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SAME SEX MARRIAGE: A COMPARATIVE STUDY OF SAME SEX MARRIAGE RIGHTS IN INDIA V. USA

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Abstract

The comparative study delves into the legal, social, and cultural landscape surrounding same sex marriage across various jurisdictions. By analyzing legal frameworks, historical precedents, and social attitudes, this study aims to provide a comprehensive understanding of the progress, challenges, and implication of recognizing same sex marriage. The study scrutinizes the impact of legal recognition on the well-being of LGBTQIA+ individuals, exploring areas such as mental health, family dynamics, and societal acceptance. Through the comparative analysis, the study identifies common trends, disparities, and innovative practices in the treatment of same sex marriage in diverse socio-cultural environments. This research contributes to the broader discourse on human rights, equality, and the evolving definition of marriage in the contemporary global landscape.

Keywords

Same-sex marriage, LGBTQIA+ rights, Equality, Discrimination. Homosexual

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INTRODUCTION

From political-legal and socio-economic point of view, marriage is considered an important element of a person's identity. Marriage is an institution that has legally codified under various personal laws to recognize the relationship between two parties. It is of great public importance with respect to rights and duties like property, inheritance and such related rights which arises from marriage. In today's world the institution of marriage is not only a civil right but it has also got international acceptance.² In India, the Right to marry is now recognized as a constitutional right, which gives an individual the freedom to choose a life partner of his or her choice.³ There is nothing wrong to love someone. It would be wrong to say that a person cannot marry someone because of their sex

In today's time as the world is progressing same sex marriage has become very important. Moreover, everyone can finally be themselves and own their individuality. Same sex marriage gives other people hope of a bright future that paves a brighter path for LGBTQIA+ community. This community has already suffered a lot due to discrimination. They deserve to be able to marry anyone regardless of sex. Same marriage is not particularly encouraged in India. There are many countries where there are strict laws against it, yet people are open minded.⁴

HISTORY OF SAME SEX MARRIAGE

Since the dawn of humanity, the existence of both men and women and their interconnectedness naturally gave rise to individuals with diverse gender orientations, a facet viewed as unconventional by societal norms. As a French historian, Foucault pointed out, the modern classification of gender began to take shape in 19th century Europe, making a significant shift from earlier times where such distinctions were absent. Modern Indian historians have grappled with the concept of homosexuality, citing numerous instances where it is acknowledged as a natural part of society. There is no historical evidence to suggest exclusion of individuals based on their sexual orientation, rather they were a friend recognized for their perceived divine insight. In contemporary

²Sahil Sharma, 'Justification to Same Sexmarriage' (St Solidiers Law College May 26 2023,) <<https://www.stsoldiercoedgroup.com/Blog-Details/Justification-to-same-sexmarriages-by-Sahil-Sharma>> accessed 16th September 2023.

³Amrita Sony, ' Same Sex Marriage in India under Personal law' (Blog Ipleaders 24April 2021) <<https://blog.ipleaders.in/sex-marriages-india-personal-laws/>> accessed 16th September 2023

⁴ Toppr, 'Same Sex Marriage Essay' (Toppr, n.d) < <https://www.toppr.com/guides/essays/same-sex-marriage-essay/>> Accessed 16th September 2023.

India, there persists a belief among predominantly heterosexual individuals that the blessing of Kinnar after, protection to their families, while their curse has the potential to bring about harm.⁵

Ila is a figure in Hindu mythology known for a rare instance of transforming from female to male. There are various stories about Ila's origin. Born to Vivasvata Manu and his wife Shraddha, who desired a son, they prayed to the God's, resulting in Ila's transformation into a man named Sudyumna. Sudyumna later ventured into a forest where a curse turned him into a female. However, Shiva intervened, allowing him to alternate between male and female every month. During the female phase Ila/Sudyumna had a union with Budha (Mercury) and was destined to bear the Pururavas (the Luran Dynasty). Ultimately, thanks to a blessing from Shiva, Ila regained permanent manhood.⁶ In Bhagavad Purana there is a narrative about Lord Shiva perceiving Vishnu in the form of Mohini and being captivated by this manifestation. This union led to the birth of Lord Ayyappa. Notably the Mahabharata features the esteemed figures of Shikhandi and Brihannala, who are held in high regard as transgender characters. In the Ramayana the birth of King Bhagirath arises from the union of his two mothers, who were also the wives of King Dilip as a result brought about by the blessing of Lord Shiva.

