INSIGHT: SOUTH ASIA

Will India become the second Asian jurisdiction to recognize same-sex marriage?

THE TAKEAWAY

India is bracing for a landmark verdict in April when the country's Supreme Court will hear an estimated 28 different petitions by private citizens asking for legal recognition of same-sex marriage. The Bharatiya Janata Party-led (BJP) Indian government's opposition to the petitions raises questions about the BJP's political ambitions and nationalistic expressions, with the party's emphasis on Indian "values" and culture. With a majority of the Indian public in favour of equal rights for same-sex couples, the question is: Despite the Indian government's opposition, will India become the second Asian jurisdiction, after Taiwan, to legalize same-sex marriage?

IN BRIEF

On March 12, the Indian government formally opposed the recognition of same-sex marriages in a filing to the Supreme Court of India, pre-emptively urging the apex court to reject all pleas challenging the current legal framework. According to the government, there is a "legitimate state interest" in limiting the legal recognition "to marriage/union/relation as being heterosexual in nature." On

March 13, petitions for the recognition of same-sex marriages were directed to a five-judge constitutional bench of the Supreme Court. The hearing will begin on April 18 and will be livestreamed.

IMPLICATIONS

Historically, transgenderism and non-binary gender identities were an established part of South Asian culture, until British colonial-era laws banned non-procreative sex, particularly impacting homosexuality, to allegedly protect British soldiers from the exotic "temptations of the Orient" and to "modernize Indian society." As a result, the Indian Penal Code, introduced by the British in 1862, included section 377, which criminalized all sexual acts "against the order of nature." In 2018, the Indian Supreme Court decriminalized the controversial section 377. However, these colonial binaries around monogamy and heteronormativity continue to influence Indian society's attitudes towards same-sex marriages.

In the Indian government's recent statement opposing same-sex marriage, they claimed that "[l]iving together as partners and having sexual

relationships by same-sex individuals [sic] … is not comparable with the Indian family unit concept of a husband, a wife and children." But it maintains that other forms of relations are not necessarily unlawful. This raises crucial questions about the central government's emphasis on Indian values and its perception of marriage.

Does the government's position on same-sex relations reflect that of the Indian public? According to a 2021 Ipsos survey, 58 per cent of Indians believe that same-sex couples should be allowed some sort of legal recognition, and 66 per cent believe that same-sex couples should be able to adopt children. These shifting societal views suggest that the interpretation of the Indian family unit will continue to broaden in the years to come.

The central government did not vocalize its position on the judicial decision to decriminalize section 377 in 2018. However, Pink List India — the country's first archive of politicians supporting LGBTQ+ rights — highlighted that 115 of 161 Members of Parliament have so far expressed support for LGBTQ+ rights, with most of them belonging to the ruling BJP.

The livestreaming of the case implies a stronger spotlight on LGBTQ+ rights in India, and will be critical for the roughly eight per cent of the Indian population who identify as LGBTQ+. Interestingly, in the past, the BJP government opposed the livestreaming of petitions to recognize same-sex marriages, claiming the matter lacked national importance. Livestreaming the hearing could be political posturing by the ruling BJP government to maintain its vote bank ahead of the 2024 Indian general elections, or a tactic to demonstrate greater transparency in governance, especially given the country's role as president of the international G20 summit in 2023.

WHAT'S NEXT

1. Striking a delicate balance

One of the key points in the government's recent statement opposing same-sex marriages was how

it "would cause a complete havoc with the delicate balance of personal laws in the country and in accepted societal values." Personal laws in India deal with marriage, family, divorce, etc., and differ based on religion to conform with normative customs and practices. However, historically, such personal laws have not hindered same-sex couples among marginalized communities. Feminist scholar and activist Ruth Vanita's book *Love Rite* argues that marginalized communities across India, including tribals (Indigenous Peoples) and Dalits, have a long history of recognizing same-sex unions. The government, by citing India's "personal laws" to oppose same-sex marriage, portrays itself as a voice for marginalized communities. But the communities themselves haven't asked the government to advocate for them on this issue. Meanwhile, they allege the government is neglecting their more urgent demands.

2. Redefining Indian families

Marriages in India have a socio-cultural significance, with the roles of family and their social acceptance prioritized within the institution. According to the Hindu Marriage Act, along with Muslim and Christian personal laws, there is an emphasis on the heteronormative demarcation of identities within marriage, which in turn governs the structure of a "family unit." The central government's further contention that recognizing same-sex marriages will have negative implications for children raised in such households attaches an unnecessary social stigma while simultaneously denying same-sex couples (and their children) the legal recognition of being a family. This has broader implications for their rights of inheritance, divorce, alimony, and parenthood.