

## SAME-SEX MARRIAGE IN INDIA

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### INTRODUCTION

In India, same-sex marriage was criminalized by law under section 377 of the Indian Penal Code<sup>1</sup>. But in 2018 Supreme Court of India recognized these marriages in the landmark judgment of Navtej Johar V. Union of India (2018)<sup>2</sup> and after this homosexuality has been decriminalized under Article 21 of the Constitution of India<sup>3</sup> right, to marry is a fundamental right. In the landmark case of Lata Singh V. State of U.P. (2006)<sup>4</sup> the Court established that an individual has the right to marry a person of their will and it is a fundamental right.

But still, the couple of same-sex don't have the rights like inheritance rights, and adoption rights which are given to a normal couple who is married. In the constitution, the queer committee was not seen as a subject. The judges did not mention even while discussing the case of Navtej Johar anything which may give legal status or civil status of marriage to these couples even after discussing many foreign judgments related to it. It is necessary to mention here that simply removing the criminalization of sexual relations between couples of the same sex would not result in equal treatment for them compared to heterosexual couples.

If positive actions are not taken by the government and Supreme Court they will be treated as unequal and discrimination will be done to them in years to come. In India, marriage is seen as a need and these same-sex relationships are seen as shameful in the Country.

### ARE HETERONORMATIVE MARRIAGE LAWS EQUAL FOR ALL OF INDIA?

India is a very diverse nation culturally and religiously. The people are allowed to choose any law according to which they want to get married. There are some major laws related to it which are as- the Hindu Marriage Act, of 1955<sup>5</sup>, the Muslim Personal Law (Shariat)<sup>6</sup>, the India

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<sup>1</sup> Indian Penal Code, Section 377

<sup>2</sup> Navtej Johar V. Union of India, AIR 2018 SC 4321; W.P. (CrI.76 of 2016) D. No. 14961 of 2016

<sup>3</sup> Constitution of India, Article 21

<sup>4</sup> Writ Petition (CrI.) 208 of 2004

<sup>5</sup> Hindu Marriage Act, 1955

<sup>6</sup> Muslim Personal Law(Shariat)

Christian Marriage Act, of 1872<sup>7</sup>, the Application Act, of 1937, and the Special Marriage Act, of 1954<sup>8</sup>, etc. Until now, these laws have been enforced and understood in a way that favors heterosexual relationships, leaving no room for same-sex relationships.

### **HINDU MARRIAGE ACT, 1955**

The opening statement in the preamble of the Hindu Marriage Act, 1955 specifies that the act applies to "any Two Hindus" and does not mandate that one of them must be male and the other one should be female. But when we read section 5 of the act<sup>9</sup>, we notice the usage of terms such as "Bride" and "Bridegroom", indicating a presumption of heteronormativity while formulating the law.

### **MUSLIM PERSONAL LAW**

Under Muslim Law, marriage is a civil contract that is subject to its own set of regulations. The main goal of marriage's agreement under this law is reproduction. Which can be understood as Muslim marriages are expected to be between individuals of different genders.

### **INDIAN CHRISTIAN MARRIAGE ACT, 1872**

Under this, law, marriage is mostly understood as a union of a man and a woman even if it is not expressly defined under this law. But in section 60 of the act,<sup>10</sup> it can be seen that the age of a man and a woman is set to get married under the law. So, we can understand that this law is also intended for a heterosexual understanding of marriage. However, it is important to note that this definition of marriage is not explicitly stated in the law.

### **SPECIAL MARRIAGE ACT, 1954**

The Special Marriage Act is a secular law that allows persons from all religions to get married but it does contain some heteronormative elements. For instance, the act uses gendered language like "man" and "women" to describe prohibited relationships.

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<sup>7</sup> Indian Christian Marriage Act, 1872

<sup>8</sup> Special Marriage Act, 1954

<sup>9</sup> Hindu Marriage Act, 1955, Section 5

<sup>10</sup> Indian Christian Marriage Act, 1872, Section 60

## **ADOPTIONS LAWS IN INDIA**

Until now, because same-sex marriages are not recognized in India, those couples who are of the same gender do not get benefits like the benefits which are enjoyed by heterosexual couples. Some rights which same-sex couples are not allowed to enjoy are the right to maintenance, the right to guardianship, the right to inherit a spouse's property, etc.

