
SAME SEX MARRIAGE: JUDICIAL AND LEGAL REFORMS

Aditya Malhotra, Jindal Global Law School, Sonipat

INTRODUCTION

The word "LGBTQ" encompasses a diverse group of individuals whose gender and sexual orientations do not conform to the heterosexual norm. The phrase in question lacks a specific meaning and is commonly denoted by the usage of the "+" symbol. The acronym "LGBTQ" is an abbreviation for the terms Lesbian, Gay, Bisexual, Transgender, and Queer. The term "LGBTQ" solely pertains to the sexual orientation of an individual.

The LGBTQ community has been struggling since a long time to receive global acceptance. Particularly in India, the topic for the same has been in discussion since August 11, 1992, when the first gay rights protest was conducted. The movement was carried by 7 members of AIDS Bhedbhav Virodhi Andolan (ABVA), who published "*Less than Gay*", due to the discrimination they faced. The report's objective was to demand rights in India, as it imposed Section 377 of The Indian Penal Code, The Army, Navy, and Air Force Act of 1950.

Section 377 of The Indian Penal Code pertained to "unnatural offences" and was applicable to anyone belonging to the aforementioned group. In addition to experiencing infringements of their rights, several individuals within the society also encounter instances of discrimination in other domains such as workplaces, employment, adoption, and maintenance, among others. In recent times, the decriminalization of same-gender sexual activity has taken place in India; nonetheless, the broader cultural acceptability and recognition of rights pertaining to this matter remain withheld.

OBJECTIVE OF RESEARCH

The objective of this research is to understand the following:-

- (a) To understand the concept and history of the LGBTQ community

- (b) To interpret the concerns of same sex marriage in India and Abroad
- (c) To interpret, whether same sex marriage should be legal India? If yes, then how will it affect the community at large?
- (d) Do the current laws violate Fundamental Rights, as stated in The Constitution of India?

HISTORY

Same-sex unions were observed in ancient Greek and Roman societies, as well as certain parts of ancient China. In comparison to ancient Egypt, Mesopotamia exhibited a greater degree of acceptance towards same-sex marriage rituals and ceremonies.

Ancient Indian holy scriptures contain references to homosexual characters, indicating a cultural acceptance and celebration of diverse personal relationships. The Rigveda has the teaching "Vikriti Evam Prakriti," which asserts that what is considered aberrant is also inherent in the natural order. Despite the prevailing disapproval of homosexuality during the Middle Ages, there was a broad disposition among individuals to exhibit tolerance towards one another, refraining from engaging in acts of harassment or discrimination on the basis of sexual orientation. Shakuntala Devi's seminal work, "The World of Homosexuals," was initially released in 1977, offering a comprehensive exploration of the LGBT population within the context of India. In the year 1994, a legal amendment was enacted to officially acknowledge Hijras as a unique gender category with the right to participate in the electoral process. The original legal petition contesting the constitutional validity of Section 377 of the Indian Penal Code, 1860 was dismissed. During the Delhi Sultanate (1296-1316), Mubarak, the offspring of Allauddin Khilji, engaged in a romantic relationship with a member of the court nobility. The founder of the Mughal dynasty, Babur, exhibited a notable degree of emotional openness in his written expressions for a youthful individual whom he affectionately referred to as "Baburi." There are being documented cases in which Nobel emperors engaged with homosexual activities.

On the contrary, various religious scriptures and practices prohibit such kind of ideology. According to Baudayana Dharmasutra, a man who ejaculates his semen in any place other than vagina becomes a thief, which is equal to committing a murder of a brahmin. This statement can

be also interpreted that homosexuality or masturbation is a pure sin and against the norms of the society. Different scriptures have different opinions on this matter, which lands us back to square 1, should Same Sex Marriage be allowed in India?

CONCERNS

The presence of significant religious and cultural resistance is a prominent determinant in the ongoing endeavor to legalize same-sex marriage within the Indian context. A prevailing cultural and theological belief posits that the institution of marriage is exclusively reserved for heterosexual couples, consisting of one man and one woman. The legal system acknowledges just two gender categories, namely male and female, for the purpose of defining marriage. Individuals belonging to the LGBTQ community are encompassed under this demographic, hence rendering them unable to enter into matrimony or get legal recognition.

Certain members of the local community assert that the institution of marriage loses its significance with the legalization of same-sex marriage, as it is argued that the fundamental objective of marriage, namely procreation and the perpetuation of lineage, becomes unattainable.

Legal matters, such as those pertaining to taxation, post-divorce alimony, transfer or inheritance of property, and the adoption of a child by a same-sex partner, can elicit concerns.

