the SMA.

2. Same Sex Marriage

Same-sex marriage, marriage between two men or two women — Most nations in the globe have laws, religious beliefs, and customs that govern same-sex marriage; nevertheless, the reactions of society and the legal system have ranged from celebration to outright punishment.

According to Beals and Hoijer (1956), “marriage is a set of cultural patterns to sanction parenthood and provide a suitable background for the care and rearing of the children”. Matrimony is not just about love and sex; it's also about gaining public recognition and sharing values. The sociological perspective of marriage is the official legal union of two individuals in a personal relationship. There are governmental and financial advantages and rights associated with a properly registered marriage.

The Universal Declaration of Human Rights (UDHR) is ratified by India. Article 16(1) of the Convention on Human Rights (1948) states that “men and women of full age have the right to marry and found a family, without limitation as to race, nationality or religion”. It recognizes the right to marry as a human right. This right is also confirmed by Article 23(2) of the International Covenant on Civil and Political Rights (ICCPR). The Indian constitution does not expressly recognize the right to marry as a fundamental right. However, this does not exclude the possibility of it becoming a constitutional right. The Constitution has been widely interpreted in the past and the right to health, education, etc. Are examples of penumbra rights that have been read into the existing provisions. The right to choose a life partner is an integral part of the right to life and personal liberty guaranteed by the Constitution of India. The court noted that this right is not only an individual choice, but also reflects social dignity and individual autonomy.

In a recent landmark judgment, the Supreme Court in **Shakti Vahini Vs. Union of India**³ that the right to choose a life partner is a fundamental right. The court said that the freedom to marry a person of one's choice is protected under Article 21, Article 19 (1) (a) and Article 14 of the Constitution of India.

• Landmark Cases with respect to Right to Marriage and Choice of Partners:

The Supreme Court has developed progressive and changing jurisprudence regarding marriage law and the choice of a partner.

1. **Lata Singh Vs. The Union of India**⁴: In the 2006 case of **Lata Singh Vs. The Union of India**, the SC said that the petitioner had the right to choose the partner he wanted to marry and the law did not prohibit inter-caste marriages.
2. **Naz Foundation v. Govt. NCT of Delhi**⁵: This is a landmark Indian case in which a two-judge bench of the Delhi High Court held that the criminalization of homosexual consent between adults violates fundamental rights, like right to privacy, right to equality etc. protected by the Indian Constitution. The ruling led to the decriminalization of homosexual acts involving consenting adults in India.
3. **Suresh Kumar Koushal and Anr. v. NAZ Foundation and Ors.**⁶: This is a case where the composition of 2 judges of the Supreme Court includes G.S. Singhvi and S. J. Mukhopadhyaya overruled the Delhi High Court in Naz Foundation v. Govt. NCT of Delhi and reinstated Section 377 Indian Penal Code. The judges stated that the parliament should discuss and decide the matter. The court upheld the constitutional validity of Section 377 of the Indian Penal Code because it makes anal sex a punishable act.
4. **National Legal Services Authority v. Union of India**⁷: The NALSA Judgement is an important judgment of the Supreme Court of India which recognized Transgender people as a third gender; asserted that the

³ Shakti Vahini Vs. Union of India (2018) 7 SCC 192

⁴ Lata Singh v State of Uttar Pradesh & Anr. AIR 2006 SC 2522; (2006) 5 SCC 475; 2006 (56) ACC 234

⁵ Naz Foundation v. Govt. of NCT of Delhi (2019) 160 Delhi Law Times 277

⁶ Suresh Kumar Koushal & Anr. v. NAZ Foundation & Ors. (2013) Civil Appeal No. 10972 of 2013

⁷ National Legal Services Authority v. Union of India (2014) INSC 275

fundamental rights under the Constitution of India were equally applicable to them and gave them the right to identify their gender as male, female or third gender. In this case, the court made a distinction between biological sex and psychological sex and gave more importance to the psychological sex. The decision was hailed as an important step towards gender equality in India. In addition, the court also found that since transgender people were treated as socially and economically backward classes, they were given reservations in admissions to educational institutions and workplaces.

5. **KS Puttaswamy (retd) v. The Union of India**⁸: This case is known as ‘Privacy Judgement’. While maintaining the fundamental right to privacy under Article 21, the court has observed that important personal choices related to marriage fall within the domain of individual privacy and dignity. Justice DY Chandrachud commented that rights of minorities are as important as everyone has. He also stated that sexual orientation is an essential attribute of right to privacy. Right to privacy and protection of sexual orientation was settled in that case.

