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Constitutional Comparison of the Legalization of Same-sex Marriage in Brazil and India

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ABSTRACT

In India, where marriages are considered to be an auspicious bond between a male and a female, the concept of same sex marriage seems quite absurd. Glimpses of homosexuality can be seen in various ancient temples and texts, but they were rarely accepted during that time. The best example is that of Shikhandi who was born as a female but was raised as a male by her father, king Drupad. He also married her off to a princess but when she got to know the truth of Shikhandi, she left her. When during that era, we couldn't accept homosexuality, then it would be extremely difficult to accept it during modern times, keeping in mind the fact that since the era of colonization we have become more reserved and conservative with regards to our customs and traditions. We have become incapable of adapting ourselves to new ideas and concepts quickly and without any efforts.

Same-sex marriage means the union between two people who have the same sexual chromosomes. Defining it more clearly, for example, two women marrying each other or two men marrying each other. In this case, the person is attracted to another person who is of the same sex. This is due to differences in sexual orientation. Sex refers to the biological and physiological characteristics that define humans as male, female, or intersex, including reproductive anatomy and genetic differences. Sexual orientation, on the other hand, is about who individuals are emotionally, romantically, and sexually attracted to, such as being heterosexual, homosexual, bisexual, or asexual.

Brazil legalized same-sex marriage in 2013, reflecting a

significant shift in its constitutional and societal landscape. This study examines how Brazil navigated constitutional provisions, public opinion, and religious influences to achieve this milestone despite being a Catholic society. On the other hand, making a comparison with India that has complex sociocultural fabric and diverse legal system and the unique challenges that potentially will take birth in legalizing same-sex marriage. One of the primary challenges in India would be the opposition from conservative sections of society and religious groups. The diverse religious landscape of India where traditional views on marriage are deeply rooted, poses a significant barrier. There is also the potential for political backlash, given the contentious nature of LGBTQ+ rights in the country.

However, the legalization of same-sex marriage in India could bring substantial advantages. It would mark a significant step towards equality and non-discrimination, reinforcing basic and necessary constitutional principles of justice, liberty, and fraternity. Legal recognition of same-sex marriages would provide LGBTQ+ individuals with legal rights and protections, including inheritance, adoption, and spousal benefits, thereby enhancing their social and economic security. Through this paper the authors intend to present a comparison of the constitutional validity of the legalization of same-sex marriage in Brazil and India, focusing on the potential challenges, advantages, and disadvantages if such laws were implemented in India. Through this paper the authors also aim to understand the economic, social and political impact on Brazil due to legalization of same-sex marriages.

KEYWORDS

India, Brazil, LGBTQ+, Same-sex Marriage, Comparative Constitution.

I. INTRODUCTION

The terms like LGBTQ+, Homosexuality and same-sex marriage have been in conversation in almost every country since the last few years. Each and every country has been working towards providing equal rights and opportunities to the people belonging

to this group. Countries like Netherlands, Brazil, Australia etc. have been successful in providing them similar rights as that of heterosexuals. While, there are still many countries that are hesitating to do so. India is somewhere between the hesitating countries and the progressive countries. It took 71 years for India to decriminalise homosexuality and there are still miles to go before LGBTQ+ persons are treated as equals.

The term homosexuality has been derived from the Greek word “Homos” which means “Same”. While, “Sexuality” refers to the sexual feelings or sexual attraction which a person feels towards other people. Therefore, the combination of both these words means having sexual feelings or sexual attraction towards the person belonging to the same sex. As far as Ancient India is concerned, there are many monuments that display the acts of homosexuality, and there are various researches as well, which mention that the religious texts and manuscripts have traces of the concept of homosexuality. As per researches, some ancient texts mentions that homosexuality was openly accepted in the society while some state that it was considered as an offence.¹ All these facts are actually true or not is something which can be debated upon. When Britishers captured India, they disapproved homosexuality and made it a punishable offence under the Indian Penal Code, 1860. Even after getting independence, homosexuality was still considered a crime till the year 2018.

Brazil shares a similar history as that of India. Since 1500, Portuguese ruled over Brazil and it criminalised homosexual acts.² In 1830, as soon as Brazil freed itself from them, they legalized homosexuality. Moreover, in 1988 when Brazil's

¹ The Pre-Colonial History of Homosexuality in India: Why Love Is Not Western (Part I/III), (June 29, 2021), <https://www.lawctopus.com/academike/history-of-homosexuality-in-india/>

² LGBTQ rights in Brazil, <https://www.equaldex.com/region/brazil>

constitution was being made, provisions relating to prohibiting all forms of discrimination were introduced. Since then the laws relating to LGBTQ+ people have been strengthened.

The concept of same sex marriage is quite different from homosexuality. Having homosexual rights does not guarantee same sex marriage rights. In India, the rights of LGBTQ+ persons are very limited and we have not reached a stage where we are comfortable in providing them with this right. On the other hand, Brazilians are quite liberal and there the LGBTQ+ people have been enjoying same sex marriage rights since 2013.

As we would move further in our research paper, we would be understanding if it would be feasible for India to provide same sex marriage rights.