During the medieval period Amir Khusrau claimed that Allauddin Khilji, the conqueror of South India, was in a homosexual relationship with his slave Malik Kafur. Malik Kafur was regarded as the most intelligent and loyal servant in Allauddin Khilji's court.⁷

A COMPARATIVE STUDY OF SAME SEX MARRIAGE BETWEEN INDIA AND USA.

LAW'S IN INDIA TOWARDS SAME SEX MARRIAGE.

In 1860, during British rule, homosexual intercourse was viewed as unnatural. It was officially deemed a criminal offence. This classification was made under Chapter 16, Section 377 of the Indian Penal Code (IPC). After gaining independence on November 26, 1949 India implemented the Right to Equality under Article 14 of the Indian Constitution. However, despite this milestone, homosexuality continued to be considered a criminal offence⁸. In the 21st century, society has

⁵ Drishti IAS, 'LGTBQIA- A detailed discussion' <https://www.drishtias.com/blog/lgbtqia-a-detailed-discussion> accessed 16th September 2023

⁶ National Centre for Biotechnology, "Transsexualism in Hindu Mythology" <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7539026/#:~:text=During%20his%20female%20phase%2C%20Ila,to%20a%20boon%20by%20Shiva> accessed 16th September 2023

⁷ Supra note 4

⁸ Supra note 4

indeed become more liberal. However, it still struggles significantly in recognizing the legal rights of individuals in the LGBTQIA+ community. This issue is widely acknowledged, as sexual and gender minorities often face social and political marginalization in various societies. The extent of this marginalization varies significantly between different countries, states and regions⁹. Legalizing same sex marriage holds significant importance for LGBTQIA+ rights activists and advocates worldwide. It's significance goes beyond legal matters, influencing societal and cultural perspectives on the LGBTQIA+ community. In India, same sex marriages are not legally recognized, as the country's law's specifically denies marriage as a union between a man and woman.

In 2009, the Naz Foundation, a non-governmental organization, challenged the Constitutionality of Article 377. They brought this challenged under Articles 14, 15, 19, and 21 of the Indian Constitution before the Delhi High Court. The Foundation argument was that Section 377 of the IPC reflects an outdated understanding of sex, which is no longer accepted in society. This significant case was heard by a five judge bench, led by Chief justices R.F Nariman, A.M Khanwilkar, D.Y Chandrachud and Indu Malhotra. The Foundation cited an incident from 2001 in Lucknow, where HIV prevention workers, who were arrested on the accusation of conspiring to commit an offense. Additionally, the Naz Foundation pointed out that the provision was being misused to criminalize consensual non-peno-vaginal sex. The initial instance, the Delhi High Court declined to entertain the petition, asserting that the petitioner lacked the requisite standing to approach the Court regarding this issue. Nevertheless, subsequent to deliberation with the Naz Foundation, the Supreme court affirmed that the petitioner indeed possessed the entitlement to lodge a Public Interest Litigation (PIL) before the High Court. The Delhi High Court's ruling emphasized that section 377 of the IPC cannot be applied to penalize consulting adults engaging in consensual sex. This decision was based on the belief that such enforcement would infringe upon their fundamental Right to Privacy, a vital component of Article 21. Furthermore, the Honorable Delhi High Court also emphasized that classifying individuals on the basis of their sexual orientation goes against another fundamental right, Article 14 of the Indian Constitution.

