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Breaking Barriers: Overcoming Political and Religious Obstacles to Legalising Same-Sex Marriage in India

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ABSTRACT

"Will India every say "I do" for Same-Sex marriage?"

Same sex marriage is a new dimension of social change in the Indian society which requires the attention of the public at large. Homosexuality is an idea which is proceeded with right from the Vedic period. This paper aims to investigate the social, political, and legal aspects of same-sex marriage in India. It likewise examines the foundations of marriage, and why individuals are hesitant to acquiesce to a more inclusive form of marriage. Throughout this paper, the simple and complex definitions of marriage are explored. The contentions of the opponents of same-sex marriage are analysed. The claim that changing the components of marriage would fundamentally change the structure and purpose of marriage is explored. This is trailed by a comparative analysis with family law in India, and the legality of same-sex marriages under the relevant statutes. It is now the time to provide for better protection to the rights of same sex couples by recognizing their marriage and keeping aside the Indian Ethos and the doomed customary beliefs which has left the entire society in the hands of majoritarianism and intolerance.

Keywords: *homosexual, same sex marriages, legalize, criminalized, sexual behaviour.*

I. INTRODUCTION

Same-sex marriage has been a contentious issue globally, with many countries legalising it while others continue to prohibit it. India, a country with a diverse cultural and religious background, has been grappling with the issue of legalising same-sex marriage. The current legal framework in India does not recognise same-sex marriage, and Section 377 of the Indian Penal Code had criminalised homosexuality until it was decriminalised in 2018. However, the decriminalisation of homosexuality did not automatically legalise same-sex marriage in India.

The paper, "Breaking Barriers: Overcoming Political and Religious Obstacles to Legalising Same-Sex Marriage in India" is a complex issue that raises questions about the rights of the

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 [ISSN 2581-5369]

LGBTQ+ community, the constitutional validity of same-sex marriage, and the impact of legalising same-sex marriage on Indian society. It is important to understand the legal and social implications of legalising same-sex marriage in India to ensure that the rights of all individuals, regardless of their sexual orientation, are protected.

This research paper will contribute to the ongoing debate on the legalisation of same-sex marriage in India and provide insights into the challenges and opportunities associated with legalising same-sex marriage in a country with a diverse cultural and religious background.

II. HISTORY OF MARRIAGES

According to the best available data, marriage is approximately 4,350 years old. Most anthropologists believe that for thousands of years prior to that, families consisted of loosely organised groups. However, as hunter-gatherers settled into agrarian societies, society required more solid structures. The earliest evidence of marriage between a man and a woman date back to circa 2350 B.C. in Mesopotamia.[3]

On the Indian subcontinent, several marriages have occurred. From historical Vedic religion through traditional orthodox Hinduism to the era of social reform and female emancipation, marriage has altered and evolved in fascinating ways over time. Some types of traditional marriage are still practised, while others have perished or been modernised due to the industrialisation, urbanisation, and globalisation that India has experienced.[4]

The *Arthashastra*, describes a range of non-vaginal sexual acts that, regardless of whether they were performed with a man or a woman, were to be penalised with the lowest level of fine. Although gay intercourse was illegal, it was viewed as a very minor offence, whereas numerous forms of heterosexual intercourse were penalised more harshly.

Homosexual behaviour is mentioned in the Manusmriti, which recounts the earliest norms of conduct that a Hindu was supposed to follow, but solely as something to be regulated. Even while homosexuality was considered a component of sexual behaviour, it was not always tolerated. There were specific penalties for homosexual behaviour. For example, in the section about sexual contact between an older woman and a virgin (woman), it is said that "... a woman who pollutes a damsel (virgin) must instantly have (her) head shaved or two fingers cut off, and be made to ride (about town) on a donkey," signifying a terrible punishment. "... a damsel who pollutes (another) damsel must be punished two hundred (panas), pay the double of her (nuptial) price, and undergo ten (lashes with a) rod," says the statement about sexual intercourse between

[3] "The origins of marriage", The Week, https://theweek.com/articles/528746/origins-marriage.
[4] "Dynamics of Marriage and Family", http://ecoursesonline.iasri.res.in/mod/page/view.php?id=104537.

