

The beyond binary relationship: A research on current scenario of same-sex marriage in India and its comparative studies

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Abstract

They are the creation of God, no difference from the rest. The gender binary in the society leads to the non-recognition of the existence of the non-binary persons. This shall not be the cause for rejection of the marriage rights and the other rights that flow along with marriage in India. 'Beyond binary' refers to sexual orientation and gender identity falling out of the binary clause i.e., male and female. Same-sex marriage is a debatable issue in worldwide. As of now 39 countries around the globe has recognized the same-sex relationship and marriage. Undoubtedly India, in *Navtej Singh Johar v. Union of India* has acknowledged the existence of homosexuals and homosexuality nonetheless the legal recognition of homosexual or same-sex marriage has been denied in the case of *Supriyo Chakrabarty v. Union of India*. This paper aims at the current position of homosexuals in the Indian society post denial of marriage rights and focuses on the factors of consideration for legal recognition of same-sex marriage in three different countries i.e., Taiwan, Nepal, and Greece.

Keywords: - Binary, Gender binary, Homosexuality, Marriage, Same-sex, Sexual orientation.

INTRODUCTION

Marriage enroots the basic legality of one's to lead a normative life in a society. Marriage is not only the union of two opposite gender i.e., the union of gender binary (male and female), rather marriage is the union of two soul irrespective of the one's gender identity. There is no definition of love that involves man and women or any gender specific. That is what it is said - *love has no bounds*. Same-sex marriage and love doesn't exist in the heteronormative society and has no acknowledgment.

It is uncommon, abnormal and nonfitted in the eyes of existing society. Nevertheless, ancient India and Indian mythology defines the existence of homosexuality and the relationship among the homosexual persons. Subsequently, post-independence the concept remain hidden as the British rules were accepted and practiced. The homosexual persons had to struggle and is still struggling for their recognition in the heteronormative society. For the absolute recognition of these people, the battle has not ended. The Judiciary has an important role to play for the acknowledgment in complete manner. Without denying the fact that, in 2018 the Hon'ble Supreme Court of India in *Navtej Singh Johar* case took a tiny step in recognizing the existence of these whole LGBTQAI+ community, but the further issues and problems need to be taken care of that is the right to marriage, parenting and many more that flows along with marriage. Such issues and problem may only be teamed worked by the Legislation and the Judiciary. The factors leading to the recognition of the same-sex marriage in 36 countries may take in consideration for the validation of the same in India. Also, the International Principles on Human Rights that is UDHR and the Yogyakarta Principle shall put down at the fore while functioning for the same-sex marriage rights.

Concept of Same- sex marriage

Before understanding the concept of same-sex marriage, we need to dig into the actual idea of marriage in Indian primitive society and the idea of marriage prevailing in the recent society. The theory of marriage doesn't define with a specification of union of a man and woman, rather it says the union of two persons. During the ancient period, the theory of marriage lies on the concept of union of two souls (no specification of any gender). The Indian history detailed about the very idea of marriage. The research on the historical existence of the sexual minorities speaks volume on their presence and love without bounds. The relationships and partnerships were accepted as complete normativity without any question of social morality. Even, history says that these minorities were acknowledged for what they are considering as 'creation of god' and were allowed to remain according to their own conduct. The Indian society, especially the modern society has completely different understanding on homosexuality, and they deal with them accordingly. Decriminalisation is one major step taken by the Indian judiciary, but there are other rights and marital benefits apart from sole decriminalisation that is needed to look after. Same-sex relationship is completely not a new phenomenon that has emerged with time. Person's sexuality/sexual orientation and gender identity has nothing to do with the culture of the society neither derive from west. Indeed, in the twenty-first century, and today's generation, people are being open about their sexuality, which is completely acceptable and has nothing to do with shame. 'It is what it is'. Nonetheless, the struggle for LGBTQAI+ recognition has been long, and it is far from absolute acknowledgment. Same-sex relationships are considered impractical and contradict to social morality.

Marriage is important in defining the family as it establishes parentage and consequently gives authority over the children. In other words, marriage refers as a social institution and union of two persons. Marriage is also a private transaction and mainspring of a family. Marriage in heteronormative culture is defined as the union of gender binary, i.e., male and female, which confers the status of husband and wife, as well as the validity of the marriage's children, and gives birth to specific marital reciprocal rights and obligations of the spouse. In India, customs and rituals from various castes and religions coexist with personal laws that regulate marriage.

