India must legalize same-sex marriage

Even after the Supreme Court of India’s landmark Indian Penal Code Section 377 judgment in Navtej Singh Johar vs Union Of India (in 2018), the LGBTQIA+ community in India has continued to fight for equal rights. The community continues to fight for same-sex marriage recognition in India.

The two lawyers who were at the forefront of the Navtej judgment, Arundhati Katju and Menaka Guruswamy, revealed one year after the Navtej judgment that they were a same-sex couple, and soon after, launched the “Marriage Project”: an initiative to legalize same-sex marriage in India. As of now, there are multiple public interest litigations (PILs) working their way through various High Courts across the country seeking to recognize this form of marriage under Indian law. And although not much yet has come out of it, the Delhi High Court recently gave the Bharatiya Janata Party-led government in New Delhi one “last opportunity” to respond to these PILs, which have been pending for months now.

Its dismal record on LGBTQIA+ rights means a positive response from the Modi government is unlikely. The government maintained a deafening silence on the Section 377 decision once the verdict was out, and at the time of its hearing, too, deliberately chose not to take a stand. The stance of the BJP’s parent organization, the Rashtriya Swayamsevak Sangh (RSS), on homosexuality, on the other hand, has softened over the years, even if it still doesn’t go far enough.

As Sunil Ambekar points out in his book, “The RSS: Roadmaps for the 21st Century,” the organization now supports the 377 decision, but still does not support gay marriages in India, because it believes it will institutionalize homosexuality and hence, should be prohibited. Even the solicitor general of India, Tushar Mehta, made his opposition to a same-sex marriage recognition in the Hindu Marriage Act (1956) petition very clear, stating that “our law, our legal system, our society, our values do not recognize” same-sex marriages.

We need to take stock of these developments and ask ourselves why Indians of all faiths still seek religious approval for homosexuality and same-sex marriage, even though religious opinion on these issues is evidently antiquated and out of step with modern times. Even today, possibly the only issue that unites people of faiths (including the RSS) is opposition to gay rights in general and same-sex marriage in particular.

Ever since the movement for gay rights gained global prominence, however, various progressive countries across the world began updating their marriage laws and including same-sex couples into their legal ambit. India is clearly lagging behind, so much so that the country’s courts took close to 25 years to merely decriminalize consensual and private same-sex activity. Surely the time has come to march forward and grant the gay and lesbian community basic civil and political rights — rights that are long overdue.

Apart from religious opposition, another important reason why marriage laws across the world have continued to exclude homosexuals is because of the erroneous myth that homosexuality is a mental disorder. In 1973, the American Psychological Association (APA) declassified homosexuality as a mental illness and thereafter, paved the way for civil rights for gay and lesbian people in the United States. The Indian Psychiatric Association (IPA) took 45 years to follow suit and released its official statement just months before the Navtej judgment in 2018.

But the damage was already done. From faith leaders to parents, doctors, politicians, and teachers, even today, most Indians mistakenly think homosexuality is unnatural, abnormal and something in need of a cure. Even though the Navtej judgment rebutted each of these arguments by unequivocally stating that
homosexuality was, in fact, neither unnatural nor abnormal, it has failed to pierce the imagination of the common person.

With the meteoric rise of the RSS-BJP machinery, we are presently witnessing what some have called “homohindunationalism;” and if India wishes to save its secular fabric, Indians should put religious differences aside and not only support the call to legalize same-sex marriage in India, but also ensure that this right extends to people of all faiths.

As with any marriage law, this one should also have clear provisions for divorce, maintenance, inheritance and adoption. In addition to constitutionally recognizing same-sex marriage, Indian courts should also enact legal safeguards that would prohibit religious leaders from overturning this decision and justifying further discrimination against the LGBTQIA+ community — at any time now or in the future. We have come too far ahead to go back in time.

In the troubling times of ordinances like those against “love jihad,” it is indeed questionable whether something as radical as same-sex marriage might actually come to fruition in India. But one must never give up hope.

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