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**LEGAL RECOGNITION OF MARRIAGE WITHIN THE
LGBTQIA COMMUNITY IN INDIA****MR. PRATIK MAITRA***Student, Symbiosis Law School, Hyderabad*

Abstract: Whether and how civil society should recognize committed romantic relationships between two persons of the same sex has been a prominent and often contested policy issue in the last decade. Supporters of legal recognition have frequently framed their arguments in terms of human rights and fairness, whereas opponents have often relied on religious teachings and tradition to back up their claims. The argument has generated factual questions regarding the nature of same-sex couples, their families, and the institution of marriage in general, in addition to this collision of profoundly felt values. Indeed, many of the legal and policy arguments made by both sides have relied on scientific evidence to support them. Although empirical research cannot resolve essential moral disagreements such as those raised by the marriage debate, it can answer factual questions. To provide credibility to their recommendations for optimal political and social change techniques, various researchers frequently look to the experiences of European governments that have passed laws allowing same-sex marriage. Some of these experts have come to the conclusion that the legalization of same-sex marriage occurs in stages. They argue that it is possible to anticipate which state would be the first to accept same-sex marriage based on certain visible social and legal processes or quantifiable factors.

“The global attention to issues of human rights for lesbian, gay, bisexual, transgender, queer, asexual, intersex (LGBTQAI) people and other sexual minorities has centred on the inherent importance of those

rights from a legal, cultural, and ethical standpoint over the last several decades¹". Understanding these fundamentals that demonstrates a necessity for ensuring impartiality for this marginalized community of the society as well as for the basic freedoms for these people has been the need of the hour. Thus in our paper we will be understanding the steps taken to eliminate prejudice and abuse against this set of community along with it the landmark judgements will also be taken into consideration, the basic base of our paper is formed by the case of Kumar Koushal v. Naz Foundation² landmark judgement where homosexuality was decriminalised.

Since the period of colonial expansion, the western understanding of sexuality has been heavily influenced in India. Puritanical beliefs and behaviours were mapped into colonial people's view and now India is carving out its path in order to ensure the rights of the LGBTQAI community which is well illustrated in State of Bombay v. Narasu Appa Mali³ case. We will try to gauge how the Indian psyche embraced the Western moral and psychological' notion that "sexuality is 'pathological,' rather than the normal manifestation of desire that was once part of Indian culture⁴".

The way people think of homosexuality has changed dramatically over the last century in the world. Since 1974, homosexuality has no longer been regarded as an unnatural behaviour in our globe and is no longer classified as a psychiatric condition. In certain nations, it has even been decriminalized. Since then, anti-discrimination or equal opportunity laws and regulations have been passed in different jurisdictions around the world to protect gay, lesbian, queer and transgender rights. In India, no such progressive reforms have occurred, and homosexuals continue to be victims of various forms of violence sponsored by the state and society. Thus in our paper, we will go into a deep analysis of the legal recognition of the LGBTQAI community in India and unfold the reality in parts in our paper.

RESEARCH OBJECTIVE

The main goal of this study is to obtain an accurate information about the legal recognition of the LGBTQAI community present in India. The researcher's main focus was on determining the legitimacy of marriage within the LGBTQAI community followed by the Jurisdictional stance in India. The paper goes on to address the

¹ Moorhead, Laura. "LGBTQ Visibility: in the K-12 Curriculum." *The Phi Delta Kappan*, vol. 100, no. 2, 2018, pp. 22–26. 16 Apr. 2021, [JSTOR, www.jstor.org/stable/26552438](https://www.jstor.org/stable/26552438).

² Kumar Koushal v. Naz Foundation, Appeal No. 10972 OF 2013

³ State of Bombay v. Narasu Appa Mali, Air 1952 BOM 84

⁴ Vanita, Ruth. "Same-Sex Weddings, Hindu Traditions and Modern India." *Feminist Review*, no. 91, 2009, pp. 47–60. *JSTOR*, 16 Apr. 2021, www.jstor.org/stable/40663979.

nation's responsibility to safeguard the community's rights and end up having a conclusive opinion on the aforesaid topic.

