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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

SAME SEX MARRIAGE **"FROM TABOO TO LEGALITY: THE JOURNEY** **OF SAME-SEX MARRIAGE RIGHTS"**

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ABSTRACT

This research paper probe into the development and evolution of rights of marriage for LGBTQ+ community in India. Further, this research paper traces the journey from taboo of the society to getting recognised by the legal system and constitution of our country. This paper examines the various milestones like historical, cultural and legal position achieved by the LGBTQ+ community, around the globe. Moreover, this research paper tries to analyse the legal framework which is followed by the legal system in the country, focusing on the societal attitudes and different experiences of other countries that have legalised the marriage for the LGBTQ+ community. Recognise that there is a group among us that have different sexual preferences than heterosexuals. Sexual preference is only one facet of their lives. They are just like any other heterosexual human being. The focus should be on social involvement that promotes inclusivity. Normalise this behaviour and eliminate the concept of shame. Sexual partners are a matter of personal preference and should not cause offence. A clear legislation can give uniform legal protection for social, economic, and cultural rights while also ensuring justice. This research paper considers the potential pros and cons of adopting same-sex marriage in the country.

KEY WORDS- Marriage, same-sex, gender, Rights, LGBTQ+ Community, Society Legal System, Constitution, Navtej Singh Johar, Judiciary.

INTRODUCTION

The acronym “LGBTQ+” has wide spectrum for the people who falls out the heteronormative understanding of orientation of gender and sex. There is no ending of definition of the term LGBTQ+, sign “+” denotes the non-exhaustive nature of the LGBTQ term. The acronym LGBTQ stands for: - Lesbian, Gay, Bisexual, Transgender and Queer. This denotes the dual aspect of sexuality and gender. Gay, Lesbian, Bisexual are termed as sexual preferences of persons whereas, the Transgender is a gender who does not fall in the category of binary of male and female. Whereas, the term queer is mostly used to denote the collective of “queerness”.

The LGBTQ+ Community has covered a long and tough journey in terms of acceptance by the society across the globe. In terms of our mother nation India, the community has faced the struggle and has long journey and fight with the judiciary for rescuing the community against the threat of getting defame and other problems. For safeguarding the interest of the community the Judiciary decriminalized Section 377 of The Indian Penal Code which defined “unnatural offences¹”, which was applied upon the members of the community who belongs to LGBTQ+ community and which resulted in the creation of environment of fear, violation and oppression by the police force and society in general. Various decisions given by the Supreme Court regarding normalising the homosexuality among the Indian Society has the ray of hope to the people of LGBTQ community regarding the rights of marriage and getting things normal for the India. Proponents of the first viewpoint argue that marriage's principal objective is to offer a generally uniform social institution for producing and raising children.

They believe that because both male and female are required for procreation, marriage privileges should be limited to opposite-sex couples. In other words, sexually intimate relationships should have at least the possibility for procreation. From this vantage point, the push to legalise same-sex marriage is a mistaken attempt to undermine the social, moral, and biological divisions that ensure society's survival, and should be opposed. This was one of the view towards legalising of same sex marriage in India.

¹ Section 377, of Indian Penal Code.

Marriage is a socially and ritually accepted institution that traditionally involves a man and a woman. Marriage is an essential element of everyone's life. Marriage is how the human species has passed along its genes to subsequent generations. Marriage is the most fundamental institution in human society. It is a worldwide occurrence that has served as the foundation for human civilization. We might claim that marriage is as old as the family itself. Both of these institutions are crucial to society.

LEGAL CONCEPT WITH THE JOURNEY OF COURTS

From the past few years, the parliament and legislature has been on the backfoot on the matter of rights of LGBTQ+ community, but the judiciary has been proactively participating in the promotion and safeguarding the rights of the LGBTQ community. From last decade the judiciary have passed many landmark judgements for the promotion and recognition of the fundamental rights of the marginalised group of LGBTQ+ Community. Passing of judgements by the judiciary depicts the conservative mindset of the Parliament for not showing the interest in the rights towards the community. Below are the landmark judgements: -

1. Naz Foundation vs. Government of NCT Delhi²

This landmark case revolves around the rights of equality under Article 14, 15 and 16 of the Constitution of India³. In this case the Delhi High Court passed the judgement declaring the provision Section 377 of Indian Penal Code as unconstitutional. On the basis of the Public Interest Litigation brought up by the NGO Naz Foundation, which paved the way for the legal review of the law prevailing from British Era. Further, in this the court held that Section 377 of the Indian Penal Code violates the Article 14, 15 and 16 of Constitution of India⁴.