In **Shakti Vahini v. Union of India** has also taken this view.

6. **Shafin Jahan v. K.M. Asoka**⁹: The court said that the right to marry a person of one’s choice is an integral part of Article 21. This right can be limited only by fair and reasonable legislation. Cases like **Laxmibai Chandaragi B. Vs. State of Karnataka**¹⁰ relied on Shafin Jahan’s view that the right to marry a person of one’s choice is an integral part of Article 21.

7. **Navtej Singh Johar Vs. The Union of India**¹¹: In the landmark judgment

Navtej Singh Johar Vs. The Union of India decriminalized homosexuality by the Supreme Court by reading Section 377 of the Indian Penal Code, 1860. The court explained that consensual and private acts between adults of the same sex are an essential part of one's privacy.

However, the court refrained from addressing how these rights would apply to public matters such as marriage rights. However, in its decision, the court relied on the cases **Shafin Jahan** and **Shakti Vahini** to support the concept of freedom of choice of life partner and the idea of individual sexual autonomy.

- **Same Sex marriage in international arena:**

33 countries, including the United States, have legalized same-sex marriage, and a number of others recognize same-sex civil unions. However, same-sex marriage is still banned in many countries, and the expansion of broader LGBTQ+ rights has been uneven around the world. Netherlands became the first nation in the world to legalise same-sex marriage in 2001, more than 30 other jurisdictions have enacted laws allowing gays and lesbians to marry, mostly in Europe and America. Costa Rica followed suit in 2020. No nation has removed a legislation permitting same-sex unions, even as support for these unions has grown. Taiwan's government became the first in Asia to approve same-sex unions in 2019.

International organizations, including the United Nations, have passed resolutions in support of LGBTQ+ rights, but human rights groups say those organizations have limited power to enforce them. Some of that momentum was driven by organizers like Evan Wolfson, who participated in Hawai **Baehr v. Lewin**¹² and founded The Freedom to Marry Coalition in 2003 to defend same- sex marriage. The 2003 decision of the Massachusetts Supreme Court in **Goodridge v. Department of Public Health**¹³, which upheld the right of same-sex couples to marry in Massachusetts, marked the beginning of a same-sex marriage backlash that directed significant LGBT movement resources toward legalization of same-sex marriage. Although more states are adopting more comprehensive anti-discrimination laws, including legal recognition of same- sex marriages, the legality of these arrangements depends on a defined and legally recognized gender.

⁸ Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors. (2017) 10 SCC 1, AIR 2017 SC 4161

⁹ Shafin Jahan vs. Asokan K.M. and Ors.(2018) 16 SCC 368, AIR 2018 SC 1933

¹⁰ Laxmibai Chandaragi B. vs. The State Of Karnataka (2021) 3 SCC 360

¹¹ Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice (2018) INSC 790

¹² Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (Haw. 1993)

¹³ Goodridge v. Dept. of Public Health, 798 N.E.2d 941, (Mass. 2003)

- **India on Same-Sex Marriage:**

According to the Vedas, there is a "third sex," which is often understood to be those for whom procreation is not possible due to impotence or a lack of desire for the other sex. However, third-sex individuals are not shunned and are occasionally acknowledged for their mystical abilities or wisdom. Hinduism's Kama Sutra, which describes the delights of sexuality, says that having sex is "to be engaged in and enjoyed for its own sake as one of the arts."

According to the Dharma Shastras, marriage has various functions including Prajaa or reproduction. This is why some find same-sex marriage unacceptable. However, it is also clear that the Dharma Shastras are guides - not binding texts - and that there are several ways to define or interpret the idea of Praja. Today, marriage equality is gaining traction among American Hindus, and some Hindu priests are performing same-sex marriage ceremonies in the United States.

3. Judicial Approach in India

The Indian legal system does not recognize same-sex marriage, and the country's laws define marriage as a union between a man and a woman. In 2018, Section 377 of the Indian Criminal Code was overturned by the Supreme Court of India, which criminalizes homosexuality, marking a major victory for LGBTQ+ rights in the country. However, the decriminalization of homosexuality did not legalize same-sex marriage. Several petitions have been filed in Indian courts to legalize same-sex marriage, but so far, the courts have not recognized same-sex couples. In 2017, the Delhi High Court declared that same-sex couples have the right to live in a permanent relationship, but it did not legalize same-sex marriage. There have been recent developments in the Indian legal system that may affect the future of same-sex marriage in India. In 2020, the Government of India introduced the Personal Data Protection Act, which includes a provision recognizing the right to privacy as a fundamental right. Some legal experts believe that the provision could be used to defend the legalization of same-sex marriage because it recognizes the right of individuals to determine their own personal lives.

