

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 4

2024

© 2024 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Same Sex Marriage: A Comparative Analysis

SISHI S.¹ AND ROSHINI T.²

ABSTRACT

Marriage has always been considered holy, whether sacrament or contract. It is an intrinsic union between two 'individuals'. In most developed nations, marriage as a union between a man and a woman is gradually being replaced by the union between two persons or individuals irrespective of gender. A growing body of literature provides important insights into the meaning and impact of the right to marry a same-sex partner among sexual minority people. However, the Indian Law is ambiguous whether same-sex marriage is legal, and if made legal then what would be the marital rights and consequences. Homosexuality is usually seen as a western concept and accepting the same is challenging socially and legally. After the magnanimous judgment of decriminalising homosexuality, the next appropriate step seems the legalising of same-sex marriage. There are two pressing questions in this regard. Can same-sex marriage be made legal in personal laws? Should there be a new law altogether to govern the marital rights arising out of same-sex marriage? The word "sex" and anything related approximately to the said term is considered taboo. The various forms of human sexuality are seldom discussed, let alone at the academic forefront. There is a need for additional research on the impact of equal marriage rights and same-sex marriage on the health and well-being of diverse sexual minorities across the globe. The introduction of same-sex marriage would not eliminate this discrimination against same-sex married couples, but it would remove the problem of ignorance, and remove one of the excuses for prejudice. It will not change at all the law applying to mixed-sex marriages, and is therefore a minor alteration compared to what has gone before. The shedding light of this paper deals with understanding human sexuality and the need for introducing and legalising same-sex marriage.

Keywords: Same-sex marriage, Sexuality, Indian Law, Personal Laws.

I. INTRODUCTION

India is known for its rich culture, heritage and diversity. It has been a country that has had a more liberal and glorious past than the present in terms of accepting diverse sexualities. The concept of gender fluidity amongst humans and yakshas³ has been acknowledged in the ancient

¹ Author is a student at Chennai Dr. Ambedkar Government Law College, Pudupakkam, India.

² Author is a student at Chennai Dr. Ambedkar Government Law College, Pudupakkam, India.

³The yakshas are a broad class of nature-spirits, usually benevolent, but sometimes mischievous or capricious, connected with water, fertility, trees, the forest, treasure and wilderness. They appear in Hindu, Jain and Buddhist texts, as well as ancient and medieval era temples of South Asia and Southeast Asia as guardian deities. The

Hindu scriptures. Homosexuality in ancient India was not viewed as a crime. In Sutra 36 of the Kama Sutra, the sexual acts between individuals belonging to same-sex were termed as *sadharana*⁴ implying that the said acts were ordinary. In the temples of Khajuraho⁵ women are shown erotically embracing each other. This can be said to be an acknowledgement of homosexual acts. The Mahabharata has a story about Shikhandini, who was a warrior and the daughter of King Drupada. She was given the name Shikhandini after being raised as a prince and was betrothed to a woman. When her wife learned about the reality, she revolted. There was a divine intervention and she was bestowed with manhood, and from then onwards, she lived the life of a hermaphrodite.⁶ The Rig Veda mentions Mitra-Varun, a same-sex couple believed to represent two halves of the moon.⁷

Some Muslim literature or Sufi poems also depict homoerotic or same-sex references. For instance, Sufi Saint Bulleh Shah, Sarmad Kashani and Shah Hussain express homosexuality, sexual fluidity and their love for partners of the same sex through poetry. The Turco-Afghan emperor of the Khilji Dynasty, Allaudin Khilji is said to have been bisexual or even homosexual and expressed his immense love for Malik Kafur (a eunuch). From the scientific point of view, homosexuality is considered to be a normal variant of human sexual orientation as opposed to a mental disorder.⁸ In the 19th Century, homosexuality was considered a mental disorder. With the advancement of science, homosexuality started being considered a disease that can be cured. Sigmund Freud, the founder of psychoanalysis, opined that the cause of homosexuality was family and development issues.⁹ The Diagnostic and Statistical Manual of Mental Disorders (DSM) — known as the “bible of psychology” — classified homosexuality as a mental illness. In its first edition, published in 1952, it classified the word as a “sociopathic personality disturbance”, and again in the second edition that was published in 1963. In 1973, the American Psychiatric Association removed homosexuality from the list of mental illnesses.¹⁰ From then onwards, it has been a constant struggle between accepting oneself as a homosexual and the State accepting an individual as a homosexual and guaranteeing fundamental rights to them.

feminine form of the word is *yakṣī* or *yakshini*. In Hindu, Jain and Buddhist texts, the *yakṣa* has a dual personality.