2. NALSA vs. Union of India⁵

NALSA vs. Union of India is the outcome of the judgement in **Suresh Kumar Koushal vs. Union of India⁶**. In Suresh Kumar case the honourable Supreme Court re-criminalised Section 377 of the Indian Penal Code, which was earlier decriminalised in the case of NAZ Foundation vs. Union of India. In the case of NALSA vs. UOI⁷, changed the relevant questions in the

² Naz Foundation vs. Government of NCT Delhi, 2009.

³ Constitution of India, 1950.

⁴ 160 Delhi Law Times 277. (India)

⁵ NALSA vs. Union of India AIR 2014 SC 1863. (India)

⁶ Civil Appeal 10972 of 2013. (India)

⁷ Supra note 5.

favour of the transgender community. Further, this judgement gave the right of third gender to the transgender community of India. A detailed set of guidelines were issued by the honourable apex court of India for protecting the rights and freedoms of the transgender community of India. After those legislative developments were followed to give a statute that clear the rights of the transgender that shall be forwarded.

There was deep debate and versions of Law presented which culminated in the year 2019 with the Transgender Persons (Protection of Rights) Act, 2019. Although the law is necessary and have some positive areas of aspect, but it has a major problem of interference by the administrative department by requiring that each person would have to be recognised as transgender on the basis of a certificate of identity issued by the collector. This is considered as one of the major and sensitive issue for this subject.

3. **Justice (Retd.) K.S. Puttaswamy vs. Union of India**⁸

Right to privacy is as an integral part of Right to Life and personal liberty under the Article 21 of the Constitution of India⁹ and this article extends and applies to every citizen of India of any gender or sex.¹⁰ Justice D.Y. Chandrachud ordered that people of LGBTQ+ Community shall be entitled of Right to Privacy¹¹ specifically freedom from the interference from the state. Special reference was, made in the context of choosing the partner of one's own choice with freedom regarding intimacy and autonomy. Further, in this case the honourable court observed that "Article 14, Right to Equality, Article 15, Discrimination on the basis of sex and Article 21, Right to life and personal liberty enshrined in the Constitution of India covers the major part of right to privacy and protection of sexual orientation of the people." This judgement played an important role for precursing the breakthrough in the case of Navtej Singh Johar vs. Union of India.

4. **Navtej Singh Johar vs. Union of India**¹²

This was the landmark judgement decriminalising homosexuality in India by striking down the Section 377 of Indian Penal Code¹³. Further, in this judgement it was held that Section 377 of Indian Penal Code violates the fundamental rights guaranteed to the citizens of India under

⁸ Justice (Retd.) K.S. Puttaswamy vs. Union of India, AIR 2017 SC 4161.

⁹ Constitution of India 1950.

¹⁰ Supra note 6.

¹¹ Article 21 of Constitution, 1950.

¹² Navtej Singh Johar vs. Union of India, AIR 2018 SC 4321.

¹³ Indian Penal Code, 1856.

Article 14, Article 15, Article 16, Article 19(1)(a) and Article 21 of the constitution of India. The honourable court held that if 2 adult performs consensual intercourse then its not an offence.

5. Abhijit Iyer Mitra Case¹⁴

This case deals with the question regarding the recognition of marriage among the same sex under various personal laws like Hindu Marriage Act and Special Marriage Act prevailing in India. The petitioner in this case put forwarded the argument that with the recognition of same sex relationships resulted in the decriminalisation, the parliament should be responsible to the cause an also conform to the international standard, treaties in which the India is signatory. The Solicitor General Tushar Mehta contradicted this argument and said that the term Spouse under Hindu Marriage Act, only includes Male and Female and interfering with these terms will “create complete havoc with delicate balance of personal laws”¹⁵ The union government was of the view that decriminalisation of Section 377 of Indian Penal Code, did not mean that these same sex relationships would be entitled with the right to marry. Focusing on the Indian customs, rituals and traditions that the marriage is based on the rituals, ethos and social values and have got a spiritual aspect. And rights for same-sex marriage cannot fall in the ambit of judicial adjudications but this matters falls under the ambit of parliament and government to review and determine for the same.¹⁶

RIGHT TO MARRY

The right to marriage is protected under the Human Rights Charter, which falls under the category of the right to family. The Indian Constitution does not clearly state this right. However, under Article 21, the freedom to marry is considered as a universal right. It is open to all people; however, it does not include same-sex marriages. Marriage rights are accepted internationally, although there is no separate marriage law in India. Marriage rights are referenced in many covenants; however, they do not cover same-sex marriages. The Indian constitution gives for the freedom to marry, but it is not a basic right.

¹⁴ Abhijit Iyer Mitra Case, W.P.(C) 6371/2020 & CM APPL. 42707/2021

¹⁵ Ojha P, “Same-Sex Marriage Is Not a Fundamental Right: Delhi HC” (LAW TIMES JOURNAL, February 25, 2021)

¹⁶ The Tribune India, “Same-Sex Marriages Not Recognised by Our Laws, Society and Our Values: Centre to Delhi HC” The Tribune India (September 14, 2020).