 [ISSN 2581-5369]

two virgins.

When taken out of context, these rules sound homophobic, but they are actually concerned with the loss of virginity, which renders a young woman unfit for marriage. The penalty for a forced sexual act between a man and a woman, for example, is harsher than the penalty for the same act between two virgins. Sex between non-virgin women was punished with a small fine, whereas homosexual intercourse between men was punished with a bath while wearing one's clothes and a penance of "eating the five products of the cow and keeping a one-night fast" — the penance serving as a replacement for the traditional concept of homosexual intercourse resulting in caste loss. The inequality in treatment could be attributed to the text's uneven attitudes about males and females, as the Manusmriti argues that a woman's social position is equivalent to (or even lower than) that of a man's land, animals, and other possessions.

(A) Conventional laws of marriages

India is a secular country where many religions are practised openly. Christianity, Islam, and Hinduism are the three main faiths. Marriages are performed in accordance with religious ceremonies and traditions, most of which are enshrined in personal statutes. Therefore, the personal laws of the spouses, which are often established by statute in most cases, control the matrimonial laws in India, including laws on marriage, divorce, and other related topics.

Hindu, Muslim, Christian as well as Parsi laws for Marriage and Divorce. Moreover, the Special Marriage Act of 1954 applies to people of different religions all at once. This is a civil law, and partners of any religion, caste, or society may choose to marry under its provisions. Then, a divorce would be subject to the Special Marriage Act of 1954.[5] However, it is only concerned with the Inter-religion Marriages and does nowhere mentions a word about same sex Marriage.

Under Article 21[6] of the Indian Constitution, the Supreme Court in "***Lata singh v.state of Uttar Pradesh***" saw the freedom to marriage as a element of the right to life. The court remarked that: "This is a free and democratic country, and once a person becomes a major, he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste marriage the maximum they can do is that they can cut off social relations with the son or daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste marriage."[7]

[5] Pinky Anand, "Family law in India: overview", November 1, 2020, https://content.next.westlaw.com/6-581-5985?__lrTS=20211129161250623&transitionType=Default&contextData=(sc.Default)&firstPage=true.
[6] The Constitution of India, 1950, Article 12.
[7] AIR 2006 SC 2522

III. CONSTITUTIONAL HISTORY OF RECOGNITION OF SAME SEX RELATIONSHIPS

"Why is it that, as a culture, we are more comfortable seeing two men holding guns than holding hands?"

Ernest Gaines

Up until 2009, Homosexual relationships were specifically termed to be an offence under Section 377[8] of the Indian Penal Code. Anyone who freely engages in "carnal relations against the natural order" is now in violation of the law. Historically, the "Law Commission of India" had argued in favour of the retaining this provision; however, in its "172nd report", 2000, the commission along with the then health minister Anbumani Ramadoss backed the section's repeal.

The High Court of Delhi ruled in "***Naz Foundation v. Govt. of NCT of Delhi***[9]" that a component of Section 377 was "unconstitutional". The Court held, Section 377 violates Articles 14, 15, and 21 of the Constitution insofar as it criminalised consensual non-vaginal sexual acts between adults. The Court found that Section 377 was valid insofar as it addressed non-consensual non-vaginal intercourse or intercourse with children; it did not completely Decriminalise the section.[10]

The Holding of the Court was appealed to the Supreme Court of India by numerous organisations and people. They argued:

- "that decriminalising homosexuality would harm the institution of marriage and encourage young people to engage in homosexual behaviour and
- that the right to privacy does not include the freedom to commit a crime."

In "***Suresh Kumar Koushal & Anr vs. Naz Foundation & Ors,***" [11], the Supreme Court overruled the Naz foundation decision and held that only Legislature has the power to decriminalise homosexuality. Additionally, it was found that only specific behaviours, not a particular group of people, are made illegal by Section 377. It also mentioned how few people who identify as LGBTI live in the neighbourhood and how few of them have been found guilty under Section 377.

There were a number of petitions filed in opposition to the Supreme Court's ruling to

[8] Indian Penal Code, 1860, § 377.
[9] (2009) 111 DRJ 1.
[10] Anil Trehan, "Legal Recognition of Same Sex Marriages in India: An Overview", SCC Online (2012) PL June 36.
[11] Civil Appeal No. 10972 of 2013.