The existing marriage law does not define marriage, but the regulations on the conditions and validation of marriage include only binary gender unions. In general, every society has distinct perspectives on the idea of marriage, and there are many sorts of marriage such as widow remarriage, divorcee remarriage, inter-caste marriage, inter-racial marriage, and same-sex marriage. Over time, If we see the concept of marriage has changed in real sense. It is more about commitment and consent among the two persons which shall be the only fundamental aspects (Vanita, 2022). A same-sex marriage involves two persons who share the same biological sex or gender identity. Also, it can be defined as the union of two spirits or souls, regardless of sex and gender (Ibid)). Same-sex marriage is marriage between the two persons regardless of the gender identity. the concept of same-sex marriage is no different from the marriage that involve the gender binary i.e., men and women. Marriage in India is contemplated as a pure form of union among the gender binary. The concept of union of two souls is far from the imagination in the heteronormative society. Same-sex marriage involves a union between two men or two women i.e., among two Gays (men) or two Lesbians (women).

For a clear understanding: -

Heterosexual Marriage: Man with woman and vice versa (heterosexual couple called as husband and wife)

Same- Sex Marriage: Woman with Woman (lesbian couple called as spouse/ lesbian partner); Man with Man (gay couple called as spouse/gay partners)

According to Ruth Vanita's (a famous academician and a writer), the concept of same-sex marriage means the same thing to same-sex lovers as it does to opposite-sex ones. The government and judiciary have established limitations on same-sex couples, saying that such marriage contradicts social morality. Vanita further stated that the essential characteristics of marriage are mutual consent and communal consensus; additionally, procreation is no longer required in most countries.

CURRENT STATUS OF SAME-SEX MARRIAGE IN INDIA

The struggle of these sexual minorities in the nation is an unending chapter. After the decriminalisation of homosexuality under section 377 of Indian Penal Code in the landmark judgment *Navtej Singh Johar v. Union of India*, (AIR 2018 SC (CRI) 1169) bolster the sexual minorities for taking further steps for their absolute recognition. Undoubtedly, the decriminalisation is not less acknowledgement of these minorities, nonetheless sole acknowledgment isn't sufficient neither justice delivered in absolute sense. LGBTQAI+ individuals continue to experience frequent violence, discrimination, disdain, and mockery in a variety of subtle and overt manifestations, even after the decriminalization of homosexual relationship in the landmark ruling in the *Navtej Singh Johar* case. The State, which is in charge of recognizing and getting rid of the various types of discrimination that the LGBT community faces, hasn't done anything to break the community's chains of oppression. Section 377 still haunts us, even after sexual offenses have been made less severe and LGBT rights have been acknowledged in the *Navtej Singh Johar* case. The lack of awareness and the discrimination that has followed have pushed members of the community into the proverbial closet. A petition filed before the Hon'ble Supreme Court of India in 2022 for the validation of same- sex marriage. In 2023 October 17, the judgment passed by the Hon'ble Supreme Court of India in *Supriyo Chakrabarty v. Union of India*, (2023 INSC 920) denying the marriage rights among

the Same-sex partners. The primary concerns in this case were same-sex marriage rights and adoption by sexual minorities, or LGBTQAI+ communities. By a 3:2 vote, the five-judge bench led by Chief Justice of India D Y Chandrachud issued a nuanced decision on a series of petitions seeking legal recognition for same-sex marriage and adoption. While the Chief Justice and Justice Sanjay Kishan Kaul ruled certain Central Adoption Resource Authority (CARA) recommendations unlawful, Justices S Ravindra Bhat, Hima Kohli, and P S Narasimha disagreed and upheld the restrictions.