Adoption laws of our country, such as the Hindu Adoptions and Maintenance Act, of 1956 ("HAMA")<sup>11</sup>, and The Juvenile Justice (care and Protection of Children) Act, 2015<sup>12</sup>, do not permit adoption to same-sex couples. This is due to the culture in India which is heteronormative because it demeans the LGBTQ+ Community. In the case of Shivani Bhat V. State of NCT of Delhi and Ors. (2015)<sup>13</sup> it can be seen clearly that people who belong to LGBTQ+ Community often face discrimination, as demonstrated by the illegal confinement of a transgender man in his grandparent's home. As in the past, we can see the government's role in giving social security and legitimacy to couples who are in heterosexual unions. Which demean same-sex relationships but in the cases of Shakti Vahini V. Union of India (2018), Shafin Jahan V. K.M. Ashokan & Ors. (2018)<sup>14</sup> and Navtej Johar, the Court have acknowledged that an individual who is an adult has a fundamental right to choose partners despite of their gender or sexual orientation. These recent cases have opened the way for the argument that same-sex marriages should be allowed in India because if discrimination is done based on sexual orientation it will be violating fundamental rights.

## **RIGHT TO CHOOSE A PARTNER FOR MARRIAGE- A FUNDAMENTAL RIGHT**

The issue related to same-sex marriage has been brought to light in recent years in India. In many cases Shakti Vahini V. Union of India (2018)<sup>15</sup> held that marriage is a fundamental right for all adult individuals and the right to marry should be available who want to choose someone of their choosing. Likewise, the landmark case of Navtej Johar acknowledged the LGBTQ+ community as a sexual minority and recognized the discrimination they face. It also mentioned that sexual orientation should include in Article 15<sup>16</sup> and discrimination should be treated as a violation of fundamental rights given in the constitution. Even though, the judgment did not

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<sup>11</sup> Hindu Adoption and Maintenance Act, 1956

<sup>12</sup> The Juvenile Justice (care and Protection of Children) Act, 2015

<sup>13</sup> Shivani Bhat V. State of NCT of Delhi and Ors (2015), W.P. (CrI) 2133/2015

<sup>14</sup> Shafin Jahan V. K.M. Ashokan & Ors (2018), Criminal Appeal No. 366 of 2018

<sup>15</sup> Shakti Vahini V. Union of India (2018), Petition (Civil) No. 231 of 2010

<sup>16</sup> Constitution of India, Article 15

specifically discuss same-sex marriages, a combined reading of these cases could lead to an argument for their legalization in India.

### **SAME-GENDER LIVE IN RELATIONS IN INDIA**

There are some important cases which are needed to be mentioned here- like the case of S.P.S. Balasubramanyam V. Suruttanayan (1994)<sup>17</sup>. The Honorable Court held that if a man and a woman live a couple of years together under the same roof, they will be assumed as husband and wife. The case of Chinmayee Jena V. State of Orrisa (2020)<sup>18</sup>, held the right of a transgender man to be in a live-in relationship with his same-sex partner and self-determination of gender/sex. The Court said that all the remedies given under Domestic Violence Act, 2005<sup>19</sup> would also apply to the women's partner in this case.

### **GLOBAL SCENARIO**

According to Human Rights Campaign, a US-based LGBTQ Advocacy group, only 32 countries around the world recognize gay marriage only 10 countries have recognized same-sex marriage by The Court ruling in other countries marriage equality was introduced by legislation.

### **UNITED STATES OF AMERICA**

In 2015, USA's Supreme Court ruled by a 5:4 majority and acknowledge gay marriage. The Court said that if the right is not given to same-sex couples it would be violating the 14<sup>th</sup> Amendment guarantee of equal protection under the law. In USA 32 States had already acknowledged the right and Massachusetts was to legalize same-sex marriage, following the Supreme Court's ruling.

### **AUSTRALIA, IRELAND, SWITZERLAND**

In Australia, the parliament passed a law and gave recognition to same-sex marriage. In 2017, the referendum showed support of 62% to 38% in favor of the law. Switzerland & Ireland also used the way of the popular vote and by the majority, LGBTQ marriages were recognized.

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<sup>17</sup> S.P.S. Balasubramanyam V. Suruttanayan (1994), 1994 AIR 133,1994 SCC(1) 460

<sup>18</sup> Chinmayee Jena V. State of Orrisa (2020), Writ Petition (CrI) 57/2020

<sup>19</sup> Domestic Violence Act, 2005

## **SOUTH AFRICA**

South Africa was the first African country to recognize same-sex marriage and it acknowledged that if there is discrimination over same-sex marriage then it will be violating the equal rights guarantee given by the constitution.