 [ISSN 2581-5369]

Decriminalise Section 377 of the Indian Penal Code insofar as it criminalised consensual sex during the time that the curative petitions against Suresh Koushal were pending.

Despite the pending curative petitions, the Apex Court established a Constitutional Bench to fully deliberate upon the challenges against Section 377. This may be due to remarks made in the "nine-judge ruling" in the "Right to Privacy" case that hinted at the rationale and verdict in Suresh Koushal's fundamental flaw.

Section of Section 377 of the Indian Penal Code was struck down by the five-judge bench in ***"Navtej Singh Johar v Union of India"***, decriminalising "same-sex relationships between consenting adults".[12] LGBT people can now have sexual relations with consent because to new legal protections. The provisions of Section 377 that make nonconsensual or sexual activity on animals illegal have been upheld by the court.

(A) Constitutional courts' recognition of same-sex marriage

The gender-neutral phrases can be liberally interpreted to include same-sex marriages when interpreting the Special Marriage Act. The schedules for the act, however, vary.

- Only heterosexual marriages are covered by the First Schedule's "Degrees of Prohibited Relationship," which does not apply to same-sex unions.
- The "Notice of Intended Marriage" is described in the Second Schedule, which is entirely gender-neutral. One may undoubtedly contend that, when read alongside Section 5, it applies to all marriages. Read Section 16 along with the Fifth Schedule, which covers "Certificates of Marriage Celebrated in Other Forms." Same-sex marriages are not subject to the same rules.
- The "Bride" and the "Bridegroom's statements and the "Certificate of Marriage" are covered in the Third and Fourth Schedules, which call for a thorough inspection.

The Homophobic may make the following arguments

i. First of all, such marriages are not accepted by Indian culture, traditions, or customs.

ii. Second, the legislature had no intention of allowing same-sex marriages at the time the act was passed, many years before Navtej Singh.

- It is possible to place extra emphasis on Section 11's Third and Fourth Schedules of the Act. The parties and three witnesses "must" sign the declaration in accordance with Section 11. This clause is a requirement, not a recommendation.

[12] WP (Crl.) 76/2016

 [ISSN 2581-5369]

- Bride and groom must submit separate declarations in accordance with Schedule 3. The "bridegroom" and "bride" must both sign the Certificate of Marriage outlined in the Fourth Schedule. The Act exclusively applies to heterosexual marriages and not same-sex unions, as indicated by the words "bridegroom" and "bride," respectively. However, these terms are not defined in respect to the other sex in the dictionary. The bride is "a woman at the time of her wedding," and the bridegroom is "a man at the time of his wedding," according to the Oxford English Mini Dictionary.

iii. *Thirdly,* while the District Court can "order the husband to pay" alimony pendente lite or permanent alimony "on the application of the "wife," Sections 36 and 37 simply cannot be applied to same-sex marriages. By deviating from the exact canon of statutory construction, the court would commit both a carnal and a grave sin. The common meaning of the terms "husband" and "wife" in the Act should be applied. According to the Oxford Mini Dictionary, a "wife" is a married woman in relation to her husband, while a "husband" is a married man.

(B) Why would the justification that "same-sex marriage is against Indian culture" fall flat?

As a result of the decision made by the Supreme Court that the freedom to marry a partner of one's choice is a fundamental right, the question of whether or not same-sex marriage was ever a part of the Indian cultural ethos might be debated. In the case of ***"Shafin Jahan v. Asokan K.M. and others***"[13], the three-judge bench of the Honourable Supreme Court came to the following conclusion after referring Article 16[14] of the Universal Declaration of Human Rights:

- *"21. The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law that is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to make decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty. The Constitution exists for believers as well as for agnostics. The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership, are within the central*

[13] AIR 2018 SC 1933.
[14] Universal Declaration of Human Rights, Article 16.

 [ISSN 2581-5369]

aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners."