The history of LGBTQ+ rights in India dates back to the colonial era, when in 1860 the British introduced Section 377 of the Indian Penal Code, which criminalized homosexual acts. That law remained in place after India's independence in 1947 and used to discriminate against and prosecute LGBTQ+ people for more than a century.

However, the struggle for LGBTQ+ rights in India intensified in the late 20th century. In the 1990s, the first LGBTQ+ organization AIDS Bhedbhav Virodhi Andolan (ABVA) was founded in Delhi to fight discrimination and violence against the LGBTQ+ community. In 2001, the NGO Naz Foundation (India) Trust filed a lawsuit in the Delhi High Court challenging the constitutionality of Article 377, seeking the legalization of homosexual intercourse between consenting adults. In 2002, the Naz foundation filed a PIL to challenge IPC Section 377 in the Delhi High Court. In 2003, the Delhi High Court refused to consider a petition regarding the legality of the law and said the petitioners have no locus standi in the matter. 3 years later, in 2006, **Human Rights Watch** published a report that Section 377 was used to harass HIV/AIDS prevention activists, as well as sex workers, men who have sex with men, and another LGBTQ+ group. In 2009, Delhi High Court decreed on **Naz Foundation v. Govt. of NCT of Delhi**¹⁴. In its verdict, it was said that, Section 377 and other legal prohibitions sex conduct to be in direct violation of fundamental rights. In 2012, a bunch of appeals were filed against the decriminalization of gay sex. However, the Supreme Court observed that homosexuality should be seen in the context of changing society. But the Central Government opposed the decriminalization of gay sex — "This is highly immoral and against the social order". In 2014, the Supreme Court overturned the decision of **Naz Foundation v. Govt. of NCT of Delhi**, in the case of **Suresh Kumar Koushal and Anr. v. NAZ Foundation and Ors**¹⁵ and reinstated Section 377 of the IPC. Months after this verdict, another bench affirmed the right of the transgender persons under Article 14, 15, 19 and 21 of the Indian Constitution. The court upheld the rights of the transgender persons to decide their gender. It also directed the government to legal recognition to their gender identity, such as male, female or the third gender. In 2017, a nine-judge Bench of the SC unanimously recognised the right to privacy as a fundamental

¹⁴ Naz Foundation v. Govt. of NCT of Delhi (2019) 160 Delhi Law Times 277

¹⁵ Suresh Kumar Koushal & Anr. v. NAZ Foundation & Ors. (2013) Civil Appeal No. 10972 of 2013

right under the Indian Constitution. Identity of a person was also considered under the scope of privacy. Sexual orientation is a part of someone's identity. Equal protection needs protection of identity of every individual without any discrimination.

Hadiya, the woman from Kerala whose conversion and marriage to a Muslim man in 2016 led to a high-profile court case, has divorced and remarried to Shafin Jahan. Hadiya's father filed a habeas corpus petition in the Kerala HC, sometime after she expressed her desire to convert to Islam and marry a Muslim man. The Kerala High Court annulled the marriage on May 24, 2017. It said, "The 24-year-old girl is weak and vulnerable and can be exploited in many ways." It sent Hadiya back to her family and put her under police observation. On Jahan's petition, the Supreme Court ordered an NIA probe in August 2017. In April 2018, the Kerala SC reversed the HC's annulment of Hadiya and Jahan's marriage. The right to marry a partner of one's choice is an integral part of Article 21 (right to life and liberty) of the Constitution, the court noted.

In an honor killing case (*Shakti Vahini v. Union of India*¹⁶), the Supreme Court in March 2018, issued directives to prevent honor killing at the behest of Khap Panchayat. In the ruling, the Court recognized that right to choose a life partner is a fundamental right. The statement of LGBTQ people was, if right to choose a life partner is a fundamental right, then why were they being prevented. In August 2018, the Supreme Court heard a curative petition against the 'Koushal' ruling. A five-judge Constitution Bench struck down IPC Section 377 to the extent that it criminalizes homosexuality.

