

A Pathway for the Supreme Court in Ensuring Marriage Equality

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The Supreme Court on Tuesday began hearing petitions to recognise a fundamental right to same-sex marriage. We believe that Part III of the Constitution encompasses any adult person's right to marry any other adult person, irrespective of the sex or gender of either party, a formulation that is superior to merely recognising 'same-sex marriage'. The latter formulation does not cater to the marriage rights of persons who reject the binary gender distinction between a man and a woman, and our jurisprudence recognises the fundamental right of any person to choose any gender, including a third gender. If the court agrees with this understanding of the Constitution, the harder task before it would be to craft a constitutionally appropriate remedy in relation to the existing legal framework that envisages marriage as a union between a man and a woman.

Indian law regulates marriage through an extremely complicated patchwork that is made up of three categories of laws. First, there exist two **non-personal laws** concerning marriage: the Special Marriage Act and the Foreign Marriage Act. The Special Marriage Act is a general law available to any persons who are unable or unwilling to marry under a personal law. The Foreign Marriage Act concerns the recognition of marriages conducted abroad. Second, there are several statutory and non-statutory **personal laws** governing marriage (such as the Hindu Marriage Act, the Indian Christian Marriage Act and Muslim personal law). In the third category are **associated laws** that do not directly regulate marriage but allocate rights and duties on the basis of the marital status of a person as well as the sex/gender of the married person. These associated laws include those regulating citizenship, parenthood, guardianship, adoption, inheritance, healthcare, insurance, tenancy, maintenance, domestic violence and so on.

Myriad provisions in all three categories of laws very likely discriminate on the bases of marital status, sex, gender identity, religion and sexual orientation and are therefore unconstitutional. The petitions currently before the court only concern the first two categories of laws directly regulating marriage.

An incrementalist stance

The complexity of the legal patchwork makes the remedial task before the court [difficult](#), but certainly not insurmountable. The difficulty arises because judicial remedies tend to be incremental – judges can tinker with an extant legal framework on the margins within the confines of a given case, whereas comprehensive law reform is a lot easier for the legislature to undertake. To make India's marriage laws compliant with the Constitution, comprehensive reform is indeed necessary – this is possible for the judiciary to deliver in the face of an unwilling or indifferent legislature, but preferably through a series of cases where marriage equality is incrementally realised.

We argue that the court should treat this set of petitions as an opportunity to make its first incremental move, one that leaves the door open for future judicial action as well as explicitly invites the legislature to enter the fray by issuing a suspended order. This step-by-step approach is more likely to result in resilient reform over time, one that is harder to undo by a less sympathetic future court, and is also less likely to allow a Sabrimala-style mobilisation against the ruling. We articulate the contours of what such an incremental approach might look like in the instant case:

Our starting point is that the court should limit its attention in the case at hand to the non-personal marriage laws under the Special Marriage Act (and, perhaps, the Foreign Marriage Act). Although the court has in fact intervened – rightly in our view – to adjudicate upon the constitutionality of (statutory and non-statutory) personal laws in a number of cases, as a matter of legal doctrine there remains some confusion over whether personal laws are indeed subject to constitutional review. Perhaps more importantly, it is much harder to accuse the judges of interfering with matters of faith and to organise a backlash against a judgment that leaves personal laws alone.

Also read: [Same-Sex Marriages: Govt Animosity Warrants Judicial Intervention To Uphold Constitutional Rights](#)

Another reason for leaving personal laws alone for now is that the petitions mainly seek remedies under the Hindu Marriage Act – singling out Hindu law for gender neutrality in the current political environment risks feeding into the progressive-majority-regressive-minority narrative or the majoritarian-victimhood narrative. Even as it protects one type of minority, the court must be mindful of its discursive implications for other minorities. Although the court has the doctrinal capacity to reform personal laws, and has done so on several occasions, it will be strategically wise to spend the very limited political capital it currently appears to have to only reform non-personal law for now. If the court adopts this incrementalist stance, it is important for it to clarify that its refusal to adjudicate on the constitutionality of personal laws must *not* be interpreted as a finding that they are compatible with the Constitution.

