

## **7. Recognition of Same-Sex Marriage**

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### **i. Abstract**

This research paper analysis “*The recognition of same-sex marriage*” in the Indian context and in a comparative study with other countries where it is legalized. Same-sex marriage is still a major issue in India even after decriminalizing homosexuality. Under the Constitution of India, the state shall not deny to any person equality before the law and no person shall be deprived of his life or personal liberty. But we know that in India, it is still not recognized to marry a person belonging to same-sex. Sexual action between same-sex individuals is illicit and same-sex marriage is still not recognized in India.

In Indian society, marriage is still something that happens only between males and females. They never consider the other group of people who wishes to marry someone of their sex. People belonging to the LGBT community are facing a very hard time in society just because they want to marry a same-sex person.

For the LGBT community, there are no official demographics. The Government of India, in 2012, submitted figures to the Supreme Court, where there were about 2.5 million gay people recorded in India according to the figures. These figures were obtained based on the individuals who self-declared to the Ministry of Health.

This research paper mainly focuses on the challenges faced by homosexual individuals, probable solution that can be applied to solve the issue, a comparative analysis with other countries where same-sex marriages are legalized, and why it is important to recognize same-sex marriage in a country like India.

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## 1. Introduction

The biggest challenge faced by the homosexual community since the evolution of mankind is sexual racism. Due to the rapid modernization and growth in trend with regard to the advancement in technology, sexual racism has now taken its roots in the form of severe crimes delivered through cyber or simply we can say any electronic medium. The violence and hatred against homosexual people have been rapidly increasing in recent times. The credit to the increase in these types of violence can be given to the conservative and orthodox thoughts and religious belief. We can see that there are many instances of crimes out of hatred that is aimed against sexual minorities in every corner of the world.<sup>121</sup> Every year on May 17th the International Day Against Homophobia, Transphobia, and Biphobia is celebrated. The LGBT community is praised and promoted by influential people. They are being given a choice to express themselves without fear of society. But even when the world is progressing in such a way to accept people belonging to the LGBT community, we know that in India individuals belonging to the LGBT community are suffering just because they are one. Especially in South India, such people and their supporters are looked down upon by the society.

Recently in a debate held in Kerala, a few trans women were present and the stories they had were truly horrifying. Their family has left them just because they are transgenders, they can't even use a public toilet because men mock them at men's washrooms and women scream on seeing transwomen in ladies washrooms. Above all these insults, all of them had one more experience in common. They all were created by someone who faked to have a relationship with them. Just because these women can't register their marriage officially, men approach them and go away with their money. Since there are no provisions to register their marriage, it is even difficult for them to get the provisions laid by the government. The only option available to them is living together under which the women can't claim any maintenance if cheated by their partner. Since same-sex marriage is not recognized some hotels hesitate to provide rooms for such couples. They are even treated as sex workers in this 21st century. People are still fighting for these kinds of things.

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<sup>121</sup> Acharya Y et al., Understanding Homosexuality: Challenges and Limitations, 1 J MORPHOL ANAT 1: 104 (2017).

We know that before 2018, Section 377 was a criminal offense under the Indian Penal Code. Section 377 deals with the unnatural offenses. According to which a person who has consensual sex with the same gender shall be punished with imprisonment for life, or with an imprisonment for a term which may extend to ten years, and shall also be liable to fine. To be liable under this offense, penetration is sufficient.<sup>122</sup> After the decriminalization of Section 377 of the Indian Penal Code by the Supreme Court, a third gender was recognized and same-sex relationships became legal but the civil rights which included marriage, inheritance, or adoption, are not recognized and guaranteed to the LGBT community.

In the case *Navtej Singh Johar v. Union of India*, the petitioners have highlighted that the rights homosexual community that comprises of 7- 8% of the total population of India had to be recognized and that it has to be protected. Also, the fact that homosexuality is an essential matter for every individual's identity.<sup>123</sup> It was after 71 years of independence, in this case, Section 377 of IPC was decriminalized. Even after decriminalizing there is no recognition for same-sex marriages in India.