⁴SAURABH KIRPAL, *SEX AND THE SUPREME COURT* 27 (Hachette India, 2020).

⁵The Khajuraho Group of Monuments is located in the Chhatarpur district of Madhya Pradesh, India.

⁶ Kirti Pandey, The back story of Shikhandi in Mahabharat and Why Bhishma Vow of Celibacy Cost Him His Life, <https://www.timesnownews.com/spiritual/religion/article/the-back-story-of-shikhandi-in-mahabharat-and-whybhishma-vow-of-celibacy-cost-him-his-life/583870>

⁷ Deepanshi Mehrotra, The Pre-Colonial History of Homosexuality in India: Why Love Is Not Western (Part I/III), LAWCTOPUS ACADEMIKE <https://www.lawctopus.com/academike/history-of-homosexuality-in-india/>

⁸ Robert L. Kinney III, Homosexuality and scientific evidence: On suspect anecdotes, antiquated data, and broad generalizations, 82, *THE LINACRE QUARTERLY*, 364-390, 2015

⁹ Crystal Widodo and Ciara Balanza, Homosexuality was Considered a Mental Illness, *EACH MIND*, <https://eachmind.org/blog/homosexuality-mental-illness/>

¹⁰ Carol North, Out of DSM: Depathologizing Homosexuality, 5, *THE LINACRE QUARTERLY*, 565-575, 2015

Up until 2018¹¹ India was bound by the shackles of Victorian Law of criminalising homosexuality. The Westerners failed to understand gender fluidity and acceptance in India. This was a turning point in the implementation of Human Rights and Fundamental Rights in India. Until then, homosexuals were deprived of basic fundamental rights inter alia right to life and personal liberty, right to freedom, right to choose a partner and right to equality.

II. TYPES OF SEXUALITIES

Before moving on to the legal aspect of homosexuality and the possibility of same-sex marriage, it is important to understand the meaning of sexuality and diverse existing sexualities beyond what is stereotypically considered as 'normal'. It is equally important to understand the difference between gender and sex. These two terms are used synonymously but sociologists and scientists both affirm that the two are distinct. Sex is the physiological and biological characteristics that a person is born with, i.e., male and female. Whereas gender or gender identity is what a person identifies as or feels from the inside¹², for e.g, a person can be born with female genitalia and identify herself as a male and prefer to use male pronouns such as his/him/himself.

Sexuality means one's thoughts, attractions, behaviors towards other people. It means who a person is sexually inclined towards. It is personal and intrinsic. Some people find it difficult to express and accept their sexuality because any act other than heterosexuality is socially condemned even if legally valid. Types of sexualities are classified based on whom a person is sexually and/or romantically attracted to. Broadly there are seven types of sexualities¹³, they are:

- Monosexual- A person who is attracted to one sex, i.e., either opposite sex (heterosexuality) or same-sex (homosexuality).
- Bisexual- A person who is attracted to both the same and opposite sex.
- Asexual- A person who is not sexually attracted to any other sex but can have romantic feelings for any person
- Pansexual- A person who is gender fluid and can be attracted to other people be it transgender, heterosexuals, homosexuals, etc.
- Demisexual- A person who is between sexual and asexual, unless they develop romantic

¹¹ Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

¹² Diamond, Milton, Sex and Gender are Different: Sexual Identity and Gender Identity are Different, 7, CLINICAL CHILD PSYCHOLOGY AND PSYCHIATRY, 320–334, 2002.

¹³ Times of India, <https://timesofindia.indiatimes.com/life-style//57181542.cms>

feelings they are not sexually attracted.

