

Same-Sex Marriage and other Queer relationships in India - A legal perspective



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1) Current Marriage law in India (Hindu / Muslim / Christian laws) - Does it explicitly define marriage as a union of one man and one woman?

Under the present system of Family law in India, citizens have a choice between their respected religion-based and community-specific marriage laws or the general and common law of civil marriage. While none of the Acts have explicitly defined marriage as a union between one man and one woman, the law has been legally interpreted and understood to mean marriage between a man and a woman through terms such as 'bride', 'bridegroom', 'husband', and 'wife'.

Marriage for Hindus, Sikhs, Jains and Buddhists are governed by the Hindu Marriage Act 1955. There is no explicit definition of marriage as a union between a man and a woman in the Act. However, even though there is no explicit definition, there is a clear heterosexist underpinning to the notion of marriage. For example, section 5 of the HMA states, inter alia, that a marriage may be solemnised between "any two Hindus" if "the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage", although the terms "bride" and "bridegroom" are not defined.

Christian marriages are governed by the Indian Christian Marriage Act 1872. Like the HMA, the Indian Christian Marriage Act 1872 does not explicitly define marriage as a union between a man and a woman. However, there is again an underlying heterosexist assumption in the notion of marriage. For example, section 60 states "the age of the man intending to be married shall not be under twenty-one years, and the age of the woman intending to be married shall not be under eighteen years".

Muslim marriages are governed by Islamic law itself, rather than any codified law by Parliament. There is no exact definition of marriage as between a man and a woman. According to the Muslim notion of marriage, marital union is contractual in nature. In spite of being solemnized by reciting verses from the Quran, it is considered as a civil contract, meant to legitimize sexual relations for procreation. As the purpose of marriage is procreation, there is a heterosexist assumption which underpins Islamic marriage.

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However, this is not a universal view, and there are competing views about homosexuality within Islam.

Under the Special Marriage Act 1954, there is no explicit definition of marriage. Again, there are heterosexist underpinnings such as the definition of a "prohibited relationship" only considering a relationship between a man and a woman within certain degrees of familial relation.

2) Is marriage a federal level law or state level law in India ?

Marriage in India is at federal level. There are several state laws regulating certain aspects of marriage, such as rules around marriage registration.

3) What are the benefits that come with Marriage in India? (Inheritance, hospital visitation rights, Pension etc..)

As there is no uniform code governing marriage, each religious law has different benefits that come with Marriage. An analysis of all the benefits that can arise through marital status will require looking into each religion's marital laws, and customs. These can vary greatly, for example for Muslim marriages they can vary from sect to sect, and region to region. However overall, some of the benefits that come with marriage include:

- Succession- Via the Indian Succession Act 1925 for civil or general marriages, the Hindu Succession Act 1956 for Hindu marriages.
- Maintenance – Obligations of husbands to provide maintenance for wives arise under several religious marital laws.
- Custody/Guardianship – Custody and guardianship can vary according to marital status and religious laws. For example, under the Hindu Minority and Guardianship Act 1956, the natural guardianship of a minor (boy or unmarried girl) is the father; if the child is illegitimate the natural guardian is the mother, and then the father.
- Pension rights – For example, under the Government of India's pension scheme for in the event of a death to an government officer due to extremist attacks, or enemy actions near border regions, widows have rights to pensions.

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- Adoption- the new CARA guidelines on adoption favour married couples and make it difficult for single persons and impossible for unmarried couples to adopt.
- A range of civil benefits including insurance benefits (Employees State Insurance Act), the Employees Provident Fund scheme (under the Provident Fund Act), the Payment of Gratuity Act, where the beneficiaries that one can nominate are limited to married partners or blood relatives.
- Benefits under the Workmen's Compensation Act and labour legislation that provides compensation to dependants in case of death and injury, since these are meant for widows and blood relatives.

4) Is legal recognition of marriages important in India? (lot of straight marriages are never registered. Wedding albums, invitations etc.. are often used as proof of marriage)

Registration of a marriage is not compulsory except under the Special Marriage Act. Since February 2006, the Supreme Court has in *Seema v Ashwani Kumar* directed State governments thrice to frame Rules for compulsory registration of all marriages irrespective of religion and personal laws of the parties. Technically, these orders have the effect of law. States are therefore in the process of making marriage registration compulsory.

In some states, laws requiring the compulsory registration of all marriages are already in force. For example, the Karnataka Marriages Act 1976 stipulates under section 3 that "every marriage contracted in the State on or after the appointment day shall be registered in the manner provided in the Act". Similarly, the Bombay Registration Marriages Act 1953, the Himachal Pradesh Registration of Marriage Act 1997 and the Andhra Pradesh Compulsory Registration of Marriage Act 2002 provide requirements for each respective state.

Notwithstanding these particular state laws, registration for marriage had different requirements according to what kind of marriage it was. Those who married under the Special Marriages Act 1954 automatically had their marriage registered by the marriage officers who had been appointed for the purpose. The Indian Christian Marriages Act 1872, and the Parsi Marriage and Divorce Act 1936, also require compulsory registration of marriages. Christians require an 'extract' of their church wedding

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as proof of their marriage. A Muslim marriage, as a civil contract, provided a legal proof of record of a marriage. Hindu marriages however did not require compulsory registration. Often, wedding photographs, invitations, evidence of co-habitation etc. are used to prove a marriage.