1. LEGAL FRAMEWORK IN INDIA

The Hindu Marriage Act, 1955

The Hindu Marriage Act, 1955 ³ is an act enacted for the purposes of amending and codifying the laws relating to marriage among the Hindus (Vira Shaiva, Lingayat, Brahmo, Prarthana or Arya Samaj) in India which as per Section 2 (1) is applicable to Buddhists, Jains, and Sikhs in India as well. The Act does not define what a marriage is but for a marriage to be considered legal and valid it has certain conditions vested under Section 5.

Section 5 of the Hindu Marriage Act, 1955 ⁴ states the conditions for a Hindu Marriage. Following are the conditions:

³ The Hindu Marriage Act, 1955 (Act 25 of 1955): Preamble.

⁴ The Hindu Marriage Act, 1955 (Act 25 of 1955): Section 5.

- Neither party should have a living spouse at the time of marriage (monogamy).
- Both parties must be capable of giving valid consent, meaning they should not be of unsound mind.
- The groom must be at least 21 years old, and the bride must be at least 18 years old.
- They must not be within the degrees of prohibited relationship unless the customs or traditions allow such marriage.
- They should not be *sapindas* (close blood relatives) unless allowed by their custom.

Section 5 has nowhere mentioned that marriage takes place only between a man and a woman but between two Hindus. But the third condition states the words bride and groom making it clear that it cannot be homosexual.

Further Section 7 of the Hindu Marriage Act, 1955⁵ that talks about Ceremonies for a Hindu Marriage states that a Hindu marriage must be solemnized according to the customary rites and ceremonies of either party. One essential part of the ceremony is the performance of *saptapadi* (taking seven steps) before the sacred fire, which is considered a binding part of marriage. Section 7 again does not mention that such ceremonies of marriage must be done between only a man and a woman.

The Hindu Marriage Act, 1955 does not explicitly recognize or permit same-sex marriages. Traditionally defining marriage as

⁵ The Hindu Marriage Act, 1955 (Act 25 of 1955): Section 7

a union between a man and a woman, and many of its provisions are based on this assumption. The Hon'ble Supreme Court of India in its landmark judgment of ***Navtej Singh Johar v. Union of India*** ⁶ decriminalized consensual homosexual relationships by striking down parts of Section 377 of the Indian Penal Code, 1860 (hereinafter referred as IPC) this did not extend to the formal recognition of same-sex marriages under Indian laws, including the Hindu Marriage Act. Although the criminal laws have now been repealed and replaced by Bharatiya Nyaya Sanhita, 2023 ⁷ and the new law does not have any such provision.

As of now, however, same-sex marriages remain unrecognized under the Act, and the courts have not yet ruled in favour of legalizing them. The recognition of same-sex marriage in India requires a judicial ruling and also a strong legislative amendment to existing laws like the Hindu Marriage Act or even more considering making a new law for regulating same-sex marriages.

Muslim Personal Laws

In Muslim Personal Laws, marriage (nikah) is seen as a civil agreement rather than a religious sacrament, which is different from Hindu marriage laws. The fundamental principles of a Muslim marriage are based on Islamic law (Sharia), and the specific regulations governing Muslim marriages in India are derived from various sources, including the Quran, Hadith, and customary practices. Muslim marriages are governed by the Muslim Personal Law (Shariat) Application Act, 1937 ⁸, and customary law. Here are the key elements of marriage under

⁶ Navtej Singh Johar v. Union of India, (2018) 1 SCC 791

⁷ Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023)

⁸ Muslim Personal Law (Shariat) Application Act, 1937 (Act 26 of 1937)

Muslim law:

1. Marriage as a Contract: In Islamic law, marriage is a legal agreement between two consenting individuals. The agreement establishes mutual rights and responsibilities between the spouses but is not considered a sacrament. The agreement can be terminated through divorce.⁹

2. Essential Requirements of a Valid Muslim Marriage:¹⁰

1. **Proposal and Acceptance:** Marriage necessitates a proposal (*ijab*) from one party and acceptance (*qubool*) by the other in the presence of two male or one male and two female witnesses.
2. **Free Consent:** Both parties must give their free and valid consent to the marriage. If any party is coerced into marriage, it can be declared null and void.
3. **Mehr (Dower):** The husband must offer a dower (*mehr*) to the wife as part of the marriage agreement. It can be a monetary sum or property and can be paid either immediately or deferred.
4. **Capacity to Marry:** Both parties must have the legal capacity to marry, meaning they should be of sound mind, must have attained puberty (15 years is presumed to be the age of puberty), and should not be within prohibited degrees of relationship (unless permitted by their respective school of Islamic law).
5. **Prohibited Relationships:** Marriages are not permitted between close blood relatives (within certain degrees of

⁹ Dr. Paras Diwan, Family Law, Allahabad Law Agency, 2022 Ed.

¹⁰ *Supra Note 7.*

consanguinity) and foster relationships. Marrying someone within these prohibited degrees renders the marriage void.

3. Types of Marriages:¹¹

1. **Valid (Sahih):** When all conditions of a valid marriage are met.
2. **Void (Batil):** Marriages that violate conditions like consanguinity or affinity.
3. **Irregular (Fasid):** These marriages may become valid if specific irregularities, like the lack of witnesses or invalid *mehr*, are rectified.