## 2. Challenges Faced and Probable Solutions

Living in an Indian society with a view different from that of the other people is the primary challenge faced by any individual. In most cases, people, male or female, are forced to the customs of the society without even thinking about their likes or dislikes. From a very young age, they are taught about the heterosexual concept of marriage. As a result, a person who differs or diverts from this conventional thinking is isolated. The scenario has indeed changed when compared to a decade before. On considering the LGBT community, decriminalizing Section 377 was their initial step that is to ensure and protect their basic fundamental right to live with someone they like without the barrier of gender. But that itself is not sufficient.

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<sup>122</sup> The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

377. Unnatural offences.—Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

<sup>123</sup> *Navtej Singh Johar vs Union Of India*, AIR 2018 SC 4321.

Considering today's world, it is essential to have an act dealing with the LGBT community, protecting their rights, and to ensure that they live in harmony just like the straight people.

The challenges that are mostly faced by the same-sex couple are:

- 1. Isolation from Society:** Indian communities have an opinion that marriage is a heterosexual institution. The strong reaction of society is that many people deny the existence of sexual minorities in India, dismissing same-sex behavior as a Western, upper-class phenomenon. Some people still label homosexuality as a disease that has to be cured or even as an abnormality that has to be treated or also as a crime that has to be punished. Since there are no organizations in India as in the West, the victimization of sexual minorities in India is more subtle. Homosexual individuals are not accepted in the Indian society, and this leads to them being extremely closeted. But when we look into the past five years, the Indian LGBT community has flourished on a platform which has mostly been the best accepting space they could have ever wished to find- the Internet. Thus they are forming NGOs, calling up help-lines, and meeting regularly to evolve strategies for their cause.<sup>124</sup>
- 2. Legalization of Marriage:** One of the most difficult challenges faced by homosexual individuals is that they cannot register their marriage like everyone. This means that there are no provisions in India till now to recognize a same-sex marriage. Marriage can be defined as a legal recognition of the union of two people which gives certain rights and obligations between those persons and also for their biological or adopted children.<sup>125</sup> Here the recognition of marriage regarding individuals preferring same-sex marriage is not mentioned.

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<sup>124</sup> Parasar, A., 2007. Homosexuality in India: The invisible conflict.

<sup>125</sup> Subodh Asthana, AIBE: Concept of Marriage in Family Law, iPleaders Blog (Sep. 28 2019), <https://blog.iPLEaders.in/aibe-marriage>.

3. **Adoption:** As mentioned above a marriage is legalized to adopt a child. This means that a same-sex couple cannot adopt a child until and unless they are married. But since there are no provisions to legalize same-sex marriage, adoption is not possible. This is a challenge faced by the homosexual community since they have the right to adopt like anyone else and these rights are being violated.
  
4. **Surrogacy:** The Surrogacy (Regulation) Bill, 2019 does not allow single parents, same-sex couples, divorced or widowed persons, transgender persons, live-in partners, and foreign nationals being used as a surrogate mother. According to the bill, surrogacy means a practice whereby a woman intentionally bears and gives birth to a child for another couple and hands over such a child to the intending couple after the birth.

Surrogacy is only allowed to the “intending couples” who have proven infertility. The couple should be citizens of India and have been married at least for five years but have no child by any means i.e. biological, adopted, or surrogate. In the surrogate couple, the woman should be between 23 to 50 years old whereas the man’s age must be between 26 to 55 years.<sup>126</sup>

5. **Job Opportunity:** It is indeed difficult for a person to get a job these days. But it is even more difficult if that person belongs to an LGBT community. In 2019, India held its first hiring consultancy firm for the members of the LGBT community in Bengaluru. Even those who have a job fight for equal pay, corporate representation, and other benefits.<sup>127</sup> Also, it has to be noted that these people are not provided a good education. Mainly because they are some families who leave their children when they come to know that their child is a homosexual. So finding a good and decent earning job is a difficult task.