- Gray-A- A person who is between sexuality and asexuality, but they are more inclined towards asexuality.
- Autosexual- A person who is not sexually attracted to another person but is sexually gratified through internal stimuli. It is also known as auto-eroticism.

Biological factors, which may be related to the development of sexual orientation, include genes, the early uterine environment (such as prenatal hormones), and brain structure that influence gender identity or sexuality. Other than biological factors, socio-environmental factors also play an important role in influencing a person's sexuality, for instance, childhood upbringing, societal attitude towards sex.¹⁴

III. POSSIBILITY OF INCLUSION OF SAME-SEX MARRIAGE IN PERSONAL LAWS

In India, marriage is governed by personal laws guided by religion. The Hindus are governed by the Hindu Marriage Act, 1955, the Christians by the Indian Christian Marriage Act, 1872, the Parsis by the Parsi Marriage and Divorce Act, 1936; likewise the Muslims are governed by uncodified Muslim personal laws. Marriage under all the personal laws is rooted in religion and is an integral part of the religion as a whole.

On careful perusal of the Hindu Marriage Act, 1955,(HMA, 1955) we can see that there is no explicit provision that the marriage has to be performed between a man and a woman. However, all the conjugal rights arising out of marriage is to be applied to "husband" or "wife"¹⁵ (e.g. Sections 9,13), meaning, even if same-sex marriages were permissible under the HMA, 1955, there are no provisions to govern the said couple post marriage such as matters of restitution of conjugal rights, divorce, alimony and maintenance, legal guardianship and implementation of child rights (if one of them as adopted as a single parent). The Madras High Court in the case of *Arunkumar and Sreeja vs Inspector General of Registration and Ors*,¹⁶ When faced w/ith the issue of whether a transwoman can be considered a woman and regarded as a 'bride' under Section 5 of the HMA, 1955, the court affirmed the statement and held that any person transwoman or intersex, identifies as a woman can be considered a bride. Therefore, the union is still between a 'man' and a 'woman'.

In *Abhijit Iyer v. Union of India and others*¹⁷, Mr Abhijit Iyer filed a petition for registration

¹⁴ The Information Architects of Encyclopaedia Britannica, Human Sexual Activity, BRITANNICA, <https://www.britannica.com/facts/human-sexual-activity>

¹⁵ This examination holds true for the Parsi Marriage and Divorce Act, 1936.

¹⁶ 6 Writ Petition no: 4125 of 2019 and 3220 of 2019, Judgment dated, April 22, 2019.

¹⁷ W.P.(C) 6371/2020

of same-sex marriage under the HMA, 1955 contending that the language of the said statute is gender-neutral and there is no express prohibition of same-sex marriage. The non-recognition of the right to marry a person of one's choice is a clear violation of fundamental rights under Articles 14 and 19 of the Constitution of India. The distinction made between homosexuals and heterosexuals in terms of marital rights has led to the social ostracisation of homosexual unions. Notwithstanding the decriminalization of homosexuality, the Central Government argued and advised the Delhi High Court that in India marriages can only be permissible between biological man and woman, i.e., heterosexuals.¹⁸ The provisions with regards to marital rights under the Indian Christian Act, 1872 are the same as that of the HMA, 1955. This Act is of British era and there is no unambiguity that the marriage shall take place only between a husband (man) and a wife (woman).

In Islam, marriage is considered as a contract or *Mitsaqan Ghalithun* (a strong agreement). The purpose of marriage is to realize the procreational role of a man and a woman and to fulfill the natural desire of men and women for each other.¹⁹ Since marriage is a contract between a man and a woman; the consideration for the same is; financial obligation to be provided by the man in turn of exclusive sexual access (vaginal intercourse) to the woman.²⁰ Since homosexuals cannot fulfill this obligation of marriage, their marriage cannot be legalized or their relation validated. The Quran per se does not make homosexual acts punishable by death²¹ and Prophet Muhammad did not forbid homosexual relations but at the same time expressed contempt towards the same. Fiqh²² considers *liwat*²³ as a punishable offense.

