


Chapter 1

A Relentless March Towards Pride: Asserting Equal Marriage Rights

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ABSTRACT

Consensual homosexual activities were decriminalized by the Indian Supreme Court in 2018. This paved way for several judicial interventions to protect LGBTQ+ persons. From recognizing the marriage of a transwoman to banning infant IGM surgeries, the judiciary has contributed immensely. Unfortunately, the legislature has not fallen in line, and the community continues to be deprived of indispensable rights such as the right to marry. This chapter traces the importance of equal marriage rights and its intrinsic role in protecting other rights including healthcare, adoption, inheritance, etc. The authors will analyze the judicial breakthroughs that have taken place in the last decade and in doing so critique the statutory framework constraints that the judiciary faces. The chapter will outlay an overview of equal marriage rights from across the world. Finally, the way forward for guaranteeing the rights of the community as enshrined under India's 'transformative' constitution is discussed.

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“Nobody is dying because they don’t have a marriage certificate.”

-Mr. Tushar Mehta, Solicitor General of India

INTRODUCTION

The Supreme Court of India in *Navtej Singh Johar v. Union of India* [*Navtej*], decriminalizing homosexuality, affirmed that gender minorities (transgender, intersex, and queers) and sexual minorities (gays, lesbians, bisexuals, pansexuals, etc.) are full and equal citizens of India, on par with others without discrimination. The judiciary for years, before and after *Navtej* has been consistently striving to guarantee the rights of the LGBTQ+ community. From recognizing a marriage between a man and a transwoman to directing and ensuring the ban on intersex genital mutilation surgeries on infants in Tamil Nadu, to recognizing the right of self-identification, the contributions of the judiciary have been immense. However, even the Judiciary, owing to limited legislative support, has only been able to protect the community from the clutches of criminal prosecution and the criminal procedure at large. It has not had the way withal to affirm their rights of marriage, adoption, inheritance, etc. The legislature on the other hand has failed to further the rights of persons from the LGBTQ+ community. Even legislation meant to protect the rights of gender and sexual minorities such as the Transgender Persons (Protection of Rights) Act, 2019 has been nothing short of a disaster (Sriraam, 2020).

The reality, however, has been far from treating LGBTQ+ persons as equal citizens as they are deprived of most fundamental rights or the exercise of them as compared to the cis-heterosexual Indian population. For instance, the Legislature is yet to recognize equal marriage rights for gays and lesbians, a right that has been vested on a silver platter for the rest of the citizenry. The Indian socio-legal framework, pertaining to personal laws is built on customs and traditions synthesized with English law. The blending has run so deep that an attempt to unmix it has become implausible. Consequently, the LGBTQ+ community suffers from the twin assault of religious conservatism and colonial rigidity, which has resulted in law institutionalizing patriarchy.

Academic and legal writing focus on the discriminatory nature of laws in India and very little attention has been paid to the right of the sexual minorities to be considered equal citizens of this nation, especially on their right to family and partnership. This chapter traces the importance of equal marriage rights and its intrinsic role in protecting the fundamental and constitutional rights of LGBTQ+ persons including healthcare, adoption rights, right to property, etc. The authors analyze the judicial efforts and breakthroughs that have taken place in the last decade

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