4. Polygamy:¹²

Under Muslim personal law, a man can have up to four wives simultaneously, provided he treats them fairly, meaning that he is able to maintain and provide for them equally. Polygamy is acknowledged, but polyandry (a woman having multiple husbands) is strictly prohibited.

Considering the aforementioned provisions of Muslim personal laws in India, as interpreted through traditional Islamic jurisprudence, same-sex marriages are not recognized. Islam defines marriage as a contract between a man and a woman, and the relationship is primarily intended for procreation and companionship. Same-sex relationships are generally considered haram (forbidden) in Islamic theology.

The Quran and Hadith (sayings of Prophet Muhammad)

¹¹ *Supra Note 7.*

¹² *Supra Note 7.*

provide strict moral guidelines on sexual conduct, and homosexuality is typically viewed negatively within this framework. Consequently, there is no provision under Islamic law or Muslim personal laws in India that permits or validates same-sex marriages.

Since marriage falls under personal laws for Muslims, any change in this area would require either new legislation or a significant shift in Islamic jurisprudential interpretation. Muslim personal laws in India do not acknowledge or validate same-sex marriages, and the law continues to view marriage as a heterosexual institution. Legal recognition of same-sex marriages under Muslim personal laws would likely require both legal reform and religious reinterpretation.

Indian Christian Marriage Act, 1872

The Indian Christian Marriage Act, 1872 regulates the marriages of Christians in India, laying down the guidelines for marriage solemnization, registration, and the necessary procedures for a marriage to be legally valid under Christian law. The Act's key provisions concerning marriage are as follows:

1. Solemnization of Marriage: Marriages can be solemnized by a licensed minister of religion or a government-appointed marriage registrar. The ceremony must take place in a recognized church or place of worship under the Act. At least two witnesses must be present, in addition to the officiating person.¹³

2. Conditions for a Valid Marriage:¹⁴

¹³ The Indian Christian Marriage Act, 1872 (Act 15 of 1872): Section 4

¹⁴ The Indian Christian Marriage Act, 1872 (Act 15 of 1872): Section 60

1. **Age of the Parties:** The male must be at least 21 years old, and the female must be at least 18 years old at the time of marriage.
 2. **Consent:** Both parties must freely and knowingly consent to the marriage.
 3. **Prohibited Degrees of Relationship:** Marriage between parties within certain prohibited degrees of relationship (close relatives) is not permitted unless sanctioned by the customs of the concerned community.
- 3. Registration:** After the marriage is solemnized, it must be registered with the Registrar of Marriages in accordance with the Act's provisions. The registration serves as official evidence of the marriage.¹⁵
- 4. Notice of Intended Marriage:** If a couple plans to marry, a public notice must be given to ensure there are no objections.¹⁶

The Indian Christian Marriage Act, 1872, like most Indian laws, is based on traditional definitions of marriage, which presuppose a union between a man and a woman. The Act does not explicitly address or recognize same-sex marriages. The provisions of the Act, including the solemnization, registration, and conditions of marriage, apply only to heterosexual unions. However, the Indian Christian Marriage Act does not allow for the solemnization or registration of same-sex marriages.

2. LEGAL FRAMEWORK IN BRAZIL

Brazil has taken significant steps towards achieving marriage

¹⁵ The Indian Christian Marriage Act, 1872 (Act 15 of 1872): Section 27

¹⁶ The Indian Christian Marriage Act, 1872 (Act 15 of 1872): Section 12

equality by legally recognizing same-sex marriage. This progress has been achieved through a series of judicial rulings and administrative regulations, ultimately leading to the nationwide acknowledgement of same-sex marriages in 2013.

Constitutional Basis

The legal basis for same-sex marriage in Brazil is grounded in the country's Constitution, which was adopted in 1988. While the Constitution does not explicitly address sexual orientation or same-sex marriage, its broad principles have enabled courts to interpret the law in a manner that ensures equal rights for all citizens, including LGBTQ+ individuals.

Key constitutional principles relevant to the legal framework include the equality of all individuals before the law (Article 5 of the Constitution of Federative Republic of Brazil ¹⁷), without any form of discrimination based on gender or sexual orientation, and the protection of human dignity, which has consistently been invoked by courts to recognize the rights of same-sex couples.

Prior to the legalization of same-sex marriage, same-sex couples could register as de facto unions (*união estável*) from 2004 to 2011, granting them certain rights similar to those of married couples, such as inheritance rights, pension benefits, and the ability to adopt children together. However, these unions were not entirely equivalent to marriage.

Evolution of Same-Sex Marriage Rights

In 2011, Brazil's Supreme Federal Court (STF) delivered a groundbreaking decision in the ADI 4277 ¹⁸ and ADPF 132 ¹⁹

¹⁷ Constitution of the Federative Republic of Brazil: Article 5

¹⁸ Direct Action, 4277

¹⁹ Action for Breach of Fundamental Rights, 132

cases, ruling that same-sex unions should be recognized as stable unions (*união estável*) under Brazilian law, thereby granting same-sex couples the same rights as opposite-sex couples in civil unions. This decision was based on the constitutional principles of equality and non-discrimination.

