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Same-Sex Marriage and Need for Constitutional Development

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ABSTRACT

This paper explores a significant issue of India's non-recognition of same-sex unions is examined in this essay, with a special focus on the social and legal background of the matter. It begins by highlighting the fundamental concept of human rights and the struggle of the Indian homosexual community to have these rights recognized. Examining the importance of same-sex union legal recognition, the difficulties LGBTQ persons have in gaining governmental benefits and cultural acceptability are highlighted. Supporters advocate for recognition based on morality included in the constitution and fundamental rights, citing international human rights norms. The study dispels objections based on historical, social, and cultural settings, disputing claims that same-sex marriage is a "Western" idea at variance with Indian customs. There is a strong emphasis on recent Supreme Court decisions upholding constitutional morality. The study concludes by suggesting a possible path of action through judicial interpretation of the Special Marriage Act, which is founded on constitutional morality, to grant same-sex partnerships legal recognition. The article provides a comprehensive explanation and rationale for India's constitution's recognition of same-sex unions overall.

KEYWORDS

LGBTQ+, Constitution, International Human Rights

INTRODUCTION

According to Section 377 of the Indian Penal Code, having sexual contact with someone of the same sex consensually is "Against the rules of Nature" and is therefore forbidden. The Naz Foundation Trust contested the validity of this section, claiming that it violates Articles 14, 15, 19, and 21 among other fundamental rights. It further asserted that this section's definition of "sex" was

restricted to childbearing. Later, on September 6, 2018, a five-judge court unanimously repealed Section 377 of the Indian Penal Code, prohibiting same-sex relationships between consenting adults in the Union of India v. Navtej Singh Johar case. The court also declared that the clause will be followed. Adulterous sexual acts that are consensual would not be penalized under the IPC; only actions taken without consent would. In ruling on the Suresh Koshal case, the court stated that legislation and parliament, not the court, would determine whether or not two people of the same sex could get married. The Special Marriage Act's concept of marriage is dissected in this essay, along with its potential relevance to gay couples. Legally speaking, the ruling decriminalized consenting to sex with a homosexual partner, but it did not remove the social stigma associated with it for married couples. Analyzing same-sex marriage in India is to promote equality and legal recognition for LGBTQ+ individuals and groups, counteract discriminatory and stigmatizing colonial legacies, and foster societal acceptance of these communities. It is a part of the greater LGBTQ+ rights movement that advocates for equality nationally and internationally in India.

AMENDMENTS BY PARLIAMENT AND THE CONSTITUTION OF INDIA

An important turning point in Indian history was the passage of the Special Marriage Act, which made marriages between people of various social groups and religious beliefs lawful. To formally recognize gay couples as married pairs, the parliament must overcome a few gaps in the Special Marriage Act. Child procreation is the main cause.

Procreation of children was the foundation for marriage in Dr. B.R. Ambedkar's Hindu Law bill. The Supreme Court is currently considering several petitions requesting that it invalidate the Special Marriage Act of 1954 or extend its application to weddings between any two individuals, irrespective of their sexual orientation or gender identity. The Special Marriage Act of 1954 and the Hindu Marriage Act of 1955, which were passed by the Parliament, are lawful examples of the authority bestowed by the Constitution, and their execution does not infringe upon any of the fundamental rights safeguarded by Part 3 of the Constitution. The court ruled that same-sex marriages are not permitted under the Hindu Marriage Act or the Special Marriage Act because they do not support the fundamental tenet of marriage, which is procreation. However, the court acknowledged that marriage is a personal choice and cannot be violated in accordance with Article 21 "Right to life and Personal Liberty." Living together is not forbidden since it is a person's right to live with whomever they choose; nonetheless, marriage rights are negotiable due to specific

prohibited degrees in special marriages that render the union null and void. In *Shafin Jahan v. Asokan K.M. & Ors.*, the court According to the Supreme Court, everyone has the right under Article 21 of the Constitution to marry the individual they desire. But it's crucial to keep in mind that this case included an interfaith marriage between heterosexuals. Same-sex marriages are not recognized by law, thus the same interpretation of Article 21 will not apply to them. Rather, same-sex individuals do not have the right to marry in the first place, and consequently, they do not have the right to marry within their chosen sex.

HUMAN RIGHTS PERSPECTIVE

For a very long period, same-sex partnerships were illegal in India as a British colony; this prohibition continued long after India attained independence. Section 377 remained in effect once we adopted British law. The LGBTQ+ community has faced tremendous challenges in bringing these issues to light.

