

# Is India ready to debate legality of same-sex marriage?

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Right jurisprudence is the hallmark of India's Constitution whose contours are expanding with the judicial craftsmanship of the court. The golden trinity of the Constitution has allowed the transformative interpretation of the right to life, liberty, equality, speech and expression, and religious freedom.

The concept of life devoid of freedom, autonomy, and privacy would be nothing more than a bare existence expounded by the Supreme Court in various judgments. In this sense, the privacy judgment has established a new paradigm of constitutional jurisprudence which is remaking and unmaking the traditional values enshrined under the constitutional text established at the inception of the Indian Republic.

Constitutional morality is often invoked by the Supreme Court to reinvent the constitutional interpretation without getting affected by the public opinion on some of the most morally contested issues, including the constitutionality of same sex marriage in India. Recently, the apex court made many observations on this issue though the final verdict is still

awaited.

## **Constitutionality of same-sex marriage**

The main contentions from the petitioners are that their non-recognition by law creates many hardships, including in the matter of right to property, inheritance, succession, adoption, and taxation. It is a well-established fact that the NALSA v Union of India judgment delivered by the Supreme Court recognised the fundamental rights of transgenders against discrimination. For homosexuals, the Navtej Singh Johar judgment legally recognised the validity of consensual sexual relationship.

However, the demand of the petitioners is to reconceptualise the concept of marriage in India to include the same-sex couple within the ambit of it. They have relied upon the Special Marriage Act, 1954 and argued to make the concept of marriage inclusive. The petitioners based their arguments on equality under Article 14, liberty, and autonomy under Article 21.

On the other hand, the Government of India has argued that the demand to recognise same-sex marriages is an antithesis to the marriage jurisprudence evolving in historical and social context. Most of the family laws have evolved from the religious values and practices, whereas marriage was conceived as a union between the two persons of opposite sexes. Marriage has been, as

argued, a social and cultural institution, whose re-conceptualisation will change the organising principles of society.

The government has argued that such decision if needs to be taken, then it is Parliament which is the right institution to adopt such a policy. Especially, in context of Hindu law, marriage is considered as a holy union between two opposite sexes, therefore, it is treated as a sacrament (samskara).

## **Historical and cultural context**

In colonial construct, 'right to desire' was naturalised on the parameter of Victorian morality. The subcontinent was more open and inclusive to such relationships. Many of carvings and sculptures in prominent Hindu temples in India have depicted the cohabitation

of same-sex couples which clearly indicates the liberal approach to such matters. Kama (desire) was considered as one of the purusharathas in India, and its realisation was not seen as papist as it was conceived as taboo in many life-worlds. Kama in Indian philosophy is also known as one of the causes of samsara. In that sense, we can conclude that same-sex relationship was not a taboo until British brought the dichotomy of natural-unnatural, and hence the Indian Penal Code recognised and legitimised the constrictive view of desire.

Every concept about nature and natural relations is a socially constructed reality. Nature, in this sense, is not free from the meaning and interpretation supplied by human communicative system.

Normality or abnormality is also a by-

product of cultural codes which define what is allowed and what is desirable.

The modern idea of freedom, developed by materialists, atomists, Marxists, and utilitarians, does not transcend the limit of limitless desires, i.e., constant consumption of pleasure.

The atomistic desires have no limits unless a word-life preceding it restricts the imaginative leap of sensuous freedom through ethical appeal or religious convictions. Same-sex marriage in India is a quest towards quenching the thirst of limitless desire in the name of freedom of choice, a formal rationality, which asks to imagine beyond the circumference of status-based tradition, to leap towards the value of autonomy and privacy for individuals in a strange competitive world.

## Conclusion

In 1950s, India witnessed codification of Hindu personal laws including the enactment of Special Marriage Act. Many believed that such reforms were meant to demolish the cultural ethos of India, but the reforms were required to fight against many social evils. The contemporary claims with respect to redefining the idea of marriage require public debate as well as the agreement reached by the demos through their representatives. Not all solutions by way of top-down approach by legal rationality does not penetrate to the societal norms and practices. Many normative developments through the courts remain unimplemented because of either ignorance on the part of people or indifference practiced by State-



apparatuses. Notably, the personal law reforms were advanced by Parliament in post-Independent India.

It is also important to examine, if the court has the judicial power to re-read the definition of marriage otherwise than clearly stipulated by the legislature. All the family laws in India define it in a heterosexual sense.

Marriage as a social institution has been deeply embedded in cultural relationship since the emergence of human civilisation. Any transformation of its concept requires dialogical understanding through democratic processes. Most importantly, the question may be raised if the people of India are ready to accept the change what is being debated in the corridors of the Supreme Court of India?

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