Subsequently, following the Supreme Court's 2011 ruling, same-sex couples sought the right to convert their stable unions into marriages, leading to various regional court decisions recognizing same-sex marriages in different parts of Brazil. However, there was no uniform legal standard across the country.²⁰

In 2013, the National Justice Council (*Conselho Nacional de Justiça, CNJ*)²¹ issued Resolution No. 175, mandating that all civil registries across Brazil perform same-sex marriages and convert civil unions into marriages if requested. This resolution effectively legalized same-sex marriage nationwide without the need for additional legislative action, based on the premise that preventing same-sex couples from marrying was unconstitutional and violated their rights to equality and dignity.

Existing Legal Structure for Same-Sex Marriage

Following the CNJ's resolution in 2013, same-sex marriages are regarded the same as heterosexual marriages according to Brazilian law. The legal framework for marriage in Brazil, in accordance with the Civil Code (Código Civil), is equally applicable

²⁰ ICJ, ADI (Ação Direta de Inconstitucionalidade) 4277 and ADPF (Arguição de Descumprimento de Preceito Fundamental) 132, Supreme Tribunal Federal of Brazil, <https://www.icj.org/sogicasebook/adi-acao-direta-de-inconstitucionalidade-4277-and-adpf-arguicao-de-descumprimento-de-preceito-fundamental-132-supreme-tribunal-federal-of-brazil-5-may-2011/> (5th May 2011)

²¹ National Justice Council (CNJ) Resolution No. 175 (2013) – Mandating the recognition of same-sex marriages across Brazil, available at the CNJ's official page.

to all couples, irrespective of sexual orientation.²²

1. **Marriage Procedures:** Same-sex couples go through the same marriage procedures as opposite-sex couples, including applying for a marriage license, conducting the marriage ceremony, and registering with civil authorities.
2. **Family Law:** Same-sex couples possess identical rights and responsibilities concerning family law, encompassing inheritance, division of property, adoption, and parental rights.
3. **Adoption:** Brazilian law permits same-sex couples to jointly adopt children, and they are granted the same parental rights as any other married couple.
4. **Spousal Benefits:** Same-sex spouses have equivalent access to spousal benefits, such as social security, health insurance, and pension benefits.

Brazil has also put into effect laws designed to safeguard LGBTQ+ individuals from discrimination. In 2019, the Supreme Federal Court (STF) declared that discrimination based on sexual orientation and gender identity is a criminal offense, equating it to the crime of racism.²³

Brazil's recognition of same-sex marriage reflects a broader trend towards heightened legal protections for LGBTQ+ individuals. While legal recognition exists, societal acceptance has been diverse. Brazil is a varied society with strong religious influences, and LGBTQ+ individuals still encounter social and institutional obstacles. Nonetheless, the legal framework offers strong

²² Brazilian Civil Code (Código Civil) – The Civil Code governs marriage and family law in Brazil. Updated editions are available at various legal databases, including official Brazilian government publications.

²³ Action of Non-Compliance with a Fundamental Precept (ADO) No. 26 and Mandado de Injunção (MI) No. 4733

protections for marriage equality.

3. IMPACT OF LEGALIZATION IN BRAZIL

Brazil, through this bold move has significantly impacted various aspects. The legalization of same-sex marriage has brought in profound economic, social and political impact on its society domestically and globally. Domestically, it has shown progress as a modern society where discrimination of all forms is in the process of elimination against the people of the LGBTQ+ community and globally they have set standards as to acceptance of such persons and providing recognition of their various rights which inherently includes the right to marry the person of their choice irrespective of sex.

1. Economic Impact

The legalization of same-sex marriage has resulted in an increase in consumer spending, particularly in the wedding industry, as more couples are getting married and investing in wedding services, travel, and related activities, which has had a positive impact on the economy.

Brazil has witnessed a surge in LGBTQ+ tourism due to its more inclusive environment, benefiting the local tourism industry and economy as international LGBTQ+ tourists perceive Brazil as a safe and welcoming destination.²⁴

The legalization of same-sex marriage has granted LGBTQ+ individuals' access to financial and legal benefits such as joint property ownership, inheritance rights, and health insurance, leading to improved financial stability for same-

²⁴ Thiago Amparo, Same-sex marriage under attack in Brazil: Analysis, Heinrich-Böll-Stiftung Logo <https://www.boell.de/en/2023/12/14/same-sex-marriage-under-attack-brazil>

sex couples and an increased demand for legal and financial services.

Inclusive policies regarding employee benefits and workplace practices are being increasingly adopted by companies, contributing to a more inclusive business environment, which has the potential to enhance worker productivity and diversity in the workforce.²⁵

2. Social Impact

Legalizing same-sex marriage marks a significant milestone in advancing social equality for LGBTQ+ individuals, contributing to a reduction in the stigma surrounding same-sex relationships and strengthening LGBTQ+ communities.