- ***"22**. In '**Justice K. S. Puttaswamy v. Union of India**', this Court in a decision of nine judges held that the ability to make decisions on matters close to one's life is an inviolable aspect of the human personality:*[15]
- *"The autonomy of the individual is the ability to make decisions on vital matters of concern to life… The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination… The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual."*
- *A Constitution Bench in '**Common Cause (A Regd. Society) v Union of India'**[16] held:*
- *"Our autonomy as persons is founded on the ability to decide on what to wear and how to dress, on what to eat and on the food that we share, on when to speak and what we speak, on the right to believe or not to believe, on whom to love and whom to partner, and to freely decide on innumerable matters of consequence and detail to our daily lives. The strength of the Constitution, therefore, lies in the guarantee which it affords that each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage."*

In "***Shakti Vahini v. Union of India***"[17], the Supreme Court held,

*"**44**. The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is 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*

[15] Justice K. S. Puttaswamy v. Union of India, 2017 (10) SCC 1
[16] Writ Petition (Civil) No.215 of 2005
[17] (2018) 7 SCC 192.

 [ISSN 2581-5369]

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."

This legal stance has been cemented by the use of both of the aforementioned judgments in Navtej Singh.

The legal requirements for a lawful marriage may be regulated by the legislation, just as it may be regulated by the circumstances under which a marriage may be dissolved or annulled (subject to constitutional conformity). These options are available to the parties to a marriage because they are the ones who should determine whether to accept one another into a marital bind or maintain that relationship. Our choice of mates is entirely independent of society.

Therefore, if the respondents used the cultural reasoning, they might accidentally hurt themselves. The respondents run the danger of giving more people the opportunity to contest the legality of numerous personal laws on the grounds that they forbid same-sex marriage.

Once Navjet Singh ruled that LGBT people have the same constitutional rights as everyone else, including freedoms and equal protection under the law, it is impossible to imagine how same-sex couples could be denied the freedom to marry the partners they choose.

(C) Why the "legislative purpose" defence has only limited use

Even if it's true that the legislature could not foresee a scenario in which people of the same sex would desire to be married to one another in 1954, it was nonetheless aware that the law does not remain static. In this country's constitutional framework, the legislature has the authority to change, repeal, or pass legislation in order to update it to reflect the current state of society. But the legislature's job is to do that.

In addition to what is said in the Act, and perhaps more crucially, what is not stated in the Act, it is the responsibility of the judge to ascertain the legislative intent.

The Act contains no provisions that forbid people of the same sex from getting married to one another. As a result, the Hon. Supreme Court noted in "***Arun Kumar and Others v. Union of India and Others"***[18], *"where a statute is silent or inarticulate, the court would attempt to transmulate the inarticulate and adopt a construction that would lean towards constitutionality albeit without departing from the material of which the law is woven."*

Ultimately the cause of justice has to be advanced and therefore, in "***State of Goa v. Western***

[18] (2006) 286 ITR 89.

 [ISSN 2581-5369]

Builders"[19], the Supreme Court opined that "*If the statue is silent and there is no specific prohibition, then the statue should be interpreted which [sic] advances the cause of justice.*" Hence, in "***Election Commission of India through Secretary v. Ashok Kumar and others"***[20] it was held that "*where statue is silent and judicial intervention is required, courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience.*"

One could claim that Schedules 3 and 4 as well as the maintenance clauses are inapplicable to same-sex relationships. However, under Article 226, the High Court can order State Governments to create special declaration forms for same-sex couples and marriage officials to register such marriages if it serves the interests of justice.

The promise provided by the Constitution that each person shall have a protected entitlement to choose a partner to enjoy intimate moments with within or outside of marriage is its main strength.

In addition, under Article 227 (2) (b) of the Constitution, the High Court may issue regulations directing all State courts and tribunals to hear cases involving same-sex couples. Additionally, the Supreme Court has the authority to issue orders under Article 142 to cover the gap until legislation is passed, as it did in cases like "***Vineet Narain and others v. Union of India and another"***[21] and ***"Vishaka v. State of Rajasthan"***[22]**.**

Last but not least, the Act features a number of clauses that are gender-neutral when construed according to the literal rule of construction defended in Part 1 of this series. While it is ideal for the terms "husband," "wife," "bride," and "bridegroom" to be accorded their common and natural meanings, following this path in same-sex weddings would deny same-sex couples their inalienable right to wed.

