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DECRIMINALIZATION OF SAME-SEX MARRIAGE IN INDIA- Pooja Koul¹**Abstract**

The article claims that it is of great importance to pursue legal acknowledgment of same-sex relationships since discrimination based on sexual orientation is offensive be it under civil law or criminal law because just decriminalization of same-sex acts is not sufficient. Marriage laws only recognize heterosexual unions however it prevents same-sex couples from social and legal recognition that married persons possess and not allowing homosexual marriages falsely discriminates against members of the LGBTQ (Lesbian, Gay, Bisexual, Transgender and Queer) community. The legal discrimination and the struggle faced by the LGBTQ (Lesbian, Gay, Bisexual, Transgender, and Queer) have been long and difficult and they are still fighting for their rights. This article concludes that same sex marriage should be legitimized and to achieve legal acceptance of same sex marriage an amendment in the Special Marriage Act, 1954 is much needed and also the society has to accept this fact that two people of the same sex can fall in love and can also be in a pious relationship like marriage.

Keywords: decriminalization, fundamental rights, homosexuality, LGBTQ, section 377

Introduction

Section 377 was introduced in 1861 when India was under British rule. Section 377 of the Indian Penal Code criminalizes sodomy. It states that whosoever willingly has sexual intercourse with man or woman or animal against the order of nature shall be punished with life imprisonment or with imprisonment of for a described term which may extend to ten years and shall also be liable to fine. It restricted sexual activities which are against the order of nature which means the natural relations of humans to each other in the absence of law. Although this section does not include the word homosexual but it has been used to prosecute homosexual

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activity.

In the case of *Naz Foundation v. Government of NCT, Delhi* Supreme Court declared section 377 unlawful insofar as it criminalizes consensual sexual acts of adults in private, but in *Suresh Kumar Kaushal v. Naz Foundation* Suresh Kaushal who was the petitioner challenged the Supreme Court's decision in Naz Foundation case in which homosexuality was legalized. The petitioner claimed that pieces of evidence documented by the Naz foundation were non-reliable. Finally, the court declared that section 377 was held to be constitutionally valid. On 24th August 2017 Supreme Court of India gave freedom to the LGBTQ (lesbian, gay, bisexual, transgender, and queer) community to freely and safely express their sexual orientation. The verdict was given by the Supreme Court in the landmark Puttaswamy judgment and stated that sexual orientation is part of privacy law, and is protected under the Right to Privacy hence sexual orientation was declared as the fundamental right of an individual. On 6th September 2018 consensual gay sex was legalized in India and decriminalized homosexuality. The Supreme Court of India passed this historic judgment in *Navtej Singh Johar v. Union of India*. Supreme Court declared Section 377 unconstitutional as it violates articles 14, 15, 19, and 21 of the Indian Constitution and also declared section 377 to rule only on the non-consensual sexual acts committed against any adult and minors.

Indeed it was a historic judgment and as a result of this judgment, homosexuals got their legal recognition in the society and also got their human rights for which they were fighting the past two decades. They are now free to express themselves in society and are not considered criminals. However, the problems faced by homosexuals don't end here, many communities opposed this decision of the Supreme Court and on the other hand, and many were satisfied with the given verdict. Homosexuals are still treated differently as no proper legislation addresses this issue to its fullest. Their rights are limited and they're still fighting for their civil rights that are same-sex marriage, the inheritance of property, and insurance.

Same-sex marriage in India

Homosexuality is considered a taboo in India. In recent years the attitude of people towards homosexuals has changed a bit. After the historic verdict of decriminalizing section 377 was passed by the Supreme Court of India, the subsequent stage in the legal fight for this community is the battle for civil rights. The initial focus of the LGBTQ community is to decriminalize same-sex marriage in India. Heterosexuality followed by the obsolete values of patriarchy is accepted by society yet there is a whole other world to that than simply this. Since

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every coin has two sides, so does sexual orientation and hence the acceptance and equal rights for the homosexual community has to be a part of the society too.ⁱ The views for the desirability of marriage outside and inside of the LGBTQ (lesbian, gay, bisexual, transgender, and queer) community differs because some people inside the community are tired of fighting and some are facing all the obstacles and are confronting all the challenges on the other hand some people outside the community are encouraging this and some are criticizing. Same-sex marriage in India is not legally recognized and has not got permit in the marriage laws. People who are engaged in a long term committed relationship with others of their sex would require legal recognition of long term same-sex unions, at par with heterosexual marriages.