Members of the LGBTQ community contend that when all the aforementioned aspects are consolidated and juxtaposed with those of heterosexual couples, it unequivocally contravenes the principles of the Right to Equality¹ and the Right to Life and Personal Liberty². These essential rights are explicitly enshrined in Part III of the Constitution of India.

ANALYSIS

India is a nation characterized by its conservative values and commitment to secularism, ensuring the protection of individuals' rights to freely exercise their chosen religious beliefs. As a nation with a strong religious inclination, the culture interprets and evaluates many aspects through the

¹ Article 14 of The Constitution of India.

² Article 21 of The Constitution of India.

lens of faith. Within the realm of diverse religious beliefs, there exists a prevailing perspective that casts a negative light onto the institution of same-sex marriage. Section 377 of The Indian Penal Code delineates that any connection falling under the purview of this provision renders the involved parties susceptible to criminal liability, hence subjecting them to jail and monetary penalties. This legal framework might be perceived as discriminatory against same-sex marriages. In 2018, an amendment was made to Section 377 of The Indian Penal Code, resulting in the decriminalization of same-sex marriage. The matter was examined in the case of *Navtej Singh Johar v. Union of India*.³ Nevertheless, the Delhi High Court rendered a significant verdict in response to a legal suit initiated by a non-governmental organization (NGO), ruling that Section 377 of The Indian Penal Code is unconstitutional. Despite the recognition of same-sex marriage in India, the absence of a dedicated legal framework for registering marriages between individuals of the same sex remains a significant unresolved matter.

The matter of same-sex marriage in India is multifaceted, encompassing many cultural, religious, and legal viewpoints. In the Indian context, marriage is perceived as a social agreement between two individuals and is widely observed, with a strong emphasis on cultural customs and practices. The LGBTQ community frequently faces discrimination because to societal perceptions that perceive their relationships as abnormal. Nevertheless, the Delhi High Court rendered a verdict asserting that the denial of the right to marry for same-sex couples constitutes a breach of their basic rights. However, this judgment was subsequently reversed by the Supreme Court of India, which determined that the matter of marriage should be entrusted to the legislative body's discretion. To date, the Indian Government has not enacted any legislation specifically aimed at safeguarding LGBTQ persons from discriminatory practices. As a result of the prohibition on marriage, couples are ineligible to access the associated benefits.

The United States government, under the administration of former President Donald J. Trump, endeavored to curtail the rights of a certain population. The assertion made by former President Donald J. Trump posited that the existence of only two genders, namely male and female, is an incontrovertible fact. Furthermore, he expressed his intention to impose legal repercussions upon

³ *Navtej Singh Johar v. Union of India - Global Freedom of Expression*. (2018, November 27). Global Freedom of Expression. <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/>
In-Text Citation: (*Navtej Singh Johar V. Union of India - Global Freedom of Expression*, 2018)

individuals who engage in dissent regarding this matter. Such a stance directly contravenes the First Amendment of the United States Constitution, which safeguards the right to assemble and express one's views through protest. The United States has historically served as a significant arena for the advancement of LGBTQ rights.

Another worry that is emphasized within the context of the same-sex marriage legislation pertains to the adoption of children or the utilization of surrogacy to bring a kid into the family. Commercial surrogacy in India is considered a criminal offense, hence resulting in criminal punishment. Gaining a comprehensive understanding of this aspect from a psychological standpoint is of utmost importance, surpassing a mere legal perspective. Based on a research study, it has been observed that children who are raised by same-sex parents may have restricted exposure to conventional gender role models, hence influencing their comprehension of gender roles and gender identity. The aforementioned reasoning is in flagrant contravention of Article 14 and Article 21 of The Constitution of India.

The United Nations Convention on the Rights of the Child, widely regarded as one of the most ratified international human rights treaties, does not explicitly address the issue of adoption by same-sex couples. Furthermore, in accordance with The Juvenile Justice Act of 2015, it is stipulated that unmarried males are prohibited from adopting female children in India. Consequently, it raises the question of whether this regulation extends to same-sex married couples, namely those comprising of homosexual individuals.

JUDICIAL REVIEW OF LGBTQ RIGHTS IN INDIA

The Indian Judiciary system has been quite proactive over the last decade; however, the legislature has been procrastinating from the same. Over the last few years, various judgements have been given by The Supreme Court of India. Some of the most crucial judgements are as follows:-

Abhijit Iyer Mitra Case⁴

This case raises inquiries regarding the legal acknowledgment of same-sex marriage within the

⁴ Thapliyal, N., & Law, L. (2022, December 20). *Live Law*. Live Law. <https://www.livelaw.in/news-updates/delhi-hc-abhijit-iyer-mitra-retweet-judiciary-biased-217194>. In-Text Citation: (Thapliyal & Law, 2022)

framework of both The Hindu Marriage Act and The Special Marriage Act in India. According to the pronouncement made by the Central government, the legalization of Section 377 would not provide the right to enter into matrimony. The subject under consideration pertains to longstanding cultural practices and the institution of marriage, which are rooted in ceremonial customs and societal norms. Based on Indian cultural norms, marriage is regarded as a social agreement with spiritual dimensions, hence excluding the legal recognition of same-sex unions. The responsibility of determining lies within the purview of the government and legislative bodies.