⁹ Kumar Shalini. 'Unconstitutionality of Section 377 of IPC: overview of Naz Foundation of Delhi' (Blog Ipleaders, 4th September 2023(<<https://blog.ipleaders.in/unconstitutionality-section-377-ipc-overview-naz-foundation-v-government-nct-delhi/>>accessed 16th September 2023

This Article asserts that every individual, simply by virtue of being human, possesses the same human rights, and should have equal entitlement of them.¹⁰

In the **Suresh Kumar Kaushal v. Naz Foundation** case is centered around the issue of LGBTQIA+ rights, a topic that has sparked intense discussion and debate. In 2009, the Delhi High Court issued a groundbreaking judgement in the case of **Naz Foundation v. Government of NCT Delhi**. This historic decision marked the culmination of approximately a century of criminalization and oppression. But, the **Suresh Kumar Kaushal v. Naz Foundation** was decided by a panel of two judges from the Supreme Court. They allowed the appeal and, in doing so, overturned the judgement of the Naz Foundation case from the Delhi High Court . The Supreme Court, in the Indian Penal Code does not infringe the Constitution of India. Consequently, they rejected the petition submitted by the respondent. The Supreme Court of India held that section 377 does not infringe Articles 14, 15, and 21 of the Constitution. It stated that the carnal intercourse referring to unnatural lust should be subject to punishment. The Supreme Court has asserted that only a tiny fraction of the country's population identifies as LGBTQIA+ and additionally, the Delhi High Court, in its effort to safeguard the rights of the LGBTQIA+ community, inaccurately leaned on international precedents. Justice Sanghvi pointed out that section 377 is a pre-constitutional legislation, any infringement of rights protected under Part 3rd of the Constitution would have been addressed and rectified by the Parliament long ago. The Supreme Court in its ruling, affirmed that section 377 of the IPC does not possess any Constitutional defects. It entrusted the capable legislature with task of evaluating whether it is advisable and justifiable to either remove this section from the statue or modify it to permit consensual sexual activity between two adults of same sex.¹¹

Navtej Singh Johar v. Union of India is a landmark case of the Apex Court of India for LGBTQIA+ rights. The Navtej Singh Johar case revolves around the decriminalization of consensual sex among adults, which encompasses homosexual relationship.¹² On September 6, 2018, the Court reached a unanimous decision, declaring the law unconstitutional “**in so far as it criminalizes consensual sexual conduct between adults of the same sex** “. The bench's

¹⁰ Supra note 8

¹¹Law Foyer,“Suresh Kumar Kaushal v. Naz Foundation” < <https://lawfoyer.in/suresh-kumar-kaushal-vs-naz-foundation/>> accessed 16th September 2023

¹² Prepp.in “Navtej Singh Johar Case Indian Polity Notes” <”<https://prepp.in/news/e-492-navtej-singh-johar-case-indian-polity-notes>> accessed 16th September 2023

conclusion was that Section 377 constitutes discrimination against individuals on the grounds of their sexual orientation and gender identity, thereby infringing upon the provisions outlined in Article 14 and Article 15 of the Constitution. Additionally, they determined that section 377 encroaches upon the Right to Life, Right to Dignity and Autonomy of personal choice as guaranteed by Article 21. The verdict was celebrated as a historic breakthrough for LGBTQIA+ rights in India. Outside the court campaigners eagerly awaited the pronouncement, erupting in cheers upon hearing the decision. It's important to note that certain aspects of section 377 specifically those concerning sexual acts with minors, non-consensual acts like rape and bestiality still remain in effect.¹³ Chief justice Dipak Mishra specify that the court found “ **criminalising carnal intercourse**” to be “ **irrational, arbitrary and manifestly unconstitutional**”. The court's ruling affirmed that LGBTQIA+ individuals in India are entitled to full constitutional rights, encompassing the freedoms safeguarded by the Constitution of India. The court emphasized that “ **the choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behavior are intrinsic to the constitutional protection of sexual orientation**”. Furthermore, the judgement highlighted that the LGBTQIA+ community is deserving of equal citizenship and legal protection, without facing any form of discrimination.¹⁴

LAW'S IN USA TOWARDS SAME SEX MARRIAGE.