After years of battle, Same-sex marriage is not yet legal. In October 2023, the Supreme Court ruled against legalizing it, referring the issue to Parliament to create a suitable framework. India does recognize individual LGBTQ+ rights, such as decriminalizing homosexuality in 2018, but the lack of marriage equality remains a significant gap. India's LGBTQ+ community has gained visibility, especially in urban areas, but traditional family values and religious influences pose significant obstacles to broader acceptance. Many still face stigma, discrimination, and social ostracism, particularly in smaller towns and rural areas. Despite the 2018 decriminalization of homosexuality, same-sex marriage was left to Parliament to decide. The Supreme Court emphasized the need for a legislative solution rather than a judicial declaration. India does not permit adoption or surrogacy for same-sex couples. The absence of marriage recognition also denies them rights linked to inheritance, medical decisions, and spousal benefits.

Post-decriminalisation of Homosexuality: prevailing discriminations

Homosexuality was criminalised under Section 377 of Indian Penal Code, 1890.

Section 377:- Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

The Hon'ble Supreme Court decriminalised a part of Section 377 in *Navtej Singh Johar* case in 2018, stating 'consensual sexual between two adults of same-sex or otherwise' is unconstitutional. The Court ruled that Section 377 violated the right to dignity, privacy, and sexual autonomy under Article 21, freedom of expression under Article 19, equality under Article 14, and non-discrimination under Article 15 of the Constitution. Section 377 will remain applicable to non-consensual sexual behaviour against adults, sexual acts against children, and bestiality. It unanimously repealed Section 377, decriminalising same-sex relationships between consenting people. It is applicable to all residents, not only the LGBT community. This decision has enormous persuasive power for other countries that continue to criminalise homosexuality.

Post-verdict of decriminalisation, the LGBTQAI+ persons still face violence and many more abuses. Only a minuscule initiation for the protection against discrimination of the queer people took place by decriminalisation of homosexuality under Section 377 of IPC. It is to be noted that the miniscule community in our society faced trouble only because of their sexual orientation and gender identity, which doesn't fit to the gender binary or the heteronormative society.

Discrimination such as social exclusion, marginalisation, family rejection, discrimination in employment sector, acceptance, and many more of such instances. Although the Court has acknowledged that a person's sexual orientation is an essential and natural characteristic, the LGBTQ population nevertheless experiences both overt and covert forms of economic, social, and political discrimination.

Supriyo Chakrabarty v. Union of India: Case Analysis

The Supreme Court ruled in *Navtej Singh Johar v. Union of India* (AIR 2018 SC (CRI) 1169) that Section 377 was unconstitutional in light of the LGBTQAI+ community's consensual relationships. The Court recognized that by restricting sexual privacy and discriminating against people based on their sexual orientation, Section 377 violated Articles 14, 15, and 19 of the Constitution. Numerous petitions have now acknowledged that the queer community must be granted a full range of fundamental rights. This included the right to sexual privacy and dignity, as well as the freedom to select your own partner. Various petitions for right to marriage for LGBTQIA+ couples filed before different High Courts of the country. It is argued that the non-recognition of same-sex marriage amount to discrimination of these sexual minorities and violation of basic rights guaranteed under the Indian Constitution. The acknowledgment of the same would lead to the exercise of their rights to free speech and expression, privacy, autonomy, and dignity, according to the petitioner. Other petitioners sought equal recognition in order to achieve social sanctity and benefit from the express and inferred benefits of legally recognized marriage under the SMA and FMA. Overall, petitioners claimed that the legal system discriminates against the LGBTQIA+ population by denying them the right to marry, which is a civic institution available to heterosexual couples.

The prime concern of this case was whether or not homosexual couples should be granted the basic right to marriage, or the 'right to marry'. Recognising the violence and discrimination experienced by the LGBTQIA+ community in India, the Court took *suo moto* cognizance of the cases. Twenty similar applications filed in different High Courts by fifty-two individuals, including seventeen LGBTQIA+ couples, were allowed by the Court. The Court recognized in allowing the case that people still faced discrimination and violence even after LGBTQIA+ sexual relationships were decriminalized. A five-judge Constitution bench of the Court heard the case due to the seriousness of the circumstance. Right to marry is not a fundamental right and that has not been expressly mentioned in the Indian Constitution. Nothing in the content of the law may elevate an institution to the status of a basic right. The right to human dignity, as well as the rights to life and personal liberty, are among the constitutional values that are reflected in various aspects of the marriage bond. The institutional restrictions of the Special Marriage Act (SMA) prevent the apex Court from either overturning the SMA's constitutional legitimacy or adding new provisions to it. Further the Court mentioned that it cannot read words into the SMA and other linked laws, such as the Indian Succession Act and the Hindu Succession Act, because doing so would constitute judicial legislation. In exercising its judicial review power, the Court must avoid subjects that come within the legislative sphere, particularly those involving policy. The Supreme Court mentioned that partners in relationships (unmarried partners) can jointly adopt child inclusive of queer couples. The JJ Act and Articles 14 and 15 are superseded by Regulation 5(3) of the Adoption Regulations. Regulation 5(3) is revised to remove the word 'marital'.