***Naz Foundation V. Government of NCT of Delhi*⁵**

The petition was filed under the jurisdiction of the Delhi High Court in this significant legal dispute. The bench was composed of two esteemed justices, namely Chief Justice Ajit Prakash Shah and Justice S. Muralidhar. The court ruled that deeming consensual homosexual activity between consenting adults as a criminal offense is a breach of their basic rights, as safeguarded by the Constitution of India. This ruling resulted in the decriminalization of gay conduct. In the case of Suresh Kumar Koushal v. Naz Foundation, the Supreme Court of India rendered a decision that resulted in the reinstatement of Section 377 of The Indian Penal Code. In the case of Navtej Singh Johar V. Union of India, 2018, a panel comprising five judges rendered a verdict that effectively decriminalized gay activities.

***Shakti Vahini V. Union of India*⁶**

The group known as Shakti Vahini has initiated legal proceedings by filing a writ petition in accordance with Article 32 of the Constitution of India. The persons in question expressed a desire to initiate measures pertaining to cases involving the act of honor killing, specifically targeting both individuals and couples. The subject under consideration was to the permissibility of family members of a married couple engaging in the conduct commonly referred to as honor killing. Does

⁵ Mahawar, S. (2021, September 5). *Unconstitutionality of Section 377 of IPC : overview of Naz Foundation v. Government of NCT of Delhi - iPleaders*. iPleaders. <https://blog.ipleaders.in/unconstitutionality-section-377-ipc-overview-naz-foundation-v-government-nct-delhi/>

In-Text Citation: (Mahawar, 2021)

⁶ *Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors.* (n.d.).

<https://privacylibrary.ccnlud.org/case/justice-ks-puttaswamy-ors-vs-union-of-india-ors#:~:text=The%20nine%20Judge%20Bench%20in,of%20dignity%2C%20autonomy%20and%20liberty.>

In-Text Citation: (*Justice K.S. Puttaswamy (Retd.) & Anr. Vs. Union of India & Ors.*, n.d.)

Article 21, which pertains to the right to life and personal liberty, encompass the rights of an individual to select a life partner? The Supreme Court of India, in its ruling, emphasized that the act of punishing or obstructing the marriage between two consenting adults by panchayats is deemed unlawful.

K.S Puttaswamy V. Union of India⁷

In the case of Suresh Kumar Koushal v. Naz Foundation, the Naz Foundation presented an argument to the esteemed Supreme Court of India, contending that Section 377 of the Indian Penal Code infringed upon the right to privacy. In response, the Supreme Court provided a comprehensive analysis of the scope and extent of the right to privacy. The court acknowledged that instances of the LGBTQ community being targeted and their privacy being violated via the misuse of Section 377 have occurred, but deemed such actions unjustifiable. In the Aadhar Judgement (K Puttaswamy V. Union of India), Chief Justice D.Y. Chandrachud made an observation that sexual orientation is encompassed under the broad scope of the right to privacy. Furthermore, he asserted that the LGBTQ community should not serve as a basis for denying individuals their inherent rights. The Supreme Court of India has rendered a verdict affirming that the right to privacy is an inherent and basic right as enshrined in Article 21 of the Constitution of India, which guarantees the right to life and personal liberty. This ruling instilled a sense of optimism throughout the community, since it raised the possibility of future repeal or amendment of Section 377 of The Indian Penal Code.

RECENT DEVELOPMENTS

India, till date does not recognize same sex marriage or civil unions, though same sex couples can attain the rights and benefits as a live-in couple, as per The Supreme Court of India landmark judgement decision in *Deepika Singh V. Central Administration Tribunal*, in August 2022.

⁷ Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors. (n.d.).

<https://privacylibrary.ccgnlud.org/case/justice-ks-puttaswamy-ors-vs-union-of-india-ors#:~:text=The%20nine%20Judge%20Bench%20in,of%20dignity%2C%20autonomy%20and%20liberty.>

In-Text Citation: (Justice K.S. Puttaswamy (Retd.) & Anr. Vs. Union of India & Ors., n.d.)

On 25th November 2022, The Supreme Court of India agreed to hear nine petitions, which were pending before the honorable Delhi High Court and honorable Kerala High Court.