## **TAIWAN**

In 2019, it became the first Asian Country to recognize same-sex marriage the legislation was brought after the Court's decision in 2017.

## **ARGENTINA**

Became the first Latin American country and the tenth worldwide to legalize same-sex marriages nationwide in 2010. However, before it the national law, many cities and local units had already given permission for civil union for gay couples.

## **CANADA**

Since 1999, the right was given in the country to couples. The Canadian Parliament officially acknowledged same-sex marriage in 2005 by passing nationwide legislation to this effect.

## **INDIAN GOVERNMENT'S STAND**

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The Indian government has opposed same-sex marriage and said that marriage between a biological man and woman is a holy union, a sacrament, and a Zanskar in India. Centre said that decriminalization of Section 377<sup>20</sup> does not mean that it is a fundamental right for same-sex couples to marry. Centre has argued that same-sex marriage did not accept as part of the fundamental right to life and dignity under Article 21 of the Constitution<sup>21</sup>. The Central Government has also mentioned that in India marriages are dependent on customs, cultural ethos, rituals, and societal values. It was also argued that same-sex marriage cannot be compared to a man and woman who live together as a family with children born out of the union. It is well recognized that the laws in the country are made for the marriage of only the union of a man and a woman.

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<sup>20</sup> Indian Penal C, Section 377

<sup>21</sup> Constitution of India, Article 21

The Centre has argued that if same-sex marriages are registered, it will result in a violation of existing personal as well as codified law provisions. The government has stated that any deviation from this norm can only be made through the legislature, and not the Supreme Court.

### **SUPREME COURT'S FORMATION OF CONSTITUTIONAL TO HEAR THE PETITIONS**

Supreme Court has formed a Constitutional bench to hear petitions seeking legal recognition of same-sex marriages in India. The Constitutional Bench consisted of Chief Justice of India D.Y. Chandrachud, S. Ravindra Bhat, P.S. Narasimha, Hima Kohli, and Sanjay Kishan Kaul. The Petitioner has argued that the right to marry and choose a spouse should be given to LGBTQIA+ Community also. The Government has filed an application asking the court to first decide on the maintainability of the petitions.

### **BAR COUNCIL OF INDIA'S VIEW**

Bar Council held a meeting jointly with all the State Bar Councils in the nation and Bar Council has passed a resolution saying that Court is requested to leave the same-sex marriage matter for the legislative, to consider.

### **PRECEDENT IN FAVOR OF SAME-SEX MARRIAGE ACKNOWLEDGEMENT**

Articles 14 and 15 of the Constitution-

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This Article opposes any discrimination based on sexual orientation and gender identity.

Right to Life with Dignity under Article 21-

It is given under Article 21 of the Constitution that every person is entitled to the right to life with dignity and so, we can assume that marriage as defined as 'one man and one woman' must be seen as it is violating Article 21 of the Constitution. Supreme Court has termed in its landmark judgment of 2018 that self-identification of gender is protected under the right to free expression.

Supreme Court on Indian Penal Court 377, homosexuality-

The Court has ruled section 377 as unconstitutional and mentioned that the constitution grants-

- Equality before the law, Article 14

- Prohibition of discrimination based on sex, religion, race, caste, or place of birth.
- Protection of life and personal liberty under Article 21
- Equal protection under laws and equal citizenship

## **ANALYSES AND CONCLUSION**

In India, the laws for marriage were made for different genders and the LGBTQ+ Community was not well recognized in India. Marriage is seen as a relation between a man and a woman, the laws were also made according to that in the country. But in recent times the situation is changing drastically in the country, new petitions are filed before the courts, and many landmark judgments are given by the Supreme Court of India. The government of India is still opposing same-sex marriage and asking the Court to leave the matter to the legislature. The Bar Council of India is also in the favor of government and had asked recently in the meeting of the Bar Council's meeting to leave the matter to be dealt by the legislature.

The Constitutional Bench has started hearing the petitions filed before the court and the arguments are being presented by both sides before the court. The Solicitor General of India and Senior Advocates are presenting the matter before the court. There is hope that the rights for same-sex marriage may be given to couples and LGBTQ+ Community is recognized.