Changes needed in the Special Marriage Act

Even if limiting itself to the Special Marriage Act alone, the court will have to order constitutionally-compliant reinterpretation of not one but several of its provisions. The Special Marriage Act is peppered with gendered language, all of which will need to be neutralised. Even these orders will not remove all issues with the Act. Anticipating perhaps that it would primarily be used by inter-caste and inter-faith couples, it prescribes a notoriously complicated procedure, including a long period of public notice of the couples' intention to marry, which allows any disgruntled parents – and increasingly vigilantes – to intervene to stop the marriage. In order to make the law substantively and procedurally viable for affording the right to marry to all persons, the court would need to consider passing the following directions:

First, Section 2(b) of the Act defines a technical term – 'degrees of prohibited relationship' – to forbid incestuous marriages. The provision, read with the First Schedule in the Act, expressly contemplates only a man and a woman being in such relationships. The court could read this provision down thus: 'a person and any of the persons mentioned in Part I or Part II of the First Schedule are within the degrees of prohibited relationship.' This would make the prohibition on incestuous marriages gender-neutral. Since the scope of these prohibited relationships may well be subject to a future constitutional challenge, the court would do well to explicitly recognise that it is expressing no opinion on the constitutionality of such prohibition as such.

Second, Section 4 of the Act, which lays down the conditions for the solemnisation of a marriage, speaks about a marriage being between 'any two persons'. While the provision itself does not state the gender of the two persons, the court should declare, for the sake of abundant clarity, that 'any two persons' in the main clause of section 4 of the Special Marriage Act means that either party to the marriage could have any sex or gender.

Third, Section 4(c) states the minimum age of the male party to the marriage should be 21 and of the female 18. There may be good reasons to equalise the age of consent for marriage between men and women. But given the incremental approach we are defending, we believe the court would do well to explicitly bracket off this issue of the constitutionality of different ages of marital consent for different-sex couples for a future case. For the instant case, the court could simply read in an exception in s 4(c) as follows: 'except in a marriage other than one between a man and a woman, in which case each person has completed the age of eighteen years'. The choice of the lower of the two specified ages – 18 rather than 21 years – would be justified because of the parental pressures that young LGBTQI couples face in their choice of partners.

Fourth, Schedule 3 of the Act sets out the declarations to be made by the ‘bride’ and ‘bridegroom’ at the time of marriage. Similarly, Schedule 4 sets out the format of the certificate of marriage to be issued at the time of marriage, and uses the terms ‘bride’ and ‘bridegroom’. Here, the court could declare that the terms ‘bride’ and ‘bridegroom’ shall be substituted by the gender-neutral term ‘celebrant’.



Photo: Karnika Kohli/The Wire

Fifth, the court should order all marriage officers and any other authority tasked with the enforcement of the Special Marriage Act to do so in a manner that facilitates and respects the equal right to marry of all consenting adults irrespective of their sex, gender identity, sexual orientation, caste, religion, disability or other statuses protected by the Constitution.

Sixth, Sections 5, 6, 7, 8, and 9 of the Act provide an extremely complicated framework requiring a long public notice and domicile and invite objections to the intended marriage. These are undue hurdles that are not imposed on marriages under personal laws. As such, they are patently unconstitutional and

should be struck down forthwith.

Finally, the court should declare that even though it is restricting its particular directions in the instant case to the Special Marriage Act, it holds that the Constitution guarantees (i) the right to marry to all consenting adults irrespective of their sex, gender identity, sexual orientation, caste, religion, disability and other constitutionally-protected statuses, *as well as* (ii) a similarly non-discriminatory access to all rights associated with marriage, including citizenship, parenthood, guardianship, adoption, inheritance, healthcare, insurance, tenancy, maintenance, and protection from domestic violence. There is thus a duty on all constitutional courts in future cases to reinterpret relevant laws in a manner that is constitutionally compliant, until such time as Parliament enacts a law to provide such equal access.

The first five orders we recommend above are all geared towards a single purpose – to make marriage gender-neutral. Even so, to further alleviate any concerns about separation of powers, the court could further incrementalise its remedial order by suspending the coming into force of the first five of these orders for a period of (say) one year (note that we do *not* suggest that the sixth and the final orders should be suspended). A suspension of the first five directions would afford Parliament an opportunity to come up with a workable solution to implement the constitutional right of all consenting adults to marry by adopting suitable legislative amendments. If Parliament fails to act within the given period, these orders would automatically come into effect.