Same sex marriage refers to the union of individuals who share the same sex or gender. Although it is legally recognized in numerous countries, it remains a subject of debate in many part of the world. The initial legal battles surrounding same sex marriage, often referred to as gay marriage, emerged in the 1970's, prompting discussion about the civil marriage rights of the same sex couple in the public sphere. Regrettably, a significant number of this legal challenges did not yield favorable outcomes. On February 12, 2004, a milestone was achieved in the United States as the first same sex marriage to place in San Francisco, California. The historic event saw Del Martin and Phyllis Lyon, a devoted gay couple of 50 years, officially wed and receive formal recognition. On May 17, 2004, Massachusetts achieved a historic milestone by becoming the first state, and sixth jurisdiction globally, to legalize same sex marriage. Subsequently, those opposed to same

¹³ https://www.echr.coe.int/documents/d/echr/Guide_LGBTI_rights_ENG

¹⁴ Social Laws Today, “Navtej Singh Johar Case (2018)”, <https://sociallawstoday.com/navtej-singh-johar-case-2018/> accessed 16th September 2023

sex marriage took steps to impose stricter restrictions on marriage. This resulted in several states enacting states constitutional amendments that explicitly defined marriage as the union between one man and one woman.

In 2008, both California and Connecticut took significantly steps in legalizing same sex marriage. This was followed by Iowa, Vermont, and New Hampshire. From 2008 to 2012, the legalization of same sex marriage was accomplished through various means including state court rulings, the passage of state legalization, and decision handed down by federal courts. Then, on November 6, 2012, a historic moment occurred as Maryland, and Washington become the first states to legalize same sex marriage throughout popular vote.

On June 26,2015, a landmark civil rights case known as Obergefell v. Hodges conclude with a significant ruling from the Supreme Court. They affirmed that the fundamental **right to marry** is constitutionally guaranteed to same sex couples under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Despite this ruling, not all states legislatures have fully adhered to the decision. Some have implemented constitutional or statutory bans on same sex marriage, commonly referred to as the “**Defense of Marriage**” Acts. As of now, thirteen(13) out of the fifty(50) U.S states still uphold such bans; however, it’s crucial to note that due to Obergefell v. Hodges, these laws hold no legal weight and are considered invalid.

Thirteen states in the U.S have not legalized same sex marriage, namely: Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Tennessee, and Texas.

On the other hand, thirty seven (37) states, along with the District of Columbia, have legalized same sex marriage. These states include Alabama (in 2015), Alaska (in 2014), Arizona (in 2014), California (in 2008), Colorado (in 2014), Connecticut (in 2008), Delaware (in 2013), District of Columbia (in 2010), Florida (in 2014), Hawaii (in 2013), Idaho (in 2014), Illinois (in 2014), Indiana (in 2014), Iowa (in 2009), Kansas (with restrictions in 2015), Maine (in 2012), Maryland (in 2012), Massachusetts (in 2004), Minnesota (in 2013), Montana (in 2014), Nevada (in 2014), New Hampshire (in 2010), New Jersey (in 2013), New York (in 2011), North Carolina (in 2014), Oklahoma (in 2014), Oregon (in 2014), Pennsylvania (in 2014), Rhode Island (in 2013), South

Carolina (in 2014), Utah (in 2014), Vermont (in 2009), Virginia (in 2014), West Virginia (in 2014), and Wisconsin (in 2014).¹⁵

INDIAN PERSPECTIVE TOWARDS SAME SEX MARRIAGE

The LGBTQIA+ community in India continues to encounter significant challenges, including societal discrimination, a lack of legal recognition, and limited legal protections. Specifically, transgender individuals face pervasive discrimination and social marginalization. Despite the passage of the Transgender Persons (Protection of Rights) Act in 2019, it has faced criticism from many activists and experts for its failure to offer adequate safeguards and legal acknowledgment for transgender individuals.¹⁶ The Indian legal system has taken certain measures to acknowledge and safeguard the rights of the LGBTQIA+ community. For instance, the National Legal Services Authority (NALSA) judgment of 2014 affirmed the right to self-identification and legal recognition of gender identity for transgender individuals. Furthermore, the Protection of Women from Domestic Violence Act of 2005 is inclusive of same-sex couples, being a gender-neutral legislation. Marriage is viewed as a sacred institution, defined as a union between a man and a woman. Those who hold this belief argue that altering the definition of marriage to encompass same-sex couples would weaken traditional family values and the institution of marriage. The primary purpose of marriage is procreation and child-rearing, a role same-sex couples cannot fulfill, thereby distinguishing their union from that of heterosexual couples.

