

Securing support for same-sex marriage in India

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On 18 April 2023, the Indian Supreme Court began hearing arguments in favour of marriage equality from members of the LGBTQ+ community. In what is being called an issue of 'seminal' importance for the country, this debate has arguments from both sides, including whether the judiciary should have any role in the matter at all.



Following the decriminalisation of homosexuality in 2018, several writ petitions seeking legal recognition for same-sex marriage were filed at the Supreme Court and the High Courts of Delhi and Kerala. These pleas sought to challenge the 1955 Hindu Marriage Act, 1969 Foreign Marriage Act and 1954 Special Marriage Act.

Since the case for marriage equality involves a 'substantial question of law pertaining to the interpretation of the constitution' and will have a 'huge bearing on society', the Supreme Court appointed five judges to a constitutional bench, led by Chief Justice of India DY Chandrachud.

There is little political support for same-sex marriage in India. Only one political party — the Communist Party of India — has openly supported marriage equality. While Supriya Sule from the Nationalist Congress Party (NCP) introduced a similar bill in the past, an official announcement from the NCP on this issue has not been made yet.

Political leaders like Brinda Karat, formerly from the Communist Party of India (Marxist), and Shashi Tharoor and Manish Tewari from the Indian National Congress (INC) have endorsed same-sex marriage, but official statements from their parties are still due. Though INC has been a vocal supporter of the community's rights in the past, its silence on this issue is concerning.

The Naga People's Front, a north-eastern regional party has expressed opposition to same-sex marriage. Most other political parties have maintained tight-lipped silence or skirted around the issue.

As a party to the hearings, the Government of India, led by the Bharatiya Janata Party (BJP), has expressed opposition to marriage equality and has even argued that the issue must be taken up by the legislature and not by the judiciary. But since 2013, several bills favouring the LGBTQ+ community have either been ignored or not tabled. With such little support, the community has had no choice but to turn to the judiciary. Supporters have argued that some interpretations of the Special Marriage Act and other secular legislation provide space for the legalisation of same-sex marriage.

During the parliamentary debates before the implementation of this act, a former member of parliament, Vijaya Lakshmi Pandit from INC advocated for the right to choose one's partner and opined that this law might not have had immediate takers but would be demanded by future generations. During the hearings on marriage equality, CJI Chandrachud also questioned whether the existence of binary gender was really a necessary requirement for the relationship of marriage.

The tone of the court during the hearings and the openness to understand the ever-changing notion of marriage is itself a positive sign, but concrete steps must flow for any meaningful change to occur.

Time and again, courts have supported the right of an individual to marry the person of their choice. Previous court rulings, albeit for opposite-sex couples, have interpreted Article 21 of the Constitution — which stipulates the right to marry — to mean the right to marry the person of one's choice. And in the landmark Navtej Singh Johar case, the court not only decriminalised homosexuality but also asserted that the 'fact that the LGBT persons constitute a "minuscule fraction" of the country's population cannot be a ground to deprive them of their Fundamental Rights'.

In the recent Deepika Singh v Central Administrative Tribunal, the court also recognised atypical familial relationships, including queer relationships. This court has made several landmark judgements in favour of the community. Judgements regarding the recognition of transgender people as representing a 'third gender' and decriminalisation of homosexuality were also ruled by the country's Supreme Court, with the same political party in government. This leaves hope for the community that they may see another momentous judgment passed in their favour.

Laws should evolve to reflect social values. A 2021 survey indicated growing acceptance of same-sex marriages and new forms of family. In contrast to the Indian government's claim that advocacy for same-sex marriages represents an 'urban-elitist' view only, a survey by CSDS-Lokniti & Azim Premji University, covering 24,000 respondents across 12 states, shows similar acceptance for same-sex marriages across the rural and urban areas. Given the variations in samples and methodologies, it is challenging to draw

conclusive trends in public opinion from these surveys alone. Nonetheless, these surveys suggest the evolving nature of Indian society and a potential emergence of a more inclusive and accepting environment for same-sex marriage.

It is natural for the LGBTQ+ community to seek legality for a relationship valued so profoundly in Indian culture. There is a long history of same-sex unions in India, although often not legally sanctioned. The experiences of marginalised couples, who married through Hindu rites or resorted to joint suicide as a form of union when forcibly separated, highlight the deep-rooted desire for recognition and union within the Indian culture.

Legalising same-sex marriage will provide greater social acceptance, along with crucial medical and financial rights granted by a marriage certificate. By embracing marriage equality, India can uphold its values of diversity and equality. Constitutional rights must not be compromised, but rather should ensure the equal right to marry a person of one's choice, irrespective of gender and sexual orientation.

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