The term ‘couple’ in Regulation 5 refers to both married and unmarried couples, as well as homosexual couples. The concept stated in Regulation 5(2)(a) that spouses in a marriage must get each other's approval if they intend to adopt a child together applies equally to unmarried couples who wish to adopt a child together. However, while drafting regulations, the state may set requirements that promote the child's best interests and welfare in accordance with the explication in the judgment.

COMPARATIVE ANALYSIS

Taiwan

The Taiwan is the first Asian country to recognise same-sex marriage. The country is governed by the constitution of Republic of China which guarantees same-sex couple's right to marry being right to equality. However, the freedom of marriage among the same-sex couple was called in question. On 24th May 2017, the Constitutional Court although declare the existing marriage law as unconstitutional vis-a vis the same-sex couple nevertheless, Yuan legislatures were advised to amend the law appropriately (Wei, 2023). Contrary to the said developed legal regime, Taiwanese electorate approved a referendum in that regard to prevent same-sex marriage from being recognized in the common personal law. The referendum was rejected by the government and declared that it would draft anew law, decisively specific to the same-sex couple rather than bringing changes to prevailing civil court marriage provisions.

The Taiwan legislature passed the Act on May 17, 2019 which legalised same-sex marriage that grant many rights that is been enjoyed by the heterosexual married couples such as inheritance rights, medical decision-making, and joint property ownership. Adoption rights were formerly restricted to same-sex couples adopting only their partner's biological children. Taiwan has progressively increased the rights of same-sex partners in the years that have followed. These rights include adoption and international marriage (for couples in which one partner is from a nation that does not recognize same-sex marriage). However, challenges continue, notably in areas such as complete equality in family law. However, the same-sex marriage legalisation in Taiwan celebrated globally and seen as a major human rights achievement, especially given the conservative stance of many neighbouring countries in Asia. Taiwan has since become a hub for LGBTQ+ activism and tourism. This move set a precedent, inspiring LGBTQ+ activists across Asia to push for similar reforms in their own countries.

The transit from no right of same-sex couple to recognise legal framework in Taiwan has been inspiring development in the Asian country. In nutshell, the following highlighted key notes is worthwhile to summarise:

- Legalized same-sex marriage in May 2019, becoming the first country in Asia to do so. A dedicated law allows same-sex couples to marry, with near-equal legal rights, although restrictions initially existed on adoption and cross-national marriages if the other country did not recognize same-sex unions.
- Taiwan's progressive legal framework reflects a gradual shift in social attitudes. While the government faced opposition from conservative groups, LGBTQ+ acceptance has grown, partly driven by Taiwan's younger population and urban centers.

- The legalization process was court-driven, followed by parliamentary action to pass specific legislation. Taiwan's example has set a precedent for LGBTQ+ rights in Asia.
- Initially, adoption was restricted to biological children of partners, though this has since been expanded to allow joint adoption in certain cases.

Nepal

The recent recognition of same-sex marriage in a recognized Hindu country Nepal, sets a best example that homosexual is not which is related to cultural norms, rather is what a person is completely born with her/his sexuality. The citizenry of the country is influenced by the Hindu mythology, culture, and believe. The Hinduism being the oldest religion faith in the universe is also largely opposed to the same-sex marriage. Despite the said odds, Nepal has set example by recognising the right of homosexuals with believe that homosexual are born with his/her physical and mentally Orientation. On June 2023, the Supreme Court of Nepal Ordering the administration of the executive of Nepal to temporarily register the marriage of same-sex couple and to create a different record file for the non-conventional partners and queer communities. Thereto on April 27, 2024, a different register to record the marriage between the homosexual partners with the nationwide adoption of such directives was issued by the department of Home affairs. Nepal has been second country in Asia to legally recognise the same-sex marriage and eventually the 37th country world across. Although the marriage between the same-sex partner are recognized but not permitted to adopt children.