4. Decoding Verdicts to the Same-Sex Marriage:

18 same-sex couples had moved petitions before the Supreme Court, seeking recognition of their relationship with the legal and social status of marriage. They made the argument that marriage includes a set of rights, not just cohabitation, e.g., financial, banking and insurance issues, inheritance, succession, adoption and surrogacy rights. The petitioners sought recognition under the Special Marriage Act (1954), which is used to recognize inter-caste or interfaith marriages, registration of marriages under SMA as well as the

Foreigner Marriage Act (1969). They appealed to the SC to interpret Section 4 of SMA with the term "Gender Neutral" or to recognize same-sex marriage through FMA. The Center and some states have opposed this argument, on grounds that sociolegal concept of marriage inherently connected to religious and cultural norms. It is therefore within the domain of personal laws that would require a 'wider national and social debate'.

5. Argument on Same-Sex Marriage in India:

A. Argument on Special Marriage Act:

Senior Advocate Mukul Rohatgi argued that right to marry for non-heterosexual couple is innate in Articles 14, 15, 16, 19 and 21. If same-sex marriage is not legalized, these articles get violated. This has become more impactful after two landmark decisions of the Supreme Court — Navtej Singh Johar case, which decriminalized homosexuality by striking off Article 377 of IPC and K.S. Puttaswamy case which upheld the fundamental right to privacy. Adv. Rohatgi further pointed to the article 4 of the SMA, which refers to a marriage in gender-neutral terms, between "any two persons" while petitioners sought the interpretation of the SMA, 1954 to read marriage as between spouses instead of "man and woman". However, Adv. Rohatgi argued that only amending the SMA is not enough, a Constitution Declaration is also needed similar to that of heterogeneous group.

Building upon "Puttaswamy Verdict", **Senior Advocate Avishek Manu Singhvi** challenged Section 5 of SMA. Senior advocate Abhishek Manu Singhvi, appearing for the petitioners, said that unlike the Special Marriage Act (SMA) of 1954, the country's personal laws "do not discriminate", but opposed its mandatory 30-day notice period. Singhvi added that this period allows for intervention by khap panchayat and others who oppose such marriages, and that it should not apply to heterosexual couples as well. Singhvi added that this invites unwarranted interference from vigilante groups and family members etc. which violates individual privacy and autonomy. Societal narration and legal needs have different version to focus.

¹⁶ Shakti Vahini Vs. Union of India (2018) 7 SCC 192

According to SMA, the minimum marriageable age of men and women are 21 and 18 consecutively. The question arises from this is what should be the minimum marriageable age in case of homosexual marriage. Moreover, in case of transgenders what gender state should consider for determining the minimum marriageable age. Petitioners submitted solutions that in case of lesbian marriage, the minimum marriageable age should be 18 years and in case of gay marriage, the minimum marriageable age should be 21 years. For transgender couples, the same ages would apply based on the gender they identify with.

B. Argument on Foreigner Marriage Act:

Sr. Adv. Geeta Luthra represented a same-sex couple, one Indian and the other foreign, whose marriage was registered and recognized in Texas, USA, but not in India. Mrs. Luthra argued that this marriage should also be recognized in India under the Foreign Marriage Act, 1969 (FMA). He stated that according to the provisions of the FMA, recognition of a foreign marriage can only be refused if it is contrary to international law. Same-sex marriages are recognized in 34 states, and the petitioner's marriage was registered in Texas. Therefore, it is not contrary to international law. He drew the attention of the Bench to the anomaly of a marriage being recognized in one country (the United States) but no longer being recognized when the couple arrives in India. He cited examples from Austria and South Africa and the Indian SC *Navtej Singh Johar* judgment (2018) to argue that non-recognition of same-sex marriages is discriminatory.

C. Argument on Transgender Persons Protection Act (2019):

On the fifth day of the hearings, **Adv. Karuna Nundy** presented two important arguments that could have positive consequences for the queer community, one of them relates to transgender marriage.

In his submissions, Nundy questions the assertion of the Indian government that it has a "legitimate state interest" in limiting marriage to only "biological men and biological women". In addition, he proposes two doctrinal principles that would not only provide a minimal interpretation of secular marriage laws, but would also preserve the enhanced protection of cisgender women under Article 15(3) of the Constitution. This approach balances the interests of cis women and transgender people, ensuring that the two do not conflict. This is particularly important due to the current situation in countries such as the United States and Great Britain, where powerful trans lobbies have convinced the public that transgender rights are at odds with women's rights. This has led to a large number of anti-transgender laws in the United States, ostensibly to "protect" women.