In "***Mahadeolal Kanodia v. The Administrator General of West Bengal"***

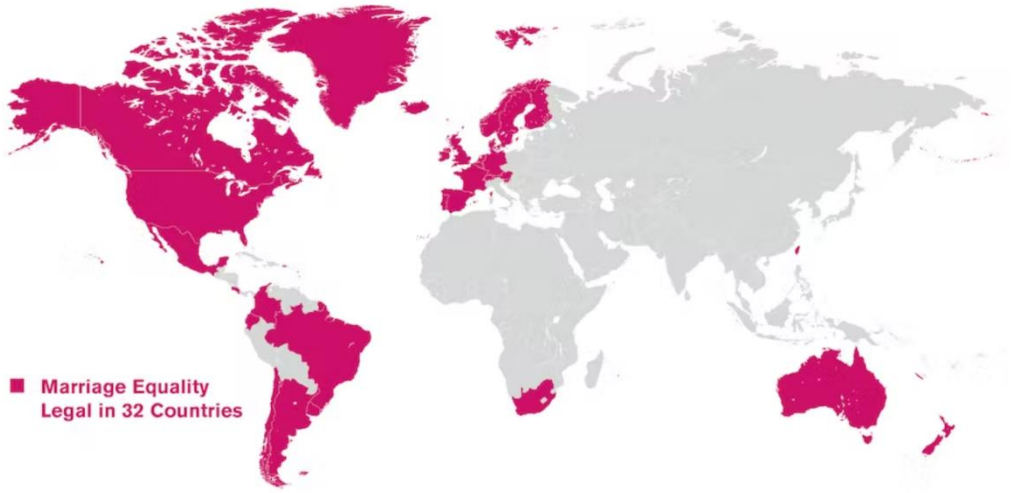
"…If the strict grammatical interpretation gives rise to absurdity or inconsistency, the Court could discard such interpretation and adopt an interpretation which will give effect to the purpose of the legislature. That could be done, if necessary, even by modification of the language used. The purpose of the legislature was never to prohibit same-sex marriages or violate constitutional provisions. However, considering the aforementioned absurdity, the court can always step in to interpret the Act or even modify the language to negate the absurdity. The

[19] (2006) 6 SCC 239.
[20] (2000)8 SCC 216.
[21] 1 SCC 226
[22] AIR 1997 SC 3011.

 [ISSN 2581-5369]

road to equality for LGBTQIA community is long and meandering with potholes and bumps along the way. The problems that each group within the community faces are diverse and far more complex than one could imagine. ***That could be done, if necessary, even by modification of the language used."***

IV. CURRENT POSITION OF LAW ON SAME SEX MARRIAGE



Source: *The Human Rights Campaign*[23]

Despite the fact that the Constitution does not expressly mention the freedom to choose one's spouse, the Indian judiciary has recognised and maintained this right in a number of judgements. One such instance was the ruling in "***Lata Singh v. State of U.P. by the Supreme Court***" [24]. In that instance, the woman wed a man from a different caste to her own. The Supreme Court ruled that the woman had the freedom to marry anybody she desired because she was a major (above the age of 18).

The Supreme Court firmly established in "***Shakti Vahini v. Union of India***" that two adult people's choice to be married is an instance of their enjoying the freedoms granted to them under Articles 19 and Article 21 of the Constitution. Known as the "Hadiya case," "***Shafin Jahan vs. K.M. Asokan (2018)***" involved a Hindu girl who converted to Islam without any undue influence or coercion and later wed a Muslim man. Their marriage was declared invalid by her father in a court case. The lower court had declared their union null and void, but the Supreme Court upheld it and acknowledged that she was free to wed whoever she chose. This decision was based on "***Justice K.S. Puttaswamy (Retd) v. Union of India (2018)***" which recognised

[23] HRC Foundation, "Marriage Equality Around the World", Human Rights Campaign, 26 November, 2022, https://www.hrc.org/resources/marriage-equality-around-the-world.
[24] Writ Petition (crl.) 208 of 2004.