Learnings from abroad

This approach is common in foreign jurisdictions, and has been adopted in equal marriage cases by the apex courts of South Africa, Taiwan and Massachusetts. If Parliament does act, it must do so within the constitutional framework prescribed by the court in the case, failing which another challenge would lie.

The South African Constitutional Court, in the case of [*Minister for Home Affairs v. Fourie*](#), had to tackle a similar argument with respect to Section 30(1) of that jurisdiction's marriage act. The court held that the omission of the words 'or spouse' alongside 'husband' and 'wife' in that statutory provision made that provision unconstitutional. It suspended this declaration for 12 months and gave Parliament that time period to cure the defect. It further held that Parliamentary inaction would result in the words "or spouse" being read into section 30(1).

Similarly, in Massachusetts, in the case of [*Goodridge v. Department of Public Health*](#), the Supreme Judicial Court redefined marriage as "the voluntary union of two persons as spouses, to the exclusion of all others." However, it stayed its ruling for 180 days for that state's legislative body to "take such action as it may deem appropriate in light of this opinion."

In Taiwan, the Constitutional Court adopted a similar route. In a case brought by [*Chi Chia-wei*](#), the Constitutional Court held that the ban on same sex marriage within the Civil Code was unconstitutional. It gave Parliament a period of two years within which to amend existing laws or to create new laws, compliant with its ruling. It further held that legislative inaction would result in a legal position where same sex couples can apply for a marriage as a legally recognised couple and partake in all the rights and obligations of marriage.

Also read: [At Least 11 of 21 Former Judges Opposing Same Sex Marriage Are Not as Sanskari as They Seem](#)

The Canadian Supreme Court has also held in several cases, including [Schachter v Canada](#), that a suspension of a declaration of a law's unconstitutionality is an available remedy under its human rights charter.

Critics of this suspension approach may worry that the court should not rely upon parliamentary action for recognising the marital rights of LGBTQI persons. However, what they miss is the fact that, as the examples cited above show, a legislature's failure to act need not preserve the status quo. As long as the court makes it clear, the suspended order would automatically come into force upon the expiry of the judicially prescribed time if Parliament fails to act.

Preparing public opinion

Admittedly, this course of action would not provide immediate remedy to the petitioners and other members of the LGBTQI community. Nor will it provide a full remedy, because even a reinterpreted Special Marriage Act would still need to interact with an entire panoply of associated laws to extend the rights and duties associated with marriage to all couples: something our incremental approach would leave for judicial resolution on a case-by-case basis or to legislative resolution whenever Parliament decides to undertake wholesale reform. However, the strong constitutional declaration under the final direction in the list outlined above would set up a clear normative framework to guide future judicial and legislative action. We note that incrementalism need not necessarily mean gradualism – the successive cases could come close on the heels of each other, and the organic judicial development of the law could be achieved within years rather than decades.

Backlash against court judgments is almost always an opportunistic political strategy rather than a spontaneous popular reaction. It might be more [protective of all minorities](#) – sexual, political, religious – in the long-run to adopt an approach that provides as little fuel for majoritarian counter-mobilisation as possible. Avoiding engagement with personal laws for now is therefore advisable. An incrementalist approach allows a larger conversation on the issue within civil society, avoiding too sharp a disjuncture between the law and the society it leads. It buys time for the preparation of public opinion for radical social change, thus ensuring that while rights protections expand somewhat slowly, they are more robust and resistant to reversal over time.

India is going through a turbulent time, when its [entire constitutional edifice is arguably under threat](#). The court needs to spend its limited political capital wisely, defending not only LGBTQI persons, but also religious minorities, political opposition, ideological dissidents and other groups facing the wrath of the ruling dispensation. After all, courts in authoritarian and semi-authoritarian contexts have to routinely

make [strategic calculations](#) to determine whether they can push, when, and how much. India sadly is at least a semi-authoritarian – rather than a democratic – regime today. The timing of this case – with a general election looming in 2024 – demands much judicial wisdom, strategic statecraft and a principled pragmatism from the court.

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Disclaimers:

- 1. Opinions expressed in this piece are strictly personal.*
- 2. Rahul Bajaj and Aishwarya Singh are former Judicial Law Clerks of Chief Justice Chandrachud.*

This article went live on April eighteenth, two thousand twenty three, at thirty minutes past eleven in the morning.

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