On 19th December 2022, Sushil Modi told parliament that India has a population of 1.6 billion and that two judges cannot declare a verdict on the same. Sushil Modi also suggested that the matter should be debated in Parliament, as well as opinions of the public should also be taken into consideration.

The Transgender Persons (Protection of Rights) Bill, 2019, was passed with the aim of safeguarding the rights of individuals within the LGBTQ community. Its primary purpose is to prevent discrimination in several domains, including work, education, healthcare, and access to both government and private institutions. Nevertheless, the aforementioned community expressed their disapproval of the measure on the grounds that it infringes upon their basic rights. The aforementioned justifications are as follows. The legislation forbids individuals from exercising agency in determining their sexual orientation, a fundamental aspect of the right to privacy as established in the NALSA judgment. The legislation stipulates penalties for "Sexual abuse against Transgender" that carry a maximum sentence of two years, but a same offense committed against a woman would result in a potential jail term of up to seven years. The proposed legislation seeks to provide a framework for promoting "inclusive education and opportunities," although it lacks a specific and detailed strategy for implementation. The absence of provisions for scholarships, quotas, the establishment of safe environments in educational institutions and businesses, as well as the availability of rehabilitation clinics for families that have opposing views, is evident.

On October 18, 2023, the Supreme Court of India issued a ruling pertaining to the legal recognition of same-sex marriage. Despite the court's decision to deny the legalization of same-sex marriage, it did, however, bestow equal rights upon the LGBTQ population. The court also emphasized that its function is limited to the interpretation of extant legislation, since it lacks the authority to establish new laws, a power exclusively placed in the Parliament of India. The petitioners put out the argument that the term "Marriage" as defined in the Special Marriage Act of 1954 should be interpreted as a union between "Spouse" rather than only between "Man and Woman". Upon considering the aforementioned reasons, Chief Justice of India D.Y. Chandrachud rendered a ruling affirming the ability of transgender individuals engaged in heterosexual relationships to

enter into marriage. Additionally, he stated that unmarried couples, including same-sex couples, have the ability to collectively pursue the adoption of a child.

CONCLUSION

Throughout the process of writing my research paper, I have been constantly thinking about the day-to-day problems that the community has to face, for something which is quite natural, for something they don't have control over, yet they are being discriminated and criticized for the same. However, there is also a different aspect of the same when it comes to being adopted by the society at large.

India is a country, which highly expresses and stands on its traditions and heritage. Although homosexuals' human being, same as heterosexuals, and should be provided with the right to marriage, and the legal remedies that come with it, but certain demands of the community are a such, for which India, as a nation is not ready.

Same Sex marriage should be allowed as it should be up to the discretion of the person, to decide that with whom the individual want to spend his/her life with. On the contrary, demands such as adoption of a child, or giving birth to a child through surrogacy might not be a healthy option for the child. As the world perceives, the role of a mother, is very different from a father. Both individuals are equally responsible for the upbringing of the child. A mother's role consists of emotional support and care, whereas a father's role consists of preparing a child for the real-world challenges, for making his son or daughter mentally strong, which is something that psychologist aren't sure of whether homosexual would be able to provide such mental and emotional support. The perception of how LGBTQ community views the world at large and is different from other people.

During my research, I was also not sure, how the child will perceive this knowledge of being told that an individual is adopted and not the couple's biological child. The legal aspect of same sex marriage is also very different from heterosexual couples. One of my greatest concerns is that, if all these demands are fulfilled, and that LGBTQ community is allowed to adopt children, will this also include a married gay couple and bisexual couples, to adopt a girl child as their daughter? As per Section 375 of The Indian Penal Code, an unmarried male is not allowed to adopt a girl, so

will this law hold true for the same? The judgement by The Supreme Court of India on 18th October 2023, allows heterosexual couples to adopt a child but it nowhere mentions if the conditions of adoption. As per the existing laws, an unmarried man cannot adopt a girl child due to the threat of rape, but the judgement nowhere mentions the same for bisexual couples. This difference between the conditions of adoption between an unmarried man and a heterosexual couple directly violate right to equality⁸, right against discrimination ⁹, and right to life and personal liberty¹⁰, Fundamental Rights that are mentioned under Constitution of India.

According to my considered opinion, it is important to think, not just from the community's perspective, but also from the societal point of view. A discussion should be conducted, views should be gathered, pros and cons of the same should be understood, and then a decision should be taken, whether same sex marriage and the rest of the demands, be allowed or not.

From the current society's mentality, in my opinion, India is not ready to have a law, which validates same sex marriage.

⁸ Article 14 of The Constitution of India.

⁹ Article 15 of The Constitution of India.

¹⁰ Article 21 of The Constitution of India.