In 2014, the Supreme Court of India made a landmark judgment in *National Legal Services Authority for Transgender Rights (NALSA) Vs. Union of India*¹⁷.

Among other things, the judgment confirmed the existence of the "third sex" as a separate but equal gender category under the law, which includes people who identify themselves as hijras, eunuchs, kothis, aravans, yogappas, shiv-shakthis, etc. called on the state "to take appropriate legislative and other measures to prohibit and eliminate discrimination based on sexual orientation and gender identity in the public and private spheres". The term "public sphere" is significant here because the Indian government's central argument for marriage equality was that marriage is a "public matter". The Government argued that although NALSA and *Navtej Singh Johar Vs. Union of India*¹⁸ has given right to privacy to gender and sexual minorities, that right cannot be extended to marriage which is public. This reasoning is wrong and the NALSA judgment clearly says otherwise. In addition, NALSA also talks about marriage and states that "no status, such as marriage or parentage, must be relied on as such to prevent the legal recognition of a person's sexual identity." This means that a person's gender identity cannot be denied or ignored just because they are married or have children. Therefore, even married cisgenders and heterosexuals have the right to change their gender identity even after marriage, if they wish. This was pointed out by Ms. Nundy, referring to the Transgender (Protection of Rights) Rules 2020, on the fifth day of the hearing. The Government of India has passed the Transgender Persons (Protection of Rights) Rules to implement the provisions of the Transgender Persons (Protection of Rights) Act, 2019.

¹⁷ National Legal Services Authority v. Union of India (2014) INSC 275

¹⁸ Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice (2018) INSC 790

Form 2 of the rules contains an affidavit form to be completed and submitted to a district judge by a person applying for a transgender identity card. With this form, a person can mention the name of his spouse in the affidavit. Similarly, the list of official documents that a person can send when applying for an identity card is specified in the appendix of the regulation. Appendix serial number 12 contains the marriage certificate. This means that the Indian government, when drafting the rules, saw the possibility that cis people in heterosexual marriages would realize that they are transgender at the time of marriage. According to NALSA, such people are not allowed to migrate only during marriage and raising children, but their marriage cannot be considered null and void after migration. This calls into question the notion that the Indian government is interested in protecting the "institution of heterosexual marriage" by limiting it to "biological males" and "biological females", since the same government formulated the law and rule allowing queer marriages between cisgenders. to continue and transgender people after transition.

If the Indian government had a legitimate interest in restricting marriage to cisgender, heterosexual people only, it would have overturned or sought to overturn the parts of the Arunkumar judgment and NALSA that dealt with "public rights" and marriage. However, the same government that opposes marriage equality today supports the Transgender People (Protection of Rights) Act 2019. This is hypocritical and leads to an inconsistency in the government's position.

D. Further arguments:

Sr. Adv. Anand Grover appeared, representing the two couples. One couple is governed by the Special Marriage Act 1954 (SMA) and the other by the FMA. Mr. Grover focused his argument on the concept of "intimate relationship" in American courts. He cited the decision of the United States Supreme Court in *Griswold v. Connecticut*¹⁹ stating that marriage was recognized as a union providing harmony in lifestyle. He then cited other cases from the Supreme Court of the United States such as *Roberts v. US Jaycees*²⁰ and *Obergefell v. Hodges*²¹ argues that the right to marry was a fundamental right. Speaking about trans people, Mr. Grover insisted that it was not acceptable to refer to them in a derogatory way. The ancient Indian scriptures recognized transgender people very respectfully. The British despised them and we took that mentality from them. Mr. Grover went on to state that if a cisgender man married a cisgender woman, and during my marriage the man identified as a woman, the law would not annul the marriage. It recognizes marriage. That is why these unions already exist in our society. Finally, Mr. Grover challenged the union and the claim that queer unions were urban and elitist ideas. He claimed to have assembled 10 classes of monsters, all from poor and rural backgrounds.

Sr. Adv. Jayna Kothari representing trans activist Akkai Padamshah was next to argue. He focused on three points in his argument: The right to marry, The right to family and SMA regulations. Adv. Kothari argued that trans people have the right to marry and start families with heterosexual couples. He stated that the family is not a heterosexual phenomenon. In fact, trans people have families, but these families are not recognized because their right to marry is not recognized. He referred to the Universal Declaration of Human Rights of 1948 and the ICCPR of 1966, arguing that the right to marry is a fundamental human right. Not recognizing this right for trans people is gender discrimination according to Article 2. Article 15 of the Constitution. Finally, Mrs. Kothari argued that the SMA, which recognized only man and woman and the right to marry, was against constitutional values. He proposed that the SMA regulations stating 'man' and 'woman' be replaced with the word 'persons' and the words 'husband' and 'wife' be replaced with 'spouses'.