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<sup>126</sup> Chaitanya Mallapur, Almost Final: Surrogacy Ban For Single Parents, Homosexuals, Live-in Couple, *INDIASPEND* (Aug. 28 2019),

<https://www.indiaspend.com/almost-final-surrogacy-ban-for-single-parents-homosexuals-live-in-couples>.

<sup>127</sup> Rohit Vaid, India set to get first dedicated LGBT hiring consultancy, *Livemint* (Jul. 21 2019), <https://www.livemint.com/industry/human-resource/india-set-to-get-first-dedicated-lgbt-hiring-consultancy-1563683768879.html>.

The best solution to all the above-mentioned challenges is the recognition of same-sex marriage. When the legislation accepts such a marriage, it is for sure that there will be a huge impact on the citizens. Up to an extent, people will welcome the concept of same-sex marriage. It is evident from the decriminalization of Section 377 of IPC that a large population accepts something when it is legalized. It is true that in a society like ours, individuals are scared to open up themselves, to say that they have likings towards their sex. This is because they are scared of the bully that follows once they open themselves. There is bullying from both offline and online communities. Even though this has decreased since the past few years, some still have a feeling of insecurity to protect their interests.

To point out the probable solutions to the above-mentioned challenges:-

- 1. Recognition of Same-Sex Marriage:** Apart from decriminalizing Section 377 of IPC, the legislation must bring an act to protect the interests of same-sex couples. When a marriage is recognized, the couple gets the rights and obligations as a couple. They can adopt a child just like any heterosexual couple. When the marriage is recognized there is legal protection to the couples who lead a live-in relationship at present. Also, they can stand for their rights without any fear of anyone when they live in a society.
- 2. Awareness to the Society:** Even after legalizing same-sex marriage, it might be difficult for the couple to live in a society they wish to if the people look down upon them as if they are committing a crime. So the society must be given programs related to the normalizing of same-sex marriage and to avoid any form of bullying or harassment. The Government must take necessary steps to provide awareness class at all levels. Also, NGOs have a great role in promoting awareness related to the acceptance of same-sex couples to the society. The preconceived notion that same-sex marriage is a crime can be solved up to an extent by this.



- 3. Health Centers to Avoid Psychological Distress:** The people who fight for their needs are humans just like anyone. They are emotional beings and their emotional aspect must be protected and it is every one of ours duty to protect the LGBT couple from being bullied and we must also ensure that the bullied ones must be given proper care to cope with their psychological distress.

The majority of LGBT couples learn to cope with the abuse, particularly when they have the support of family and friends, and participate with LGBT organizations and social networks. However, a significant number of LGBT couples, most particularly younger LGBT couples, had to cope with stigmatization, discrimination, and harassment without support. Many people also faced stress in addition to the above mentioned. This is from experiences that include high levels of homophobic bullying in schools, physical attacks, and verbal attacks. All this stress hurts their mental health which gradually leads to the significant levels of psychological distress, self-harm and they can even have suicidal thoughts.<sup>128</sup>

- 4. Education Programmes at School Level:** Schools and teacher education programs are crucial sites where LGBT issues and concerns need to be addressed. To encourage health and safety among homosexual youth, schools can help and encourage respect for all students. Schools should take responsibility for prohibiting bullying, harassment, and violence against all students be it homo or heterosexual students. Schools can identify safe spaces and encourage youth clubs where homosexual youth can receive support from teaching and non-teaching staff at school. Schools can even facilitate access to providing health services, which includes HIV/STD testing and counseling, to LGBT youth from experienced community-based providers.<sup>129</sup>

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<sup>128</sup> Chatterjee Subhrajit, Problems Faced by LGBT People in the Mainstream Society: Some Recommendations, IJIMS Vol 1, No.5, 317-331 (2014).

<sup>129</sup>Id, at 7.