RESEARCH QUESTIONS

- What is the stance of Official Recognition of Same-Sex Couples.?
- What is the legality of Same-sex Marriage in India .?
- How had been the activist movements and the Indian Reaction.?

RESEARCH METHODOLOGY

To better understand the subject under constitutional law, the present research topic necessitates a doctrinal research process. The most popular approach used by those conducting legal research is doctrinal. The doctrinal analysis approach focuses primarily on legal propositions and doctrines. The main goal of this research approach is to define the evidence and achieve the study's goals. This study is focused on publicly available information. It is solely a theoretical study based on legal statutes, case citations, case laws, and legal review. The study is qualitative in nature, and it is subjected to a variety of analyses and observations. It entails conducting a thorough review of the subject and weighing the various facts and data available. As a result, the researcher recommends doctrinal research because it better suits the current subject's study.

LITERATURE REVIEW

According to the preliminary research, there are numerous sources available in the form of journals, papers, textbooks, case laws and judgments, e-books, and other formats to evaluate, review, and efficiently conduct research on the subject. The author chooses to go across some of the most famous journals and hence try to provide deep understanding of the aforesaid topic and make an opinion on the same.

“The author reviewed *legal recognition of same-sex relationships in India by Nayantara Ravichandran*⁵”. This paper has made an attempt to study the social-legal analysis of the LGBTQAI community, it mentioned

⁵ Nayantara Ravichandran, legal recognition of same sex relationships in India, 16 april 2021, <https://docs.manupatra.in/>

the changes that are required for positive results in India and hence provided the public with a consolidated opinion to restructure our societal norms.

The second article “*Same-sex marriages cannot be given legal sanction by Samanwaya Rautray*”⁶ has been reviewed by the author to understand the stance of the government which illustrated that the Centre has been a vocal opponent of any attempt to legalize same-gender marriages in India. It gave in depth explanation of the Centre's counsel advise to the Delhi High Court that decriminalizing “Section 377 of the Indian Penal Code”⁷ does not automatically translate into a constitutional right for same-sex couples to marry.

“The third article that has been reviewed by the author is *homosexuality in India- the invisible conflict by Anuradha Parasar*”⁸ This research paper examines homosexual marriages in India as an invisible conflict that has been effectively concealed. It also tries to identify and justify different aspects of homosexuality, such as its evolution, causes, and social attitudes and reactions to such relationships. The author also includes information from countries that have legalized homosexual marriages, as well as the outcomes of such legalization.

Forth article that has been reviewed is *same-sex marriages in India: a socio-legal analysis by Rohit Beerapalli*⁹ The basic and complex meanings of marriage are investigated in this article. The arguments made by critics of same-sex marriage are dissected. The argument that , altering the components of marriage will drastically alter its function and intent is investigated. Following this social research, the legitimacy of same-sex marriages in different countries is investigated too.

“*Recognition of foreign same-sex marriage in India: a legal exploratory analysis by Stellina Jolly and Ritika Vohra*”¹⁰ This paper discusses about Indian queer people's access to healthcare, it further suggest that rules must be formulated and that it does not follow the social odds in numerous contexts, which leaves issue unresolved, particularly in light of recent legal changes.

“*A STUDY ON THE LEGAL RECOGNITION OF SAME-SEX MARRIAGE by R.Venkadesh kumar*”¹¹- The article aims to look at the legal recognition of same-sex marriage under different acts. To prevent the spread of STDs amongst humans and to safeguard the culture and heritage of the country.

⁶ Samanwaya Rautray, Same sex marriages cannot be given legal sanction, Feb 25, 2021,7

⁷ Indian Penal Code, ,§ 377

⁸ Anuradha Parasar, homosexuality in India, 15 April 2021, <http://www.delhihighcourt.nic.in/>

⁹ Rohit Beerapalli, same-sex marriages in India: a socio legal analysis , 15 April ,2021, <https://thelawbrigade.com/>

¹⁰ Jolly, Stellina, and Ritika Vohra. “RECOGNITION OF FOREIGN SAME-SEX MARRIAGE IN INDIA: A LEGAL EXPLORATORY ANALYSIS.” *Journal of the Indian Law Institute*, vol. 59, no. 3, 2017, pp. 302–326. 16 Apr. 2021, *JSTOR*, www.jstor.org/stable/26826609.