E. Centre's arguments:

The Center opposed same-sex marriage in the Supreme Court, stating that marriage between a biological man and a woman is a sacred union, a sacrament and a sanskar in India. The government argued that the court in its 2018 judgment in *Navtej Singh Johar Vs. Union of India* only decriminalized same- sex intercourse, not legalizing that

¹⁹ *Griswold v. Connecticut*, 381 U.S. 479 (1965)

²⁰ *Roberts v. U.S. Jaycees* :: 468 U.S. 609 (1984)

²¹ *OBERGEFELL v. HODGES* 772 F. 3d 388, reversed.

“conduct”. The government argues that marriage depends on customs, rituals, practices, cultural atmosphere and social values.

Parliament designed and formulated the country’s marriage legislation to recognize only the union of a man and a woman. Registering a same-sex marriage would violate existing personal and codified rules. The Special Marriage Act 1954 provides a form of civil marriage for couples who cannot marry under their own personal law. The government argued that exceptions to that rule could only be made through the parliament, not the Supreme Court.

The impact that such a decision could have on further laws on adoption, insurance, inheritance and taxation remains to be seen and attracted strong opposition from the Solicitor General of India representing the Indian government, who said that about 160 parts of the various provisions of the Act, except the SMA, would not have accepted what the petitioners prayed for in this case.

6. Does India need a separate law for Same-Sex Marriage? : A conclusion

Every individual, regardless of their sexual orientation, have the right to marry and found a family. Same-sex couples should have the same rights and protections as opposite-sex couples. The non-recognition of same-sex marriages amounted to discrimination that struck at the dignity and self-fulfillment of LGBTQ+ couples. This topic is important because it concerns the fundamental human rights of LGBTQ+ people and the recognition and protection of their relationships. Legalizing same-sex marriage would not only give legal recognition and protection to LGBTQ+ couples, but also foster greater social acceptance and reduce community discrimination. Allowing same-sex couples to marry strengthens families and communities, promoting stability and security. This is an important issue for LGBTQ+ rights activists and defenders around the world, and its importance extends beyond the legal realm to broader social and cultural attitudes towards the LGBTQ+ community.

In the summer of 2018, three bodies were found in the Sabarmati River in Ahmedabad, a large city in the western Indian state of Gujarat. Two women - Asha Thakor (30) and Bhavna Thakor (28) - committed suicide along with Asha's three-year-old daughter. Before jumping into the water, the women left a message written in red lipstick on the riverside wall. They wrote in Gujarati language, this world did not allow them to be one.

In the recent judgement, a five-judge bench headed by Chief Justice DY Chandrachud acknowledged that the LGBT community faces discrimination from the state, but refused to get involved in “judicial lawmaking” on same-sex marriage, saying such a decision was outside its jurisdiction and should be handled by the Indian Parliament.

The question is that, isn't the right to life in the country being eroded now?

Being a developing country, India should legalize same – sex marriage like our neighboring countries, e.g., Nepal & Taiwan to promote and protect the LGBTQ+ rights, in the bigger context, the human rights. If the Indian Government can amend the criminal laws in India, then why can't it amend or enact marriage laws and separate laws respectively? What so ever happens, LGBTQ+ people's rights have to be ensured and protected by laws, by the Government.

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- [16] Suresh Kumar Koushal & Anr. v. NAZ Foundation & Ors. (2013) Civil Appeal No. 10972 of 2013
- [17] Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors. (2017) 10 SCC 1, AIR 2017 SC 4161
- [18] Shafin Jahan vs. Asokan K.M. and Ors.(2018) 16 SCC 368, AIR 2018 SC 1933
- [19] Laxmibai Chandaragi B. vs. The State of Karnataka (2021) 3 SCC 360
- [20] Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (Haw. 1993)
- [21] Goodridge v. Dept. of Public Health, 798 N.E.2d 941, (Mass. 2003)
- [22] Griswold v. Connecticut, 381 U.S. 479 (1965)
- [23] Roberts v. U.S. Jaycees :: 468 U.S. 609 (1984)
- [24] OBERGEFELL v. HODGES 772 F. 3d 388, reversed.

Statutes

Indian Constitution

- [25] INDIA CONST. art 14,15,16,19,21.