 [ISSN 2581-5369]

the freedom to marry the person of one's choice as a right guaranteed by Article 21 of the Indian Constitution. In the Puttuswamy decision, Justice Chandrachud made the observation that the judiciary should examine sexuality as a whole, which encompasses cohabitation and marriage, rather than just sexual orientation.

The freedom to marry the person of one's choice was repeatedly affirmed by the Supreme Court in the aforementioned instances as a Fundamental Right under Article 21.

The proceedings before the Delhi High Court provide a chance for the judiciary to step up and clarify that same-sex couples have a fundamental right to the freedom to marry, even though courts haven't made this observation in the specific context of same-sex couples.

(A) Constitutional validity

"*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth*."[25]Article 15 forbids discrimination based on "religion, race, caste, sex, or place of birth," among other things. One of the grounds isn't specifically listed as gender.

It should be remembered that "sex" and "gender" are two distinct concepts. As opposed to "gender," which refers to one's own perception of who they are, their emotions, psychology, and what they personally identify as, "sex" refers to the classification of human beings into different groups based on traits like the type of chromosomes, hormones, genitalia, and other secondary sexual characteristics. The Supreme Court of India expanded the definition of "sex" under Article 15 of the Indian Constitution to include "gender" in "***National Legal Services Authority v. Union of India"***[26]. Due to the fact that such discrimination would only be based on the gender of the parties involved and would thus directly violate Article 15 if same-sex marriages were not legally recognised. I believe that prohibiting homosexual marriages or refusing to recognise them would be against Article 15.

V. CONCLUSION

Over 20 years ago, the Netherlands became the first country in the world to legalise same-sex marriage. Since then, 31 countries have followed suit. Although homosexuality is still punishable by death in some nations, identifying as LGBTQIA+ is still outlawed in 70 countries.

Because of a modified form of Section 377, it is now permissible to participate in adult, consenting, and private same-sex relationships in India. However, the absence of robust

[25] The Constitution of India, 1950, Article 14.
[26] (2014) 1 SCC 1

 [ISSN 2581-5369]

LGBTQIA+ inclusive policies at the federal, state, and local levels, as well as a general lack of political will to strengthen LGBTQIA+ legislation, suggests that these problems will be consigned to the margins.

One needs to investigate why the union administration stated that limited marriage to a union between biological man and female was in the "legitimate State interest". What business does the State have restricting individuals in consenting relationships—a(n) (in)visibly oppressed minority group—from marriage's boundaries?

Non-traditional heterosexual relationships are already recognised under Indian law.

Personal laws govern marriages in India, including the Hindu Marriage Act of 1955, the Indian Christian Marriage Act of 1872, and the Muslim Personal Law (Shariat) Application Act of 1937, among others. Same-sex and queer marriages are allowed in India, despite the fact that they are not recognised by the government.

In "***Arunkumar and Anr. vs. The Inspector General of Registration and Ors***"., The term "bride" in Section 5 of the Hindu Marriage Act, which outlines the prerequisites for Hindu marriages, cannot have a specific definition, according to Justice G.R. Swaminathan. Instead, it needed to be updated to accommodate for transwomen, intersex persons, and other transgender women, as well as altering social expectations. The court went on to recognise the existence of various gender identities. Despite the fact that it did not address same-sex marriage in its verdict, the court confirmed the legitimacy of marriages between genders (i.e., those who were not biological women - in opposition to the union government's position).

The Madras High Court's ruling is based on the grounds put out in "***Shafin Jahan vs. Asokan K.M. and Ors.***", in which the freedom to choose and marry a spouse was recognised as constitutionally protected. *"society has no role to play in influencing our choice of spouses,"* and *"marriage intimacy stays within an inviolable core zone of private, the logical inference from these verdicts is that any legislative restriction on same-sex and queer weddings must be judged invalid, especially in light of Articles 14, 15, and 21 of the Constitution."*

As a result, non-traditional heterosexual relationships are recognised under Indian law. The time has come to extend these rights to homosexuals. In addition, the courts must reconsider their position on sex and gender equality, as well as settle long-standing issues between fundamental rights and personal rules. If they do not, they will be on the wrong side of history.

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 [ISSN 2581-5369]