The Indian Constitution does not expressly recognise marriage as a fundamental or constitutional right, but rather as a statutory right. Marriage is controlled by several statutory enactments, but its recognition as a basic right has only come about through legal decisions by India's Supreme Court. Article 141 of the Indian Constitution makes such a statement of law binding on all courts in the country.

The question of same-sex marriage frequently aroused emotional and political debate among proponents and opponents. By the early twenty-first century, several jurisdictions, both national and subnational, had legalised same-sex marriage; in others, constitutional measures had been adopted to prevent same-sex marriages from being sanctioned, or laws had been enacted that refused to recognise such marriages performed elsewhere. The fact that the same conduct was rated so differently by different groups highlights its significance as a societal issue in the early twenty-first century, as well as the extent to which cultural variation persisted both within and between countries.

If it is said that right to marry a person of his/her own choice is fundamental right and that has also been held in the case of *Safin Jahan*¹⁷ then why there still exist system of khap panchayat and the stoppage on same sex marriage. Article 21 of the Constitution provides citizens the right to marry the person of their choice¹⁸. This privilege can only be taken away by the law, not by anyone else, even the individual's family. "An intrinsic part of Article 21 of the Constitution would be the freedom of choice in marriage,". According to this article, the right to marriage is an extension of the right to live. The first case to address this issue was "*Lata Singh v. State of Uttar Pradesh*"¹⁹. In this case, the Supreme Court ruled that the girl was a major, she had the freedom to marry whoever she chose, and no regulation could prevent an inter-caste marriage.

OBSTACLES IN SAME SEX MARRIAGE

Marriage, whether sacramental or contractual, has always been regarded holy. It is an intrinsic union of two 'individuals'. In most industrialised countries, marriage as a union between a man and

¹⁷ *Safin Jahan v. Ashokan*, AIR 2018 SC 1136.

¹⁸ Article 21 of The Constitution of India, 1950.

¹⁹ *Lata Singh v. State of Uttar Pradesh*, (2006) 5 SCC 47.

a woman is progressively being superseded by a union between two people or individuals of either gender. However, Indian law is confused as to whether same-sex marriage is lawful, and if so, what are the marital rights and penalties.

There are two important questions about this. Can same-sex marriage be legalised in personal laws? Should there be a new law to handle the marital rights resulting from same-sex marriage? The word "sex" and anything associated to it are deemed taboo.

There are many challenges as per the society that same sex marriage cannot be allowed, and if it gets allowed than society will face many consequences and there arises many challenges towards it. Legalising same sex marriage is not a problems but aftermaths affect to it creates challenges.

1. **Dowry systems-** Same-sex weddings are still unthinkable, as any incidence of sexual intercourse between people of the same sex elicits hostility and contempt. Dowry is deeply ingrained in Indian society, and same-sex weddings are discouraged. If both parties are guys, or ladies, it will be difficult to determine who will pay the dowry to whom.
2. **Patriarchy-** our civilization is very community oriented, and individualism is not encouraged at all. Any manifestation of homosexuality is interpreted as an attempt to repudiate tradition and embrace individualism, posing a danger to the order in Indian society. It is said that legalising homosexual marriages will erode the concept of a traditional family and undermine the sacredness of marriage. It must not be forgotten that the Indian society is patriarchal in nature, and the fact that certain women and men have various options that are not sanctioned by the 'system' frightens them in some manner.
3. The LGBTQ+ group continues to confront severe obstacles in India, including societal discrimination, a lack of legal recognition, and inadequate legal protection. Transgender people experience widespread discrimination and social isolation. Many activists and professionals have criticised the Transgender Persons (Protection of Rights) Act, which was passed in 2019, for failing to provide enough protection and legal recognition for transgender individuals. The Indian legal system has made some efforts to recognise and safeguard the rights of the LGBTQ+ community. For example, in 2014, the National Legal Services Authority (NALSA) ruled that transgender people had the right to self-identification and legal acknowledgment of their gender. Furthermore, the Protection of

Women from Domestic Violence Act of 2005 is gender-neutral and covers same-sex couples.

4. **Parentage-** Children's of same sex couple will always be in crave for their father or mother. As the couple for giving the birth to child will need sarrogate mothers or sometimes the process of IVF therefore they will always be hungry for their mother who gave them birth. Homosexual couples that use in vitro fertilisation (IVF) or surrogate moms intentionally produce a generation of children who will live away from their mother or father. Title of mother, father, husband and wife will be problematic.
5. One of the most serious risks that same-sex "marriage" brings to marriage is that it would likely undermine the norm of sexual fidelity in marriage. In the first version of his book in support of same-sex marriage, *Virtually Normal*, homosexual writer Andrew Sullivan wrote: "There is more likely to be greater understanding of the need for extramarital outlets between two men than between a man and a woman." Of course, incorporating this line of thinking into marriage and broadcasting it to the public through sitcoms, magazines, and other forms of mass media would do immense harm to the norm of sexual faithfulness in marriage²⁰.