But to provide all the probable solutions, a large support from the Government is required. Same-sex couples are fighting for their basic fundamental right i.e. to live with a person of their choice. So the challenges faced by them must come to an end.

### **3. Comparative Analysis with Developed Nations**

In 2011, the UN General Assembly passed a wide-ranging resolution on human rights, homosexuality and gender identity, expressing concern about violence towards LGBTQ people and commissioning the first-ever UN study focused on LGBTQ issues.<sup>130</sup> The United Nations showed so much concern at acts that involved violence and discrimination, in all parts of the world, that is aimed against persons due to their homosexuality and gender identity. It requested the UN High Commissioner for Human Rights to conduct a study that documents discriminatory laws and practices. Also, acts of violence against individuals based on their homosexuality and gender identity were to be studied. Since the violence against the LGBT community was a world-wide issue, the study was requested to be conducted in all regions of the world. The UN also asked to make a study on how international human rights law can be utilized to put an end to the violence and other human rights violations that were based on homosexuality and gender identity.<sup>131</sup>

The treatment of LGBT people varies in different countries. When compared to India, there are countries where the same-sex couple faces more hardships and there are also countries which protects the interest of such people. Some countries impose death penalties on individuals belonging to the LGBT community. India is one of the countries that have decriminalized same-sex offenses.

In 123 UN Member States, consensual same-sex sexual acts are not criminalized. Out of which 21 states are in Africa, 24 in Latin America and the Caribbean, 2 in North America, 20 in Asia,

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<sup>130</sup>HRC staff, 10 Ways the U.N. has Protected LGBTQ Human Rights, HUMAN RIGHTS CAMPAIGN (Sept. 18 2017), <https://www.hrc.org/blog/ten-ways-the-united-nations-has-protected-lgbtq-human-rights>.

<sup>131</sup>SRI Traditional values submission, OHCHR (Mar. 5 2013).

<https://www.ohchr.org/Documents/Issues/HRValues/SRI%20.pdf>.

48 in Europe and 8 in Oceania. Some of these States never had a provision criminalizing homosexuality in their Penal Codes, while others consciously removed the law when initiated within parliaments or by the imperatives set by courts of law. The countries that still consider criminalizing consensual same-sex sexual acts between adults include 32 in Africa, 9 in Latin America and Caribbean, 0 in North America, 21 in Asia, 0 in Europe, 6 in Oceania.<sup>132</sup>

There are also countries among the countries that declared illegal where laws and regulations have been enacted to restrict the right to freedom of expression in relation to homosexuality issues. This can take place in the form of restrictions on expressions of same-sex intimacy and restrictions on expressions of support or positive portrayals of non-heterosexual identities and relationships. Morality codes pertaining to public discussion have long been in force in some Arabic States. However, a new legal vehicle has been employed more recently to criminalize expressions of affirmation or support for homosexuality, known as “propaganda laws”. Even in this era, some countries have recently introduced laws that criminalize even communication between individuals on same-sex dating applications and websites. There are even penalties if that communication leads to sexual encounters.<sup>133</sup>

When looked into the recognition of same-sex marriages in other countries, the U.S. Supreme Court ruled on June 26, 2015, that the Constitution grants same-sex couples the right to marry, effectively legalizing same-sex marriage in the thirteen states where it remained banned. The five-to-four ruling, which extends to U.S. territories, came amid dramatic shifts in public opinion: 67 percent of Americans polled in 2018 approved of same-sex marriage, up from 27 percent in 1996. More than half of the countries that allow same-sex marriage are in Western Europe. Same-sex marriage has been legalized in the Netherlands (2001), Sweden (2009), Portugal (2010), Belgium (2003), Spain (2005), Norway (2009), Iceland (2010), Denmark (2012), France (2013), the United Kingdom (2013), Luxembourg (2015), Ireland (2015), Finland (2017), Malta (2017), Germany (2017), and Austria (2019). Italy is the largest Western European country where same-sex marriage is not legal; its parliament, however, approved civil unions for same-sex couples in 2016. In 2005, it was Canada that legalized same-sex marriage making it the first country in the Western Hemisphere. It was followed by Argentina in 2010, Brazil and Uruguay in 2013, Mexico in 2015, Colombia in 2016, and Ecuador in 2019.