The legalization has facilitated easier adoption for same-sex couples, leading to the formation of diverse family structures in Brazil. This has notably increased the visibility and acceptance of various family models, particularly in urban areas. There has been an expansion in public awareness and education about LGBTQ+ rights, particularly in urban areas. However, traditional attitudes toward marriage and family may still prevail in rural areas, resulting in social divisions.²⁶

Although there has been legal progress, Brazil still harbours conservative and religious groups that are opposed to same-sex marriage. This opposition has at times resulted in social

²⁵ Sueann Caulfield, The Recent Supreme Court Ruling on Same-Sex Unions in Brazil: A Historical Perspective, <https://quod.lib.umich.edu/i/ij/11645653.0001.103/--recent-supreme-court-ruling-on-same-sex-unions-in-brazil?rgn=main;view=fulltext>

²⁶ *Supra Note 22.*

tensions and instances of discrimination, highlighting the ongoing challenge of achieving widespread societal acceptance.

3. Political Impact

The initial drive behind the legalization of same-sex marriage in Brazil came from judicial rulings rather than changes in legislation. The courts interpreted the Brazilian Constitution to grant marriage rights to same-sex couples, emphasizing the principle of equality before the law. This has impacted ongoing discussions about constitutional rights and the judiciary's role in Brazil.

The issue of same-sex marriage has caused division in Brazilian politics, with progressive political parties and movements supporting it as part of a broader effort to advance LGBTQ+ rights, while conservative and religious groups have frequently opposed it, leading to ideological conflicts in political discussions. As the LGBTQ+ community becomes more visible and gains legal rights, there has been an increase in political activism. Some members of the LGBTQ+ community have gained representation in Brazilian politics, advocating for further legal protections and reforms.

Brazil's decision to legalize same-sex marriage has established the country as a leader in LGBTQ+ rights in Latin America. This has influenced other countries in the region and bolstered Brazil's reputation in international human rights forums, aligning the country with global movements toward equality and non-discrimination.²⁷

²⁷ Auto Convidado, Gay Marriage in Brazil, Koetz Advocacia,

4. ADVANTAGES OF LEGALIZING SAME-SEX MARRIAGE IN INDIA

The quest for equal recognition of same-sex marriage has sparked fervent debate and impassioned discourse within civil rights movements. Same-sex marriage has been a highly debated issue in the fight for equal rights. Despite the legalization of same-sex marriage and the increased rights and protections for the LGBTQ + community in many countries, there are still nations where same-sex marriage is not legally acknowledged, leading to unequal rights and privileges for same-sex couples compared to heterosexual couples. This lack of recognition denies same-sex couples' legal benefits such as inheritance, hospital visitation, and child custody rights, perpetuating discrimination and inequality.

There is a shift occurring, with more nations acknowledging the significance of legalizing same-sex marriage for equality and social progress. The journey for LGBTQ + rights has been arduous and lengthy, marked by substantial progress but with ongoing struggles. One of the most controversial issues has been the recognition and legalization of same-sex marriage, with certain countries and societies vehemently opposed to its acceptance. Despite this opposition, same-sex marriage has evolved into a global movement, with an increasing number of countries providing legal recognition to same-sex couples.

There are multiple advantages which the persons from the LGBTQ+ community will enjoy if same-sex marriage is legalized in India:

1. The Golden Rights

Article 14 of the Constitution of India which talks about

<https://koetz.digital/gay-marriage-in-brazil/>

equality before the law states that, “*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*” The principle of equality is such a positive and progressive concept. It makes an emphasis that Courts can command the State to provide equal treatment to all persons in similar circumstances, but Courts cannot command the State to do any action that is illegal.²⁸ This principle of equality is an important fundamental right as it upholds the principles of justice, equity, and good conscience.

If same-sex marriage is legalized in India, it would promote and uphold the principles of equality as well as non-discrimination as provided for under Article 15 (1) of the Constitution of India which states that, “*The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth, or any of them.*” Such non-recognition of the marriage rights of the persons of LGBTQ+ community infringes Article 15 (1) as it also mentions about non-discrimination based on sex. It would provide a recognition to the people of the LGBTQ+ community and make them stand in the same footing as the heterosexual couples. Such legalization would also focus on dismantling the stigmatization and systematic discrimination faced by such persons in various facets of life.

Article 21 of the Constitution of India, one of the most important fundamental rights of protection of life and personal liberty states that, “*No person shall be deprived of his right to life and personal liberty except according to the procedure established by law.*” This right includes right to

²⁸ Usha Mehta v. Government of Andhra Pradesh, (2001) SCC OnLine AP 751

live with dignity, autonomy, and its scope is as huge as an ocean. Not recognizing and legalizing the same-sex marriage, denies the liberty of such persons from choosing whom to marry. It further isolates them from participating in family life, equal access to social, legal, and financial protections. Thus, legalization of same-sex marriage will uphold multiples rights of people of the LGBTQ+ community under Article 21.

2. Economic Benefits

In banking sectors, many insurance policies for couples are formulated. Such policies are highly beneficial for families in contingencies. Legalization of same-sex marriages will allow homosexual couples to avail such services and enjoy the benefit of family financial policies through recognized banks.²⁹ India is a country where the common people focus on savings of money through insurance policies and housing to a larger extent, although various other investment methods also exist. Such recognition will allow the homosexuals from availing loans, they can avail credit facilities, and all other banking facilities.