INTERNATIONAL HUMAN RIGHTS CONVENTS

States have been constantly pushed to grant the same advantages and protections to all people, irrespective of sexual orientation or gender identity, and to legally recognize same-sex unions, whether through marriage or civil partnerships. The UN human rights procedures and Article 16 of the Universal Declaration of Human Rights both underline this.

INDIA'S OBLIGATION UNDER THE TREATY

While India is bound by all the treaties, unlike Article 16 of the Universal Declaration of Human Rights, the Indian Constitution does not expressly acknowledge marriage as a basic or constitutional right. India's Supreme Court decisions are the only ones that have led to the recognition of marriage as a fundamental right, despite the fact that marriage is governed by numerous statutory acts. A court in any part of India is required by Article 141 of the Constitution to adhere to this statement of law. A homosexual couple whose applications for marriage registration under the Foreign Marriage Act of 1969 and the Special Marriage Act of 1954, respectively, were denied by state officials. Both couples' petitions have been received by the Delhi High Court, and they are presently awaiting a ruling. A couple identifying as LGBT has also petitioned the Kerala High Court in a similar manner, requesting that the Special Marriage Act recognize marriages between homosexuals. This Act controls civil unions, also known as "court marriages." The struggle for equality appears to be an uphill battle because the State has made it clear that it opposes

these petitions on the grounds that same-sex marriages are not recognized by Indian law and culture¹.

SOCIAL ACCEPTANCE

India's complicated marriage laws are a reflection of the great diversity of the nation's cultures. These regulations would need to be changed if same-sex marriages were to become permitted in India. Second, the main psychological issue is that same-sex relationships are not accepted in society because people see them as aberrant. Thanks to activists who promote it and the increasing acceptance of LGBTQ+ acceptance among younger generations, the idea of LGBTQ+ acceptance has been steadily gaining ground.

DISCUSSIONS

IMPACT OF DECRIMINALIZING OF SECTION 377

In the historic ruling in *Union of India v. Navtej Singh Johar*, India decriminalized same-sex relationships and said that everyone has the freedom to live with whoever they choose. The laws need to change to reflect the new circumstances. The 150-year-old statute was changed by the Supreme Court's ruling. The initial instance of this trend surfaced when anti-HIV/AIDS non-governmental organizations (NGOs) petitioned the Delhi High Court to allow homosexuality. They said that this went against people's rights to privacy and to obtain any necessary medical care related to their sexual orientation. Their health deteriorated as a result of the community members' reluctance to seek medical assistance.

With the slogan "take me as I am," LGBTQ+ activists soon began a fresh campaign, which was fulfilled by the court in the landmark decision that allowed same-sex couples. While it is true that everyone can pick who they love and live with, there are several rights that are not granted in India. As a result, the government prohibits homosexual couples from getting married, and many court cases remain unresolved.

The court decision in this case held that while the right to live freely is inalienable, marriage cannot be because there are several procedures involved in obtaining legal marriage licenses, and if the couple chooses to become gay, there might be an imbalance in the country's population. Furthermore, it is considered sin in many faiths and beliefs. If the change is required, several laws will need to be changed. The court also ruled that citizens had to

¹ Dormaan J Dalal, *The fundamental right to marry in India and its application to same-sex marriage*, (Jan. 3, 2021), <https://www.barandbench.com/columns/the-fundamental-right-to-marry-in-india-and-its-application-to-same-sex-marriages>

knock on the doors of parliament and that courts lacked the power to alter marriage laws.

COMPARISON

The concept of homosexuality is not new in Indian history. Many puranic stories discuss homosexuality, and characters like Shikhandi, Chitrangada, and Brihannala all had varied sexual identities but were never treated any differently from one another. In Indian civilizations, marriage is highly valued and considered a fortunate union. Additionally, homosexuality was not a novel concept. The term LGBTQ+ was not well understood, and there was little research done on it until 2013, the year that same-sex partnerships were made legal in Britain. India has not fully embraced the idea even as of yet².

There are several nations in the world that have not fully embraced the idea. While some nations have publicly embraced it, others have not. While some still permit same-sex civil unions, others have approved same-sex marriages and partnerships. Nonetheless, a discrepancy exists in the global spread of LGBTQ+ rights, and many countries still prohibit same-sex unions.