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<sup>132</sup> Lucas Ramón Mendos, *State-Sponsored Homophobia*, 13th ed. ILGA 23, 175-231 (2019).

<sup>133</sup> *Id.*, at 8.

New Zealand and Australia are the only Pacific Rim countries in which same-sex marriage is legal. The legality of same-sex marriage was in May 2019 in Taiwan. It was declared as a result by the legislature to rule the top court issued two years earlier. In most of the parts in South and Central Asia, same-sex relations are still illegal, including in Bangladesh and Pakistan. Apart from India, countries like Bangladesh, Nepal, and Pakistan allow people to register as a third gender in official documents. Same-sex relations are illegal in much of the region and are punishable by death in Iran, Saudi Arabia, and Yemen. South Africa is the only sub-Saharan African country where same-sex couples can marry.<sup>134</sup>

In short, India is one of the countries that have just begun recognizing third gender. Many countries in Asia are yet to decriminalize same-sex relations. Compared to those countries India is far better but when compared to European countries and the USA, India is far behind and it is essential to recognize same-sex marriage for the welfare of society.

#### **4. Conclusion**

In the case *Navtej Singh Johar v. Union of India*, it was observed that: section 377 of the IPC involves the characteristic of unreasonableness. It is indeed a weapon in the hands of the majority to seclude, exploit and harass the LGBT community. Section 377 of IPC harms the lives of the LGBT community in criminality and constant fear affects their joy of life. They are constantly faced with social prejudice and disdain. The LGBT community is also subjected to the shame for being natural, that is they are abused for being themselves. Thus, an archaic law that is incompatible with constitutional values cannot be allowed to be preserved.

It was also observed that the prejudiced and homophobic attitudes deprive of positive human qualities for the LGBT community by repudiating their dignity, personhood, and above all, their basic human rights. It is essential to understand that identity and homosexuality isn't something that has to be silenced by maltreatment. Liberty, being one of the main terms in our

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<sup>134</sup> Claire Felter & Danielle Renwick, Same-Sex Marriage: Global Comparisons, CRF (Oct. 29 2019), <https://www.cfr.org/backgrounders/same-sex-marriage-global-comparisons>.

constitutional values, enables people to define themselves and to express their identity. It is important that a person's identity has to be accepted and respected by everyone without any criticisms.

In the case, it was noticed that the very existence of Section 377 IPC that criminalizes transgenders shows a great symbol of oppression and it is discriminated against a class of people. This stigma, oppression, and prejudice were to be removed and the transgenders have the right to recover from their narrow "claustrophobic spaces" that is to just survive in hiding with their isolation and fears that lead to the deprivation of enjoying the richness of living out of fear with a full understanding of their potential and equal opportunities in all walks of life. The objectives enshrined in the Constitution can be attained only when every person is allowed and enabled to participate in the social mainstream. Every person should experience the journey towards attaining equality in all spheres, to have equal opportunities in all walks of life, equal freedoms and rights. Moreover, every individual must have equitable justice.<sup>135</sup>

This highlighted the need for decriminalizing Section 377 of the Indian Penal Code. That means why it was necessary to identify a third gender. But why is it needed to recognize same-sex marriage in India? In a country like India with a population of 1.3 billion, almost 8% of them are identified as the people belonging to the LGBT community. Now there are many more who shut their dreams just because they are scared to open up and till their interests. It is important to recognize the needs of these citizens because just like anyone else they should have their rights and duties like a normal couple.