It would help the people of the LGBTQ+ community by having a reliable investment plan, opening of joint bank accounts, designation as nominees, retirement policies and so on. Inheritance rights, taxing policies, and other spousal benefits would be accessible to them enabling their community to progress economically.³⁰

²⁹ O'Connell, A. (2013). Same-Sex Marriage and Financial Planning. *Journal of Financial Service Professionals*, 67(3), 41-48.

³⁰ Badgett, M. V. L. (2009). *The Economic Benefits of Marriage for Gay Couples*. Gay and Lesbian Rights and the Economy, University of Massachusetts Amherst.

3. Health Care Benefits

In health care institutions, people of the LGBTQ+ community shall gain rights to make decisions related to access to health care insurance plans for spouse, family and so on. Spouses are often the beneficiaries of various health care insurance policies, and such would be beneficial for same-sex couples as well if they have legal recognition.³¹ Such persons are often victims of discrimination for being in relationships with person of same sex leaving them no room to be at mental peace. Providing them a legal formal recognition to marry the person of same sex will contribute to normalize their relationship in the society which will improve their mental health as well.

4. Enhanced Protection

Legal protection under both domestic and international law would be more readily available to same-sex couples. Equal property and inheritance rights would be guaranteed, and their partner's family could not have a legal claim on their possessions at death. Legal recognition of same-sex marriage would also simplify visa and citizenship for foreign spouses. As more countries are beginning to recognise same-sex marriages, if India were to follow this path Indian same-sex couples could get married abroad and thus secure the right's provided by foreign jurisdictions.³²

5. Promoting Social Justice and Human Rights

Legalizing same-sex marriage would be a strong statement

³¹ McCarthy, M. (2013). "Health Care Access for LGBTQ+ Individuals." *New England Journal of Medicine*, 368(15), 1368-1371.

³² Sitaraman, K. (2013). "Same-Sex Marriage and International Human Rights Law." *International Journal of Constitutional Law*, 11(3), 521-530.

of India's commitment to human rights and social justice. More than 30 countries globally have legalized same-sex marriage, and India's recognition to same would be indicative of its support to the global human rights norms. It will promote inclusivity and challenge the traditional patriarchal and heteronormative structures of society, thereby working towards a more inclusive society.³³

6. Precedent for Broader LGBTQ+ Rights

Legalizing same-sex marriage has the potential to open conversations about other LGBTQ+ rights such as strengthening antidiscrimination laws that protect LGBTQ+ people against discrimination in employment, housing, and education. A positive legal step forward for same-sex marriage could reinforce other gender-related reforms, particularly on nonbinary and transgender identity and status in law.³⁴ It would reiterate constitutional commitments to equality, dignity, and non-discrimination in India. Same-sex marriage legalization also has direct benefits such as better health access and outcomes, economic security, and social recognition. Further, reaching same-sex marriage would mark another important milestone in the fight for broader LGBTQ+ rights in India.

5. CHALLENGES OF LEGALIZING SAME-SEX MARRIAGE IN INDIA

Living in a country where laws are influenced by the age-old customs and where people are of the belief that marriage can be

³³ Helfer, L. R., & Voeten, E. (2014). "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe." *International Organization*, 68(1), 77-110.

³⁴ Reynolds, A. (2013). "Same-Sex Marriage as a Precursor for Broader LGBTQ+ Rights." *Political Research Quarterly*, 66(4), 867-880.

solemnised only between a man and woman, legalising same sex marriage can be quite challenging as it would require changes not only in various laws but in societal attitudes as well. Following is the list of problems which LGBTQ+ people might have to face before they are granted same sex marriage rights.

1. Legal obstacles:

In the case of **Shafin Jahan v. Asokan K.M. and others**³⁵, by referring to Art. 16 UDHR³⁶ and Article 16(2) of Indian Constitution, the Supreme Court stated that the right to marry is a person's own choice under Art. 21 of the Indian Constitution. Moreover, a person cannot be restricted on the grounds of religion, race, caste, sex, and place of birth. But in the case of **Navtej Singh Johar v. UOI**, the court stated that since, right to marriage is not a fundamental right and none of the personal laws recognise same sex marriage, therefore, the court cannot read words into the legislation. Only the Parliament and State Legislature can make any amendments in the personal laws.

2. Social and Cultural barriers³⁷:

Cultures and traditions play a huge role in marriages. Since time immemorial, marriages have been considered to be a union between a man and woman. While, same sex unions have been considered to be morally wrong, and unnatural. Moreover, religion too plays an important role. For example, in Hinduism, due to lack of proper evidences relating to

³⁵ Shafin Jahan v. Asokan K.M. and others (2018) SCC OnLine SC 343

³⁶ Universal Declaration of Human Rights

³⁷ Swastik Yadav, Same-sex Marriage in India: A road to legalisation and a comparative analysis with other Countries,

www.legalserviceindia.com/legal/article-10820-same-sex-marriage-in-india-a-road-to-legalization-and-a-comparative-analysis-with-other-countries.html

acceptance of same sex marriages in ancient times, many interpretations of Hindu Scriptures have been made which consider same sex marriage as sinful. Similarly in other religions as well, it has been considered immoral.