IV. LEGISLATION NEED FOR SAME-SEX MARRIAGE IN INDIA

Same-sex marriage may not receive a wilful acknowledgement in personal laws, thereby necessitating the making of new legislation. The new law can be availed by same-sex couples. Ironically, heterosexual couples are looked down upon for pre-nuptial sex and homosexual couples are only given limited sexual rights with no marital rights. It is about time to reform the very essence of marriage. With the realization of women's rights, it would be wrong to say that the only purpose of marriage is procreation. Women have the sexual right to choose whether or

¹⁸ 8 LAW TIMES JOURNAL, <https://lawtimesjournal.in/same-sex-marriage-is-not-a-fundamental-right-delhi-hc/>

¹⁹ 9 Dr Ibrahim B. Syed, Same-Sex Marriage and Marriage in Islam, Islamic Research Foundation International, Inc, November 2019.

²⁰ Jonathan AC Brown, Muslim Scholar on How Islam Really Views Homosexuality, VARIETY <https://variety.com/2015/voices/opinion/islam-gay-marriage-beliefs-muslim-religion-1201531047/>

²¹ Schmidtke, Sabine, Homoeroticism and Homosexuality in Islam: A Review Article, 62, BULLETIN OF THE SCHOOL OF ORIENTAL AND AFRICAN STUDIES 260–266, 1999.

²² Fiqh is Islamic jurisprudence and comprises the human understanding and practices of Sharia (set of Islamic religious laws).

²³ Anal sex or *liwat* is considered haram (any act forbidden by God) by most Shia and Sunni scholars

not to be a mother. International law has recognised forced pregnancy as a crime against humanity.²⁴ In *Suchita Shrivastava and another v. Chandigarh Administration*²⁵, it was held by the Supreme Court that a woman's right to reproductive choices is guaranteed under her right to life under Article 21 of the Constitution of India. Given the aforementioned observation, it is safe to say that marriage contemporarily does not or rather should not necessitate procreation. On this note, same-sex marriage can be legalised.

Non-legalisation of same-sex marriage would frustrate fundamental rights such as the right to life (Art 21), the right to equality (Art 14), the right to freedom of speech and expression (Art 19(1)(a)), the right to live with dignity (Art 21), the right to choose a partner (Art 21) and the right to privacy (Art 21). Under Article 15 of the Constitution of India, the State is also under an obligation to not make any discrimination in terms only of religion, race, caste, sex, place of birth or any of them. The legalisation of same-sex marriage can have twin benefits. Primarily, as various nations including India have adopted policies and enactments for population control, same-sex marriages would contribute to the sustainability of the environment by population control. Secondly, legalising same-sex marriage *inter alia* would lead to enacting the laws for adoption and maintenance. There are 30 million orphaned and abandoned children in India.²⁶

Due to stringent laws on adoption and a lack of adoption rights for same-sex couples, these children are deprived of happy family life. The Delhi High Court in *Lakshmi Bhavya Taneeru v. Union of India and others*²⁷ held that the right to meaningful family life is a part of the right to life. Since legalizing the same would mean to accord a bundle of marital rights, it is next to impossible to include all such rights under personal laws. Therefore, new legislation should be made that comprehensively explains the need for the new law and the competency of the parties. The provisions for divorce, maintenance, adoption, succession and inheritance are the key elements to the fulfillment of marital rights. Therefore, the Parliament has to vividly state as to who is primarily entitled to give maintenance or who will have primary legal guardianship of the adopted child or how will the inheritance and succession amongst the couples of the same sex.

V. LEGALISATION OF SAME-SEX MARRIAGE: APPREHENSION OR PROGRESSION

Non-legalisation of same-sex marriage can cause chronic social stress and severe mental health problems. Scientific studies have shown that homosexual couples are as capable and fit to be