¹¹ R.Venkadesh kumar, , A STUDY ON THE LEGAL RECOGNITION OF SAME SEX MARRIAGE 14 April 2021, <https://acadpubl.eu/>

“*Reportage of Decriminalizing LGBTQ Community in India by Supreme Court: Content Study of Indian Newspapers in English Language by Dr.Parasarathi*¹²” this article aimed to better understand the role of the media in shaping societal attitudes on topics that were previously considered taboo in society. It argues, current agents in the social milieu must engineer the shifting attitudes of society, which always stands as a major point at a certain point based on many factors present within the vacuum of the society.

*Decriminalizing homosexuality in India by Geetanjali Misra*¹³ - This paper looks at the successful battle against Section 377 of the Indian Penal Code, which made private consensual sex between adults of the same sex legal. This legislation had resulted in severe prejudice against people who engaged in homosexual activities, who were often beaten and blackmailed by cops who threatened them with arrest.

*Douglas McDonald-Norman by Douglas McDonald-Norman*¹⁴ This article used country information in assessing claims for refugee status based on sexual orientation or gender identity. And argue about the, limitations on country facts hinder oppressed people's ability to prove their claims.

INDIAN SOCIETY AND HOMOSEXUALITY

Although there have been considerable advances in India in terms of social and legal recognition, the LGBTQAI community continue to be victims of various forms of violence that are supported by the state and society. The LGBTQAI community in India have grown starting from over a small group of a few hundred to a ten-crore-strong and ever growing community with its own nightlife and activities. Both online and offline, they are weaving their way from metropolises to semi-urban societies. This number is steadily rising as more and more people like them come out of the closet. This demonstrates that homosexual relationships are not uncommon in India; nonetheless, they are more common in the country's major cities, where people are more open about their sexuality. The homosexual communities of Calcutta, Mumbai, and Bangalore have all organised gay pride marches in the recent past.

LEGALITY OF SAME-SEX MARRIAGE IN INDIA

¹² Dr.Parasarathi, *Reportage of Decriminalizing LGBTQ Community in India by Supreme Court: Content Study of Indian Newspapers*, 15 april 2021, <https://www.readcube.com/>

¹³ Misra, Geetanjali. “Decriminalising Homosexuality in India.” *Reproductive Health Matters*, vol. 17, no. 34, 2009, pp. 20–28. 17 Apr. 2021. *JSTOR*, www.jstor.org/stable/40647442..

¹⁴ Douglas McDonald-Norman, Douglas McDonald-Norman, 16 april 2021, <https://refuge.journals.yorku.ca/>

Recognizing these rights reflects a necessity to achieving impartiality as well as universal freedoms for a marginalised group of individuals. In order to achieve equality, working to reduce prejudice and violence against LGBT people necessitates enacting those rights. Human rights organisations and scholars from around the globe have documented human rights brutalities and violations, with LGBT people facing discrimination, familial rejection, violence, imprisonment, and other forms of exclusion in every country assessed. The current restrictions on same-sex marriage in India are constructed in such a way that they don't expressly forbid it.

CRIMINALIZATION OF HOMOSEXUAL ACTIVITIES

Despite the fact that there are no clear restrictions on same-sex marriages, there are additional aspects to consider before entering one. The consummation of a marriage, for example, is regarded as one of the most important aspects of Hindu marriage. Marriage consummation, on the other hand, would be a criminal offence in the case of two guys being married. Even if same-sex partners were permitted to marry legally, there is always the possibility that they would be prosecuted for their sexual relationship. As a result, any marriage that may exist, at least in the instance of two guys marrying, would be devoid of sexual activity. If the pair decides to have a sexual relationship, they will have to worry about being prosecuted under the Indian Penal Code.