3. Amending various laws:

Currently all the personal laws protect the rights of only heterosexual marriages. Therefore, legalising same sex marriage would require major amendments in all the laws relating to marriage, adoption, inheritance, divorce, etc. It would be advantageous for the same sex couples as they too would get the same rights and protections as that of heterosexual couples but amending all such laws would take quite a lot of time due to a large-scale opposition from conservative groups who regard same sex marriages as sinful.

4. Procreation issues:

It is a belief that the aim behind marriage is to procreate. But it would be difficult for same sex couples to have a biological child. Therefore, union of such people would lead to popularity of surrogacy which is against the natural order of things³⁸.

6. SIGNIFICANT CASE LAWS

Consensual sexual relations between individuals of the same sex were historically considered within the scope of Section 377 of the erstwhile IPC. However, in 2009, in the case of ***Naz Foundation***

³⁸ Same sex marriage in India, Drishti IAS (17th October 2023), <https://www.drishtiias.com/daily-updates/daily-news-analysis/same-sex-marriage-in-india>

v. Government of NCT of Delhi³⁹ the Delhi High Court overturned this interpretation, stating that Section 377 cannot be applied to punish consensual sexual activity between adults as it violates the right to privacy and personal liberty guaranteed under Article 21 of the Constitution. The High Court also argued that singling out and categorizing homosexual individuals contradicts the equal protection clause outlined in Article 14 of the Constitution.

Following the Delhi High Court's ruling, various organizations and individuals dissatisfied with the decision appealed to the Supreme Court. They contended that decriminalizing homosexuality was unacceptable, asserting that the right to privacy should not cover criminal acts, which had been classified as offenses under the IPC. Additionally, they expressed concerns about the potential impact on marriage and feared that the ruling could encourage young people to engage in same-sex activities.

In 2013, the Supreme Court overturned the decision of the Delhi High Court in the case of **Naz Foundation (India) Trust v. Suresh Kumar Koushal**⁴⁰. The Hon'ble Supreme Court of India observed that only the Parliament has the power to legalize homosexuality, not the Court. It was further observed that Section 377 did not target any specific group of people, but rather criminalized specific acts. It emphasized that only a small number of individuals within the Queer community had been prosecuted under Section 377. Despite this setback, several petitions were submitted to the Supreme Court seeking a review of the case.

In 2014, legal recognition was given to transgenders as third gender through the case **NALSA v. Union of India**⁴¹. The National

³⁹ (2016) 15 SCC 619

⁴⁰ (2014) 3 SCC 220

⁴¹ (2014) 5 SCC 438

Legal Services Authority of India (NALSA) took a huge initiative to protect the rights of the transgender persons. Shri Gowri Sawant (a transgender), through NALSA initiated the movement for legal recognition of persons who do not fall under the category of either male or female. The Transgender Persons (Protection of Rights) Act, 2019⁴² came into picture because of this landmark judgment.

In 2016, five members of the LGBTQ+ community renowned Bharatanatyam dancer Navtej Singh Johar, restaurateurs Ritu Dalmia and Ayesha Kapur, hotelier Aman Nath, and media person Sunil Mehra filed a new writ petition. Their aim was to abolish Section 377 IPC, particularly in cases where it criminalized consensual same-sex intercourse. The results of this petition became evident two years later, in 2018.

Section 377 of the IPC dealt with unnatural offenses. In the case ***Navtej Singh Johar v. Union of India***⁴³, the Hon'ble Supreme Court of India partially decriminalized this provision, where in consensual same-sex intercourse among adults was allowed. This was a bold move which became a door to the recognition of the rights of the people of the LGBTQ+ community. But this particular section of Section 377 has been removed from the current BNS, which is an Act that replaced the IPC. The removal of this section presents challenges in ensuring protection against non-consensual intercourse for individuals in the LGBTQ+ community.

Another challenging judgment was delivered by the Hon'ble Supreme Court of India via an three-judge constitution bench in the case of ***Supriyo @ Supriya Chakraborty and another v. Union of India***⁴⁴ denied the recognition of same-sex couples to

⁴² The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019)

⁴³ (2018) 1 SCC 791

⁴⁴ 2023 SCC OnLine SC 1348

enter into marriages or have any civil unions equivalent to marriages. It was further held that there is marriage does come with an absolute right, and the same cannot be guaranteed as a fundamental right to same-sex couples. Further explaining the decision, it was observed that marriage shall be recognized by customs and statutes, since there is neither any custom nor any legislation that recognized marriage of same-sex couples, such a right is not inherent to them. People of the LGBTQ+ community are free to be in consensual relationships of same sex, but their marriage has not been provided a legal recognition.

In Brazil, the perspective on the legalization of same-sex marriage differs significantly, as the recognition was granted back in 2013, almost a decade ago. The Constitution of the Federative Republic of Brazil, 1988 establishes the foundation for equal rights and non-discrimination. It sets the goal of promoting the welfare of all individuals without bias in Article 3, Item IV⁴⁵, and ensures equality before the law in Article 5⁴⁶. While the Constitution doesn't explicitly address same-sex marriage, it provides a framework that the courts later interpreted as supportive of equal rights for LGBTQ+ individuals.