Additionally, children raised by same-sex couples may face negative consequences. The children benefit from the influence of both a mother and a father for a well-rounded upbringing, which same-sex couples cannot provide. Children brought up by same-sex couples may be more prone to emotional and behavioral difficulties, and legalizing same-sex marriage might encourage adoption by same-sex couples, a move they assert could be detrimental to a child's well-being. Furthermore, the legalizing it would potentially lead to a breakdown of established social norms, opening the door to other unconventional relationship forms and ultimately posing a threat to the country's cultural and religious traditions. The same-sex marriage runs counter to Indian cultural

¹⁵ World Population Review, "Same Sex Marriage States" <https://worldpopulationreview.com/state-rankings/same-sex-marriage-states> accessed 16th September 2023

¹⁶U.S Department of State, "2019 Country Report on Human Right Practice: Pakistan" < <https://www.state.gov/reports/2019-country-reports-on-human-rightspractices/pakistan/> > accessed 16th September 2023

and religious beliefs, and its legalization would signify a step towards westernization and the erosion of traditional values. Lastly, the majority of the Indian population does not support it, citing a perceived threat to the nation's traditional values, and that legalizing it would contradict the beliefs and sentiments of the majority. The Issue of same-sex marriage in India is multifaceted, encompassing cultural, religious, and legal dimensions. Indian society holds deeply ingrained cultural and religious perspectives, which frequently serve as grounds for opposing same-sex marriage. Culturally, marriage is esteemed as a sacred institution, regarded as a social covenant between two families, and cherished to uphold family heritage and customs. The traditional values of Indian society tend to lean towards conservatism, often leading to limited acceptance of same-sex relationships. Regrettably, LGBTQIA+ individuals frequently face stigmatization and discrimination, with their relationships deemed as unnatural. From a religious standpoint, several prominent religions in India, such as Hinduism, Islam, and Christianity, consider homosexuality to be morally unacceptable, deeming it a transgression.¹⁷

CONCLUSION

The Indian government and judiciary have made strides in acknowledging and safeguarding LGBTQIA+ rights. However, there remains a considerable journey ahead to attain complete equality and embrace for the community. The approval of same-sex marriage and the enactment of extensive anti-discrimination laws are still awaiting resolution. It is imperative to intensify advocacy and awareness campaigns to guarantee the thorough protection of LGBTQIA+ rights. As we peer into the future, there is optimism that India will persist in advancing LGBTQIA+ rights. Encouragingly, there have been recent steps forward, like incorporating gender identity in the nation's census and the adoption of policies by various state governments to offer job quotas and reservation benefits for transgender individuals. The Indian government is also contemplating the potential legalization of same-sex marriage, especially in view of the increasing worldwide movement toward marriage equality. The recent approval of same-sex marriage in neighboring countries like Nepal and Taiwan might exert influence on India to take a similar path.¹⁸

¹⁷ Times of India, 'Same Sex Marriages In India:A Complete Overview' <https://timesofindia.indiatimes.com/readersblog/dopamineffable/same-sex-marriages-in-india-a-complete-overview-53507/> accessed 16th September 2023

¹⁸ibid

SUGGESTIONS

Same-sex marriage stands as a beacon of equality and love in our society. It signifies a monumental step towards recognizing and affirming the rights of individuals, irrespective of their sexual orientation. The acceptance of same-sex unions is a testament to the principle that all human beings are entitled to the pursuit of happiness and the right to form lasting, meaningful partnerships. It fosters an environment of inclusivity and understanding, strengthening the fabric of our diverse communities. Through legalizing same-sex marriage, societies not only grant equal rights but also acknowledge the intrinsic value of love and commitment within these relationships. It empowers LGBTQ+ individuals by validating their identities and normalizing their experiences. Furthermore, it creates a foundation for stable families, nurturing environments for children, and solidifies the bonds of love and companionship. The recognition of same-sex marriage reflects the evolving values of a progressive society, moving towards a more inclusive and empathetic world. It is a beacon of hope for generations to come, reminding us that love transcends gender, and that every individual deserves the right to celebrate their unions, regardless of who they are or whom they love.