²⁴ 4 Rome Statute of the International Criminal Court, § 7, 1998

²⁵ (2009) 14 SCR 989, (2009) 9 SCC 1

²⁶ INTERNATIONAL LEARNING MOVEMENT, <https://www.ilmuk.org/news/>

²⁷ W.P.(C) 5533/2021

parents as heterosexual couples.²⁸ However, the legalisation of same-sex marriage can have repercussions in a country like India. India as a nation can adapt to changes but is it capable of upending marriage laws? Live-in relations do not equate to marriage. Marriage gives birth to social, economic and moral benefits to the parties. Due to the lack of same-sex marriage laws, homosexual couples are denied social recognition. This increases the stigma attached to homosexuality and can perpetuate homophobia. Even if homosexual couples are allowed to live together, they can't avail the benefits of heterosexual couples in a live-in relationship such as protection against domestic violence and maintenance and alimony²⁹. The couple must be able to enjoy all the rights aforementioned to guarantee the protection of fundamental rights. However, the legalization of marriage would open a plethora of marital rights and issues such as adoption, divorce, maintenance, legal guardianship and custody, and inheritance; economic rights such as the ability to hold joint bank accounts, right to receive the spouse's pension, disabilities benefits, etc. In this regard, could divorce and other marital issues be resolved by prenuptial agreement³⁰ amongst homosexual couples? These are the various issues that are likely to arise post-legalisation of same-sex marriage.

Another problem that is likely to occur is that it can open the gateway to polyamorous marriage which is illegal in India. Legalizing the marriage of one form of sexual diversion would lead to the demand for legalizing marriage across all sexualities. There are couples who go by the term 'throuple' which means three people in a healthy and loving relationship where all three love one another. It is difficult to understand such notions until researchers or scientists find conclusive data on such matters.

VI. CONCLUSION AND SUGGESTIONS

It can be concluded that there are inadequate laws for the protection of human rights and fundamental rights of people living on the LGBTQ+ spectrum. Allowing marriage equality would render homosexuals to live happier and fuller lives. The same-sex marriage should be legalised for consenting adults just like for heterosexual couples. Polyamorous marriage should not be permitted unless allowed by personal laws (Muslim law-polygyny). The couple should be entitled to all the rights given to heterosexual couples. Denial of marital rights to a same-sex couple is a denial of fundamental rights accorded to them. They can not enjoy any of the

²⁸American Psychological Association, Lesbian and Gay Parenting, LESBIAN, GAY AND BISEXUAL CONCERN OFFICE, <https://www.apa.org/pi/lgbt/resources/parenting-full.pdf>

²⁹ Protection of Women Against Domestic Violence Act, 2005; however, the protection is extended to women only so the observation made would concern lesbians exclusively.

³⁰ Prenuptial agreement is an agreement entered into by both the parties to be married prior to their marriage, which binds both the parties, in matters such as division of property to ensure that the assets are equally divided.

fundamental rights as all are interrelated. Their right to life is infringed as they do not have the freedom to choose whether or not they want to get married. The right that they were given after reading down Section 377 of the Indian Penal Code, 1860 is not of acceptance of their identity but mere indulgence in consensual sexual intercourse which is comparatively insignificant to the quantum of rights that they are denied. The right to equality, needless to say, is violated as there is no marriage equality law.

There are 30 countries worldwide that have legalised and regularised same-sex marriage. The Netherlands was the first country to recognise the same in the year 2001. India can ruminate the existing marriage equality laws of these various countries and can adapt its laws as is the most appropriate to its constitutional regime. In the Netherlands, partners can either marry or live together by entering into a registered partnership.³¹ Almost a decade ago, in 2012, the Government of India estimated about 2.5 million gays³² which is almost the entire population of Namibia. This population is not minuscule. The Parliament needs to take appropriate steps to guarantee not only the rights of this isolated community but also to protect their health. Amongst the 2.5 million gays, 7% were HIV-positive. After decriminalizing homosexual intercourse, it is indispensable to regularize it, otherwise, it will create health havoc as opposed to securing fundamental rights. It has become imperative to seriously look into these matters.

For the reasons stated above, the researcher is of the opinion that legalising same-sex marriage is the next plausible step in attaining the goals of human rights. It is not only the need of the hour but also to protect the overall fundamental rights of homosexuals. An abrupt change in the marital laws can be chaotic, hence, it is of paramount importance to amend marital laws or create new laws without upending the existing marital laws. As the legal fraternity goes by the saying, “Justice delayed is justice denied”, the sooner we have adequate marital laws, the better.

³¹ Government of the Netherlands, <https://www.government.nl/topics/>

³² BBC, <https://www.bbc.com/news/world-asia-india>