It's been two years since homosexuality was legalized in India and now the activists are fighting and debating for legalizing same sex marriage but the government says that it is against our Indian Culture. In 2011, Haryana court legally acknowledged same sex marriage which involved two women and they faced a lot of criticism from their family as well as from the society. Currently there are many petitions of same sex marriage pending with the courts. Uttarakhand High Court on 12th June 2020 approved that same sex marriage may not be legal but live-in relationships and sexual relationships are protected under and by the law. Many states in India have allowed same sex relationships and have acknowledged their marriages and some states still take it as a crime. Same-sex marriage is legal in many countries like Australia, Germany, Brazil, Canada, France, South Africa, the UK, the US, etc. Many countries including India oppose the demand to legalize same-sex marriage. Government policies use marriage as a condition for a wide range of benefits like succession, maintenance, and pension rights that are available to married couples and are not available to same-sex couples. The government has banned surrogacy for same-sex couples totally which is unfair and wrong because anyone who wants to have a child should be allowed to have a child. Not all individuals in the same-sex relationship are looking for radical changes in society and many are politically conservative. Many of them merely desire acknowledgment without discrimination and the opinion to have a legally accepted partnership.ⁱⁱ Same-sex couples are offered limited rights such as a civil union or a domestic partnership.

Lawyers Menaka Guruswamy and Arundhati Katju who were the main faces of the historic section 377 came out as a couple and they have recently spoken about their 'Marriage Project' at the oxford union where they discussed the challenges they had faced to make homosexuality legal in India and what is the future of homosexuals in India. They talked about their future

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plans in which they said that they have already started their fight against the legitimization of marriage and they have already filed petitions in the court. This project has garnered both support and criticism from the LGBTQ (Lesbian, Gay, Bisexual, Transgender, and Queer) community.

Should same-sex marriage be legalized in India?

Legal system in India and in most countries anywhere in the world is premise on a bundle of rights that recognizes our personhood. Now we may agree or disagree with it but that bundle of rights is premise on one thing which is blood relationship that is marriage or a spousal relationship this is the one part of it, if you want to be the part of the legal project of rights, civil liberties, protection then you either have to be born to someone or you have to be married to someone. The legal reality is that either you are recognized by the law to be part of that personhood or you are not. Unfortunately all legal systems across the world are premise on this understanding of the law.

Society will find queer people getting married and it is happening already. We just need a provision in the Special Marriage Act or Uniform Civil Code to ensure that all the homosexual people get a right to choose their partners and stay with them. It's their fundamental right, homosexuality is natural and everything natural should be legalized. In ancient India, homosexuality was not illegal instead it was portrayed as natural and joyful in Hinduism. A canonical text of Hinduism *Rigveda* says that *vikriti evam prakriti* which means that what seems unnatural is also natural. In India, marriages have a strong religious, cultural as well as social significance and importance. Recognition of same-sex marriage under Indian personal marriage laws would be the most satisfactory course in this surrounding. The gay community is going to ask for the legalization of the same-sex marriage as it has a wide range of social as well as legal benefits like pension, partnership, tenancy laws as all these depend on the marriage and if heterosexual people can have them, its homosexual people's right also to have them. India is a marriage country here we sanctifies one kind of relationship and that is marriage and just like heterosexual people many same-sex couples wish to marry just because they are part of a culture in which marriage has been represented as the ideal institution of connection and commitment. They also believe that the decision of a marital partner is an individual choice on which society and especially state ought to have no control. Therefore the simple argument in favor of same-sex marriage is that if two people want to make a commitment of marriage then they should be permitted to do so and excluding any particular class of a community from the

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benefits insults their dignity.ⁱⁱⁱ

Conclusion

In our country marriage is the only relationship which is considered and acknowledged socially, religiously and legally. Marriage between different sex couples is allowed but marriage between same sex couples is considered as illegal, what kind of discrimination is this? Love is love, and just like heterosexual people, LGBTQ people also have the same desires and needs. Marriage is a bond that shows the strongest commitment between two people and is also a legal joining. Marriage is the only institution where two people show their love and commitment towards their partner, so why LGBTQ people be deprived of this right. Who are we to judge anyway? Same-sex marriages should be legalized and if two people of the same sex love each other and want to unite and be in a pious relationship like marriage and want to amalgamate their destinies, then it should be celebrated and not be criminalized. Same-sex relationships harm no one, and if one supports or opposes this than the government should not interfere in this as it is a matter of personal belief.

ⁱ Nayantara Ravichandran, Legal Recognition of same sex relationships in india

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ⁱⁱⁱ Vidhan Maheshwari, Same Sex Marriage: Is it the time for Legal Recognition.

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