UNITED STATES

In *Obergefell v. Hodges*, the U.S. Supreme Court declared in 2015 that same-sex couples have the constitutional right to marry. The 5-4 decision extended to U.S. territory and essentially made same-sex marriage legal in the thirteen states where it was still illegal.

EUROPE

More than half of the countries with equal marriage legislation are in Western Europe. Among the nations that have legalized same-sex marriage are Belgium (2003), Spain (2005), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Denmark (2012), France (2013), the United Kingdom (2013), Luxembourg (2015), Ireland (2015), Finland (2017), Malta (2017), Germany (2017), Austria (2019), and Switzerland (2021). Although same-sex marriage is prohibited in Italy, the government of the nation approved same-sex civil partnerships in 2016³.

² Astha Jain, Dhanashree Kodape, Evolution of Recognition: Navigating LGBTQ+ Marriage Rights in India - A Holistic Perspective and Way Forward, Apr 16, 2024 <https://articles.manupatra.com/article-details/Evolution-of-Recognition-Navigating-LGBTQ-Plus-Marriage-Rights-in-India-A-Holistic-Perspective-and-Way-Forward>

³ CFR.org Editors, Marriage Equality: Global Comparisons, Last updated December 22, 2022 9:30 am (EST) <https://www.cfr.org/backgrounders/marriage-equality-global-comparisons>

A 2019 Pew Research Center survey found that 14% of Ukrainians and 28% of Lithuanians were in favor of same-sex union legislation. While same-sex marriage is still illegal in Poland and Hungary, support for it has lately increased to 47% and 49%, respectively.

RUSSIA

In 2013, it was made illegal in Russia to spread "propaganda of nontraditional sexual relationships among minors". Human rights groups argue that the law is a vehicle for anti-LGBTQ+ discrimination, and the European Court of Human Rights ruled that the measure violates the right to free speech and is discriminatory. In 2022, Russian President Vladimir Putin signed legislation extending the prohibition. It prohibited the distribution of such materials to adults, made it illegal to treat same-sex relationships as "normal," and strengthened the penalty for breaking the law⁴.

MIDDLE EAST

Same-sex partnerships are illegal in most of the region, and in Yemen, Saudi Arabia, and Iran, they are punishable by death. Algeria, Morocco, Oman, Syria, Tunisia, and Gaza all have laws that specifically prohibit same-sex partnerships⁵.

CONSEQUENCES

India is now developing even if the idea is not well understood or embraced. LGBTQ+ is a relatively recent adaptation and a totally different concept in the world community. People never thought same-sex partnerships would be possible or exist during the preceding 100 years. It's even thought to be an unrealistic idea. There are several drawbacks and implications to this concept alone. Although it can be difficult to exercise, people's freedom of choice is a legal entitlement. What if the LGBT idea were universally accepted? It would be incredibly difficult to survive in that situation.

It will affect identity, reproduction, and a plethora of other elements.

It's a good thing that laws and development are evolving. Though decisions and ways of thinking differ, people's minds and thoughts are not all the same, and sometimes they are not entirely wrong.

⁴ Supra 8

⁵ Supra 9

CONCLUSION

This study indicates that India is a developing nation that is adjusting to a variety of cultural norms. India is overcoming many preconceptions and succeeding in doing so. The idea of marriage is delicate there since it is seen as the joining of two souls and a family. The nation's marriages are governed by several regulations, and it can be challenging for society to adapt to legislative changes. It is a belief that was founded on the old scriptures and that modifications to it could harm the original texts. Second, there may be a connection between this and societal acceptability. Many taluk villages have never even heard of the phrase, making acceptance even more improbable for them.

However, the primary reason for India's growth in recent decades has been the several laws that have emerged and become landmarks, such the Prevention of Sati Act and the Special Marriage Act. The acceptance of marriage equality for LGBTQ+ individuals by society is a sign of a significant shift. The challenges of extending marriage rights to LGBTQ+ couples in India are multifaceted, akin to the discrimination they encounter daily. As same-sex couples' status has grown over time, it's time for our country to adapt as well.

With its rich historical legacy, India can celebrate diversity by ensuring that everyone's rights are respected. We must collaborate across all governmental spheres to dismantle antiquated traditions and promote a more tolerant and compassionate society to achieve equality and dignity. Given how proud we Indians are of our long and rich heritage, why are we so reluctant to acknowledge homosexuality as a part of it as well? Through educating people and promoting an accepting attitude toward this change, it is possible and hopefully will before this happens. In India, marriage may become lawful shortly.