With such laws still that were being vigorously enforced, it was impossible for same-sex partners to marry being constantly aware that they could be arrested and sentenced to prison under Section 377. This was arguably a flagrant infringement of such people's rights to equality and life.

In *Naz Foundation v. Govt. of NCT of Delhi*¹⁵, the Delhi High Court ruled that Section 377 of the Indian Penal Code was unconstitutional in terms of limitations on homosexual behaviour. The Supreme Court used a liberal construction to the term "sex," incorporating biological sex as well as sexual orientation. This practically meant that any law targeting homosexuals would be declared null and void.

In *Suresh Kumar Koushal v. Naz Foundation*¹⁶, the case was later overturned. The Supreme Court stated that the legislature was responsible for changing the law, and that the judiciary could not overturn certain elements of the statute. The bench, on the other hand, simply commented on the High Court's ability to strike down the law; they did not overturn the Delhi High Court's decision that Section 377 was unconstitutional. The judiciary has acknowledged, at least tacitly, that the marginalisation of same-sex couples would violate the fundamental

¹⁵ *Naz Foundation V. Government of NCT of Delhi*, 60 Delhi Law Times 277

¹⁶ *Suresh Kumar Koushal vs. Naz Foundation* civil Appeal No. 10972 OF 2013

rights of such individuals. No same-sex marriage would be safe from persecution until laws targeting such people are struck down or repealed.

ACTIVISTS MOVEMENT

For a decade, gay rights advocates have been fighting Section 377. Lesbian and LGBT organisations petitioned the Delhi High Court in 1994 to overturn the ban. The lawsuit went on for five years and had sparked a lot of controversy. Even members of the Indian lesbian collective Stree Sangam spoke at a government conference on marriage and family law in 1996 about domestic-partnership regulations. In a letter to the homosexual magazine *Trikone*, the organisation claimed that it was "possibly the first time that a lesbian/gay group [attempted] to create public opinion on the issues in such a venue." The second national LGBT conference, the Indian National Gay Conference YAARIAN -99, took place in February 1999. Similarly, to the attacks on the films "Fire" and "Girlfriend," a number of organisations have formed the Lesbian Rights Campaign.

The petition, submitted by a non-profit group, contended that homosexuality should not be a criminal offence in 21st-century India.

MAINSTREAM REACTION

According to 2006 public opinion polling, 41% of Indians would not want a homosexual neighbour, and 64% say homosexuality is never justified. Over time, negative sentiments have waned. In India, LGBT persons report encounters with violence, rejection, and prejudice in a variety of settings, including employment, education, health care, and social services. In several studies of LGBT people, high percentages of poverty have been discovered. Health inequalities connected to stigma and exclusion have been discovered in public health studies. Depression, suicide ideation, and HIV are all more common among LGBT people than they are in the overall population. Result of society's harsh reaction, many people in India deny the reality of sexual minorities, considering that the same-sex behaviour replicates a Western culture, upper-class phenomena. Many others see it as a disease that needs to be treated, an abnormality that needs to be corrected, or a crime that needs to be punished. As a result, gay men and lesbian women are largely unaccepted in Indian society, and as a result, they are exceedingly secretive. However, in the last five years, the Indian homosexual community has migrated to and thrived on the Internet, which is possibly the most tolerant environment they could have wished for. As a result, people are founding non-governmental organisations (NGOs), establishing

helplines, and holding monthly meetings to develop strategies for their cause. Even so, according to Ashok Row Kavi an Indian journalist, sexual minorities in India are primarily stigmatised and disempowered socially, culturally, politically, and, in certain cases, legally and economically. As a result, a huge proportion of lesbian and homosexual teenagers experience solitude, which is frequently accompanied by feelings of self-loathing and uncertainty about their future.

LACK OF OFFICIAL RECOGNITION OF SAME-SEX COUPLES

Starting off with an example Vinoda Adwekar and Rekha Chaudhary attended the Registrar of Marriages in 1993 to request a marriage certificate. The Registrar did not immediately turn the women away, but instead convened an emergency meeting with the judges and law enforcement to assess whether such a certificate could be provided. One of the women was persuaded not to marry in this situation. Regardless of the lack of a firm decision, the Registrar's confusion indicates that there is a lack of clarity in the family laws. It's possible that asking if there is a law that specifically outlaws same-sex marriage isn't the greatest approach. Rather, the topic to consider is whether same-sex couples can marry under current rules.