In 2004, a state court in Rio Grande do Sul issued the first recognition of a same-sex civil union. Although this decision didn't immediately legalize same-sex marriage, it marked the initial judicial recognition of same-sex relationships, paving the way for broader legal changes. The turning point came in May 2011 when the Supreme Federal Court (STF) of Brazil, through a unanimous decision, ruled that same-sex civil unions (união estável) should have the same legal rights as opposite-sex civil unions. The basis

⁴⁵ Constitution of the Federative Republic of Brazil, 1988: Article 3, Item IV

⁴⁶ Constitution of the Federative Republic of Brazil, 1988: Article 5 on Equality and Non-discrimination

for the court's decision was the principles of dignity, equality, and non-discrimination found in the Constitution.

The pivotal case in Brazil that set the stage for the legalization of same-sex marriage was **Action for Declaratory Relief of Unconstitutionality (ADI) 4277** and **Argument for Breach of Fundamental Precept (ADPF) 132**⁴⁷; these two cases led to this groundbreaking ruling. These cases were brought forward by the Prosecutor General of the Republic and the state of Rio de Janeiro, respectively, seeking to extend the rights of civil unions to same-sex couples. The Court ruled that denying same-sex couples the same rights as heterosexual couples violated the Constitution's principles of equality and human dignity. This decision effectively legalized same-sex civil unions across Brazil.

Despite the 2011 Supreme Court ruling extending civil union rights to same-sex couples, it did not automatically ensure access to civil marriage. Some lower courts were still hesitant to permit same-sex couples to marry⁴⁸. In May 2013, the National Justice Council (CNJ) issued Resolution 175, which prohibited notaries from refusing to register same-sex marriages. This resolution was significant because it applied nationwide, guaranteeing that same-sex couples could marry in any state without needing to assert their rights in court. The CNJ based its decision on the 2011 Supreme Court ruling and argued that denying same-sex couples' access to marriage was unconstitutional and violated the

⁴⁷ ADI (Ação Direta de Inconstitucionalidade) 4277 and ADPF (Arguição de Descumprimento de Preceito Fundamental) 132, Supreme Tribunal Federal of Brazil (5 May 2011), <https://www.icj.org/sogicasebook/adi-acao-direta-de-inconstitucionalidade-4277-and-adpf-arguicao-de-descumprimento-de-preceito-fundamental-132-supreme-tribunal-federal-of-brazil-5-may-2011/>

⁴⁸ Supreme Federal Court (STF) Decision (2011) – ADI 4277 and ADPF 132, The 2011 Supreme Federal Court decision that recognized the legal rights of same-sex civil unions, using principles of equality and dignity, (<http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=179439>)

right to equality. This resolution effectively legalized same-sex marriage across Brazil, without requiring additional legislation⁴⁹.

Although conservative groups challenged the CNJ resolution, these challenges were unsuccessful. The Supreme Federal Court reaffirmed the CNJ's resolution by rejecting appeals that sought to overturn the legalization of same-sex marriage, confirming that the right to marry was constitutionally protected for same-sex couples⁵⁰.

Brazil's journey to legalizing same-sex marriage did not involve legislative action but evolved through judicial interpretations of constitutional principles. As of 2013, same-sex marriage is fully legal, and couples enjoy the same rights and responsibilities as heterosexual couples⁵¹. These legal milestones illustrate how Brazil's judiciary played a central role in advancing the rights of LGBTQ+ individuals, making it one of the first countries in Latin America to legalize same-sex marriage.

7. CONCLUSION

Through this paper, the authors have presented a comparative study on the legalization of same-sex marriage in Brazil and India, where major focus is presented on the distinct constitutional and societal frameworks. Homosexuality in India, despite ancient cultural mentions, has faced huge legal and societal opposition especially during the colonial era which criminalized homosexual acts but the same was decriminalized in the year 2018. Brazil

⁴⁹ National Justice Council (CNJ) Resolution 175 (2013): This resolution mandated that notaries could not refuse same-sex couples the right to marry , (<https://www.cns.gov.br/en/councilresolutions/>)

⁵⁰ Supreme Federal Court (STF) Decision Upholding CNJ Resolution (<http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=241430>)

⁵¹ National Justice Council (CNJ). (2013). Resolution 175: Legalization of same-sex Marriage, (<http://www.cnj.jus.br/buscaatosadm?documento=2576>).

shares a similar history where during the colonial era homosexuality was criminalized but Brazil broke this by legalizing same-sex marriages in 2013. India and Brazil share certain similarities in their historical treatment of homosexuality where both have been influenced by colonial era laws.

Legal and social obstacles still remain in India due to conservative views, religious opposition, and the need for reforms in legislation. Brazil's constitution, although does not explicitly address sexual orientation, upholds the principles of equality and non-discrimination, which enabled the courts to progressively grant rights to LGBTQ+ individuals. Despite such important provisions provided for in the Indian Constitution, rights of LGBTQ+ people in India are very limited. Starting with recognition of civil unions in 2004, Brazil's national Justice Council had legalized same-sex marriage nationwide in 2013 but India on the other had denied to accept civil unions between same-sex couples through the case of ***Supriyo @ Supriya Chakraborty and another v. Union of India***.⁵²

Through this paper, the authors have identified and analyzed the potential challenges and advantages of legalizing same-sex marriages in India and the impact such legalization caused in Brazil.

⁵² 2023 SCC OnLine SC 1348