The 2007 judgement by the Supreme Court of Nepal acknowledging the rights to self-determination of sexual orientation and gender identity is a significant turning point. Three important promises were contained in this judgment. It first outlawed discrimination against minorities based on sexual orientation and gender identity. The government was directed by the court to create a suitable environment and enact legislation in accordance with it. According to international human rights accords, national legislation, and the Constitution, the State was obligated to treat all Nepali citizens and natural people equally. Second, the decision recognized that gender identity is not subject to medical validation because it is founded on "self-feeling." Third, the decision created an additional gender indicator for official government records (Mishra, 2023).

Discussing international human rights laws takes up a significant amount of the ruling. In particular, the Yogyakarta Principles (The Yogyakarta Principle + 10) and their account of the prejudice that minority groups based on gender and sexual orientation experience globally. The ruling also contrasted the international commitments of Article 26 of the International Covenant on Civil and Political Rights (equal treatment before the law without discrimination) with Article 13 of its own Constitution, which guarantees the right to equality. Sunil Pant's contribution to the creation of the Yogyakarta Principles +10 may be a likely explanation for why the judiciary in Nepal plays such a significant role in its implementation at the national level.

The afore referred Judgment has been based on the International Human right laws, specifically the Yogyakarta Principle. The take away note in so far as Nepal is concerned are as follows: -

- In June 2023, the Supreme Court issued an interim order mandating temporary registration of same-sex marriages. However, full legalization is pending legislative changes. The first official

registration took place in November 2023, making Nepal the second Asian country to recognize such unions, albeit with a provisional status.

- Nepal has a unique context where third-gender recognition has long existed, but acceptance of same-sex couples is still evolving. While some urban areas are becoming more inclusive, traditional beliefs persist, particularly in rural regions.
- The government has been slow in implementing LGBTQ+ reforms. The Supreme Court's order to temporarily allow same-sex marriages puts pressure on the legislature to pass permanent marriage equality laws.
- Same-sex couples currently lack formal parental or adoption rights, and future laws will need to address these issues as part of broader reforms.

SUGGESTIONS AND CONCLUSION

Equality among all individuals shall be the prime moto of the nation to meet the Constitutional morality. The Constitutional morality shall not be disregarded merely to satisfy the social moralities. From the above discussion it is to be noted that the marriage among the homosexual partner is the root to meet rest of rights that flows along with marriage in India. Furthermore, the state and government need to take appropriate steps and action in protection of the rights by enactment to proper laws. The Judiciary have an important role to investigate the upcoming matters relating to non-conventional family, homosexual, and homosexual partners. The government at the same should take the references of the other countries validating same-sex marriage and other rights and take into the points and factors for such legalization and protection against the discrimination of non-conventional family. To achieve the Constitutional ethic and meet the human rights of all individuals, equality among all individuals must be the utmost importance of the State. The state and government must take appropriate steps and actions to preserve rights, such as enacting suitable laws. The judiciary has a significant role in investigating upcoming cases involving same-sex relationships. The government should also consider the references of other nations that have validated same-sex marriage and other human rights, as well as the arguments and factors for such legalization and protection against sexual minority prejudice.

Concluding the above statement, sexual minorities and same-sex relationship have existed in a covert and isolated form throughout history. Same-sex relationships are not a new concept or idea. Sexual minorities and same-sex relationship including marriage, are recognized beyond conventional standards, but their basic human rights must not be denied based on their sexual orientation or gender expressions. The majority of homosexual, bisexual, and transgender endure prejudice from both society and family. To incorporate them into societal morality, the morality of the constitution must not be overlooked. The function of the judiciary and legislation does not end here. The state shall adopt the appropriate legislations and provisions from properly and completely recognising sexual minorities' rights to meet the homonormative society. In closing, Legislative enactment and Judicial guidelines for granting the human rights enroute to the homonormativity in the heteronormative society.

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