One can wonder how crucial it is for a marriage to be recognised by the state. The origins of the State's marital power must be explored in order to address this question. Marriage was a secular affair in pre-modern times, at least in Europe, and religious involvement was not required. The clergy just gave their blessings to the institution, as they did to other secular endeavours. With rising demand from the upper classes, the blessing ceremony was transferred from the outdoors to the inside of the church. Over time, the ceremony that is now observed evolved. The state's control of marriage was not complete until the French Revolution, when it was decreed that only civil ceremonies registered by a state authority would be legal.

It is not uncommon in Hindu marriages for persons to get married without receiving official certification of the marriage. Judges would evaluate proof of the marriage if it became necessary to seek judicial intervention. Photographs and recordings are utilised to determine whether two persons were married. The importance of adhering to the ceremonies is highlighted. If the ceremonies are not in accordance of the rules laid, the marriage may be declared invalid. There can be no valid Hindu marriage if the rites cannot be proven. Same-sex couples have been unable to obtain official recognition despite having completed all of the necessary processes and rituals for marriage. The couples involved would have been married in every sense of the word, according to religious rituals and ceremonies, but they would not have been considered wedded in the eyes of the state. This would place same-sex couples in the same legal dilemma as homosexual marriages in the United States, when same-sex marriages performed before a State ban put such unions in limbo. Due to their lack of legal recognition, these couples will be denied the same rights and protections as other couples. Married couples, for example, would be able to get greater financial aid than unmarried ones.

People would be discriminated against purely because of their sexuality, which would be a breach of the principles of equality.

ROLE OF JUDICIARY

The Indian judicial system has played an important role in recognising gay's rights and partially decriminalising Sec. 377 of the Indian Criminal Code, 1860. The Supreme Court's decision to decriminalise gay behaviour is the first step in giving the LGBT population in India equal status and rights. It also allows members of the community to assert their right to marry, adopt, and have children. Because the ruling only addressed the criminalization portion of Section 377, it is likely that rules governing same-sex marriage, adoption, and inheritance will soon follow.

Union of India v. National Legal Service Authority¹⁷ is a major Supreme Court of India ruling that deemed transgender individuals to be a "third gender" and so granted them the right to gender identification. This decision is a significant step toward gender equality.

The Delhi High Court has declared that Section 377 of the Indian Penal Code is unconstitutional because it criminalises hidden consensual sexual actions between adults, which violates Articles 14, 15, and 21 of the Constitution..

Suresh Kumar Koushal v. Naz Foundation overruled a decision. The Supreme Court stated that the legislative was responsible for changing the law, and that the judiciary could not overturn certain elements of the statute. The bench, on the other hand, simply commented on the High Court's ability to strike down the law; they did not overturn the Delhi High Court's decision that Section 377 was unconstitutional.

However, the Supreme Court overturned the Delhi high court's decision, Those who engage in sexual intercourse in the ordinary course are classed differently from those who participate in carnal intercourse against the natural order, and those in the latter category cannot claim that Sec. 377 is arbitrary and irrational. Sec.377 just defined a specific offence and specifies the punishment that may be imposed if the trial is conducted in compliance with Crpc provisions. As a result, Sec.377 was free of any constitutional flaws. Regardless of this ruling, the competent legislature is free to assess the appropriateness and desirability of repealing or amending Section 377 of the Indian Penal Code.

A nine-judge Supreme Court bench hearing. In a dispute challenging the biometric programme Aadhar card, the Supreme Court unanimously ruled that privacy is a fundamental right. in K.S.Putaswamy and Anr v.