However, it is crucial to note that there is significant opposition to LGBTQ+ rights in India, particularly among orthodox religious groups. Any efforts to advocate for increased legal recognition and protection of LGBTQ+ rights may face opposition from these groups, perhaps leading to legal and political disputes. Overall, the future of LGBTQ+ rights in India is dubious. While there are positive changes and opportunities for advancement, there are also challenges and hurdles that must be addressed. LGBTQ+ activists and allies must continue to advocate for their rights and drive change, while simultaneously working to raise awareness and foster more acceptance and understanding in society as a whole.²¹

Same sex Marriage Around the globe.

Since the first same-sex marriages were legally recognized in the Netherlands in 2001, more than

²⁰ Family research council, ten arguments against same sex marriage, <https://www.frc.org/issuebrief/ten-arguments-from-social-science-against-same-sex-marriage>

²¹ VidhanMaheshwari, "Same Sex Marriage: Is It The Time For Legal Recognition," available at <http://www.legalserviceindia.com/articles/semar.html>

30 other jurisdictions – mostly in Europe and the Americas – have enacted laws allowing gay and lesbian couples to marry. More recently, Taiwan became the first place in Asia to allow same-sex marriages.²²

In recent years, several countries have made significant strides towards marriage equality. In 2024, Greece became a trailblazer among Christian Orthodox majority nations by legalizing same-sex marriage and adoption on February 15. Estonia followed suit, marking a historic moment as the first post-Soviet Union country to legalize same-sex marriage, effective January 1.

In 2022, Cuba and Andorra both took steps towards equality. Cuba approved a Family Code in a national referendum on September 25, granting same-sex couples the right to marry. Andorra's General Council unanimously voted on July 21 to amend civil union laws to include marriage equality, affirming equal rights for all couples.

Slovenia's journey in 2022 was marked by a Constitutional Court ruling on July 8, which deemed the ban on same-sex marriages unconstitutional. The Slovenian parliament swiftly responded by passing legislation on October 4 to legalize same-sex marriage, aligning national laws with constitutional rights. These advancements build upon earlier milestones. Chile enacted marriage equality on December 9, 2021, following the legalization of civil unions in 2015. Switzerland solidified marriage equality through legislation passed on December 16, 2020, confirmed by a public referendum in September 2021.

In 2020, Costa Rica embraced equality following a Supreme Court ruling that legalized same-sex marriage after a deadline set by the court. The year 2019 saw significant progress with Austria and Taiwan legalizing same-sex marriage. Austria's Constitutional Court ruling in December 2017 set the stage for marriage equality to take effect on January 1, 2019. Taiwan made history in Asia by enacting legislation on May 24, 2019, following a Constitutional Court decision in 2017 affirming the right to marriage for same-sex couples. Ecuador joined these nations on July 8, 2019, after its Constitutional Court declared the ban on same-sex marriage unconstitutional.

²² Same sex marriage around the world, <https://www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world/> (June 28, 2024).

These developments underscore a global movement towards equality, reflecting evolving attitudes and legal reforms across diverse cultural and political landscapes.

As a result, much emphasis is focused on what occurs at the Supreme Court; a good verdict will make India the 35th country to legalise same-sex union, ushering in tremendous social change. Many other laws, including those governing adoption, divorce, and inheritance, will also need to be revised.

CONCLUSION

To attain equal treatment for same-sex and opposite-sex partnerships, more legislative reform is needed than just recognising same-sex marriage. It's important to note that a same-sex marriage cannot be annulled due to a lack of procreation. Marriage is no longer solely for the sake of procreation. Legislation should change to make failure to procreate/impotence a grounds for divorce, or legal remedies should be waived if the parties are aware that procreation is impossible. Recognise that there is a group among us that have different sexual preferences than heterosexuals. Sexual preference is only one facet of their lives. They are just like any other heterosexual human being. The focus should be on social involvement that promotes inclusivity. Normalise this behaviour and eliminate the concept of shame. Sexual partners are a matter of personal preference and should not cause offence. A clear legislation can give uniform legal protection for social, economic, and cultural rights while also ensuring justice.

Based on the overall discussion over same-sex marriage, whether it should be legalised or not. This is more of a theological discussion than a political one. Homosexuality is not a sin; it is simply a means of pursuing happiness, specifically sexual satisfaction or desire.

What should be the best strategy to dealing with same-sex marriages? The topics are enormous and complex. However, the desirability and feasibility of such an approach need to be determined. In any case, there is a rising belief that our current way of criminalising same-sex sexual conduct neither benefits homosexuals nor protects society in general. To advance human rights, we must legalise same-sex marriages.