Of course, even if there is a roll out of compulsory marriage registration nation-wide, many marriages will remain unregistered. This will be because they are prior to the enactment of the requirement for mandatory registration; or because of the practical difficulties due to variety of customs, religions, literacy. The latter reason was expressed by the Indian government when agreeing in principle to compulsory registration of marriages under the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

5) What would it take to for the Indian system to legalize same-sex marriages?

There are two methods which could legalize same-sex marriage in India.

First, an Act, or an amendment to a current Act, could be passed through Parliament of India. In this case, there would be a Bill drafted, which is brought forward by a Member of Parliament. It would have to pass three readings, consultation with citizens, and assented by the President to before it is enacted as a law.

Second, there could be an order by the Supreme Court, which would then become a law. For example, if there was a Public Interest Litigation filed on the basis of a constitutional matter (such as the recognition of equality under Article 14 and the Special Marriages Act), and if the Supreme Court makes an order, re-interpreting the Special Marriages Act 1954, that marriage is possible between two members of the same sex, then this will become the governing law of the country.

There is also the option that we should consider to put in place a system of 'civil partnerships' that would provide the benefits that come with marriage to same sex couples, and unmarried heterosexual couples, and possibly to any two adults who would like to enter into this agreement. This would require amending related legislation on succession and adoption.

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6) The recent Lesbian episode in Haryana was widely covered by the media as legalization of Lesbian marriages in India. Is this accurate?

(<http://socyberty.com/work/lesbian-marriage-legalized-in-indian-state/>).

The reports on the lesbian marriage are from the newspapers, so unless we get hold of a copy of the order it would be difficult to say anything accurate about this. However, from our reading of the law it would be difficult for the court to have legally solemnized such a marriage.

7) How come the judge granted protection to this couple using the *high court judgment on protection for eloped couples*, if same-sex marriages are not legal in India?

While granting protection to the eloping couple is perfectly legal, and the court could grant such protection to any persons above the age of majority, from our reading of the law it would be difficult for the court to have legally solemnized such a marriage.

8) Would it be possible for other couples (male-male, female-female) to seek protection from law enforcement based on the Haryana Lesbian couple's case?

All couples can seek protection both from the police and from the courts as long as the partners are above the age of majority. The Lesbit group in Bangalore has many years of experience on the strategies that they use with runaway couples. The Alternative Law Forum in Bangalore has brought out a guide for runaway couples. However, all of these are in the context of couples seeking protection against parents, relatives or others who oppose them living together, and are not related to the issue of marriage directly.

9 a) What are the requirements for a male-to-female TG person to enter into a legal marriage with a biological male?

9 b) What are the requirements for a female-to-male TG person to enter into a legal marriage with biological female?

For both a) and b) As long as the parties registering the marriage have all the necessary documentation - age proof/ residence proof

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and they look male and female there would be no problem per se registering the marriage. The problem would arise if one of the parties to the marriage raises an objection to the effect that either party to the marriage is not capable of solemnising a marriage as they are not male/ female- in this case, the marriage would be held to be *void ab initio* (right from inception). A marriage registered- whether under SMA/ HMA between a trans- man and any woman (biologically born woman) would be *void ab initio* since the use of the words bridegroom / bride in the marriage statutes must be taken to mean persons who are born male/ female and the main purpose or religious and cultural sanction to marriage has been understood to be the propagation of lineage/ to have children etc. Hence, the problem with trying to interpret bridegroom/bride in any other manner.

For both 9 a) and b), the interesting legal question would be if the marriage is between a person who changes his/her sex medically and then gets married. If the marriage is then contested by one of the parties, an argument could be that the marriage was in fact between a 'bride' and a 'bridegroom', and therefore not void. However, there is no case law related to this in the Indian courts that we are aware of. There is precedent in other jurisdictions where such marriages have been held to be valid.

In the case of *Christine Goodwin v. The United Kingdom*, Application No: 28957/95 (Jul. 11, 2002) the European Court of Human Rights declared that the United Kingdom's failure to alter the birth certificates of transsexual people or to allow them to marry in their new gender role was a breach of the European Convention on Human Rights. It also stated that a test of biological factors could no longer be used to deny legal recognition of a change of gender.

The Yogyakarta Principles which distil international human rights law related to sexual orientation and gender identity states:

Principle 3: Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal

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recognition of their gender identity. No status, such as **marriage** or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

10) If a biological male is married to a biological female, and comes out as TG and wants to get SRS, will the marriage be considered invalid after the SRS?

The problem would arise if one of the parties to the marriage then says that the marriage is not valid (a third party cannot object to this) as either party to the marriage is not capable of solemnizing a marriage as they are not male/ female. Here the marriage would be held to be void ab initio i.e. not valid from the beginning and cannot be set right through a sex change operation.

Note: There is not much of a difference under Hindu Marriage Act and the Special Marriage Act. The statutes are almost identical. However the Special Marriage Act would become mandatory if the parties intending to marry are of different religions. Also, Special Marriage Act will have a 30 day notice period to be provided before marriage is solemnised. Also since the Special Marriage Act is not founded on religious sanction, any legal re-interpretation of the existing personal law might be easier for a marriage under this legislation.

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