¹⁷ Union of India v. National Legal Service Authority (2014)5 SCC 438

Union of India. ¹⁸With the recent judgement condemning Section 377 of the Indian Penal Code as "unconstitutional," there is a ray of hope for those seeking to legalise homosexuality in India. What happens between two people of the same sex in their own private domain must be shielded from government and official intrusion. The decision on the right to privacy is one step in achieving the goal.

In *Navtej Singh Johar v. Union of India* (2018), dancer Navtej Singh Johar filed a petition alleging that Sec. 377 of the Indian Penal Code infringed his constitutional rights to privacy. The court ruled that criminalising private consensual sex between adults violated the right to privacy. Sexual orientation is a natural aspect of self-identity, and to deny it would be a violation of one's right to life. As a result, Section 377 of the Indian Penal Code was partially decriminalised, allowing consensual intercourse between two adults of any gender. The Supreme Court dealt with a case (*Fazal Rab Vs State of Bihar*¹⁹) in which a man had gay relations with a boy with the youngster's consent. 'The offence is one under Sec. 377, IPC, which entails sexual perversity,' the Supreme Court stated in 1983. Because of the boy's assent, the Supreme Court lowered the punishment from three years to six months of harsh incarceration.

CONCLUSION

It is undeniably true that the European experience with the legal recognition of same-sex partnerships allows for a better knowledge of how social and legal changes occur, as well as for predicting future changes. However, forecasts based on presented ideas about the path leading to the legalisation of same-sex marriage have been debunked, demonstrating that applying a general rule fails in the face of a slew of outliers.

In India, same-sex marriages are frowned upon by the general public. This is due to the fact that many individuals believe such relationships are "unnatural" or "unholy" according to their different beliefs and cultures. As a result, the LGBT community is subjected to a system of institutionalised intolerance. While same-sex marriages are not technically forbidden in India, there are laws now that makes it feasible to marry without ambiguity. There have been cases of same-sex marriages taking place in India, despite the fact that they are not socially recognised by the Indian government. Many religious academics believe that such relationships were quite prevalent in ancient Indian society and that the scriptures do not condemn them. However, post-colonial changes in how society views culture have resulted in a lack of understanding of this knowledge, leading to some declaring such interactions as foreign and anti-Indian culture.

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¹⁸ *K.S.Putaswamy and Anr v. Union of India*. (2017) 10 SCC 1.

¹⁹*Fazal Rab Vs State of Bihar* AIR 1983 SC 323, 1983 CriLJ 632, 1982 (1) SCALE 803, (1982) 3 SCC 9

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- State of Bombay v. Narasu Appa Mali²¹
- Fazal Rab Vs State of Bihar²²
- Navtej Singh Johar v. Union of India (2018) ²³
- Naz Foundation V. Government of NCT of Delhi,²⁴
- Suresh Kumar Koushal vs. Naz Foundation²⁵
- National Legal Services Authority v. Union of India²⁶
- Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors²⁷
- Arun Kumar v Inspector general of Registration²⁸

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²⁰ National Legal Services Authority v. Union of India, WP (Civil) No 400 of 2012

²¹ State of Bombay v. Narasu Appa Mali, Air 1952 BOM 84

²² Fazal Rab Vs State of Bihar, AIR 1983 SC 323, 1983 CriLJ 632, 1982 (1) SCALE 803, (1982) 3 SCC 9

²³ Navtej Singh Johar v. Union of India (2018), 1 SCC 13 (2009) 11 DRJ

²⁴ Naz Foundation V. Government of NCT of Delhi, 60 Delhi Law Times 277

²⁵ Suresh Kumar Koushal vs. Naz Foundation Civil Appeal No. 10972 OF 2013

²⁶ National Legal Services Authority v. Union of India , WP (Civil) No 400 of 2012

²⁷ Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors, WRIT PETITION (CIVIL) NO 494 OF 2012

²⁸ Arun Kumar v Inspector general of Registration, W.P. (MD) NO. 4125 OF 2019 AND W.M.P. (MD) NO. 3220 OF 2019

- ¹ R.Venkadesh kumar, , A STUDY ON THE LEGAL RECOGNITION OF SAME SEX MARRIAGE 14 April 2021, <https://acadpubl.eu/>
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