In the case *Naz Foundation v. Government of NCT of Delhi and Others*, the Court highlighted certain rights of individuals who are of different homosexuality in this respect by referring to the Yogyakarta Principles under which the term "homosexuality" and "gender identity" means every person's ability for profound attraction to animate and intimate. It also includes the sexual relations with persons of a different gender or the same gender or more than one gender under the definition of gender homosexuality and gender identity. In this case, the Court declared that by criminalizing consensual sexual acts of homosexual adults in private, Section 377 of the Indian Penal Code, 1860, violates Articles 14, 15 and 21 of the Indian Constitution.<sup>136</sup> But in

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<sup>135</sup> Id, at 3.

<sup>136</sup> *Naz Foundation v. Government of Nct of Delhi and Others*, (2009) 160 Delhi Law Times 277 (India)

the case, *Suresh Kumar Koushal & Anr vs Naz Foundation & Ors*, the Supreme Court struck down the decision by the High Court in the Naz Foundation Case.<sup>137</sup>

In 2017 a ‘progressive’ Uniform Civil Code, suggesting for same-sex marriage and transgender marriage, was submitted to the Law Commission of India. In the draft, it was given that in case of homosexual marriages, prohibition due to customs is not a valid reason to bar a marriage and the registration of such marriages will have to be solemnized by the registrar of the marriage.

In the draft, regarding the issue of adoption is provided for all married and in a partnership, couples to adopt a child irrespective of their sexual identity. The Law Commission began considering the public views and requests on the issue in March 2018. In late May, the Commission sought the views of religious groups. It was found that Muslim groups are against such a uniform civil code draft because implementation such a code would ban triple talaq, polygamy, and also it would not be based on the Sharia law which governs Indian Muslims.<sup>138</sup>

Homosexuality is usually regarded as a taboo subject by both Indian civil society and the Government. The fact that sexuality in any form is rarely discussed openly suppressed the idea of public discussion of homosexuality. However, in recent years there has been a change towards the attitudes with regard to homosexuality. To be specific, there have been more discussions of homosexuality in the news media and by Bollywood. The legalization of same-sex marriage has become a religious subject rather than a political one.<sup>139</sup>

In January 2020, the Kerala High Court asked the Centre and State government to respond to a petition demanding recognition of same-sex marriages. The petition was because it amounted to discrimination and also violates the fundamental rights guaranteed under the Constitution of

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*the Yogyakarta Principles define the expression "homosexuality" and "gender identity" as follows: "sexual orientation" is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.*

<sup>137</sup> Suresh Kumar Koushal & Anr vs Naz Foundation & Ors, Civil Appeal No.10972 of 2013 (India)/

<sup>138</sup> Recognition of same-sex unions in India, WIKIPEDIA (May 4 2020, at 14:26),  
[https://en.wikipedia.org/wiki/Recognition\\_of\\_same-sex\\_unions\\_in\\_India](https://en.wikipedia.org/wiki/Recognition_of_same-sex_unions_in_India).

<sup>139</sup> Anil Trehan, Legal recognition of same sex marriages in India: An Overview (2011) PL June 36.

India. In Navtej Johar’s judgment in 2018, the apex court, though decriminalized homosexuality did not get into the civil rights issues of the people belonging to the LGBT community. The Supreme Court dismissed a petition in April 2019 which sought civil rights such as marriage, adoption, and surrogacy. In the same month itself, the high court of Madras recognized a marriage between a man and a transwoman.<sup>140</sup>

It is true that India when compared to many other Asian countries is much more developed when it comes to the LGBT community since we have recognized a third gender. But we know that there is a long way ahead and recognition of same-sex marriage is one of the important steps in it. By recognition of same-sex marriage, a same-sex couple gets the right to adoption, inheritance. Moreover, the bully and harassment faced by them in the society will decrease up to an extent.

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<sup>140</sup> Dhruvo Jyoti, Plea in Kerala High Court seeks recognition for same-sex marriages, HINDUSTAN TIMES (Jan. 28 2020 12:45 AM),

<https://www.hindustantimes.com/india-news/plea-in-kerala-hc-seeks-recognition-for-same-sex-marriages/story-usG9x12oM4urkZPQK99aHP.html>.