



THE VALIDITY OF SAME-SEX MARRIAGES IN INDIA

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Abstract

The paper acknowledges the existence of Same-Sex Relationships taking into account the opinions and the prevalent laws in respect of them in the previous times, where there was a separate and conflicted mythological view; when there was the radicalization of the British influencing people and implementing laws; where through a series of judicial decisions, the recognition of Same-Sex Relationships have surfaced and about the long way to go to lead these relationships into legal marriage in India and the recognition. I came to the conclusion that as of right now there exists no legal precedents of same-sex marriages being legal but there is no specific illegality mentioned of such acts.

Keywords: Same-Sex Relationships, Same-Sex Marriage, India, LGBTQ+



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Introduction

"I am what I am. So take me as I am"

-Deepak Misra, 45th Chief Justice of India.

This statement so put above may seem like a normal amalgamation of words which means the recognition of them as they are but it is not merely only that. It is the recognition of all those dead albeit alive souls who were trying to fight who they are, to closet their feelings for the same gender as they are and to not be who they are. This statement was said in front of the whole world by the former CJI and still stands as one of the best judgments that have come up to surface and debated upon in the supreme court of law. Same-sex relationships have in this generation always being debated on with the people of orthodox mindset, these people who believe in the natural course of intercourse¹. These heated debates sometimes lead to new sunlight but sometimes because of people's own tolerant and non-liberal opinions and lead to riots.

¹ The Law divides intercourse into two types, natural and carnal intercourse. Till 2018 only natural intercourse (which is the sexual intercourse done for the ultimate end: procreation), was given legal validity. Where now, carnal intercourse is only recognized by Article 14, 15, 19, 21 of the Indian constitution, 1950.

This kind of relationships is the legal solemnization of marriage of two people who have feelings for the same sex/gender as them, It is them entering into a civil or religious ceremony to be recognized and enjoy all the benefits of being married and culminating their love in front of their loved ones and in the end become whole as one in front of law. Although, in India, this kind of Marriage is not recognized. Same-sex couples are neither offered limited rights such as a civil union or a domestic partnership nor is there any unified marriage Law. Only recently the stigma of homosexuality being bad has removed by the recent landmark judgment *Navtej Singh Johar v. Union of India*² which overthrew the norms of carnal intercourse between a man and a man, a woman and a man, a transgender and a man and a transgender and a women and made this whole notion valid, by decriminalizing section 377 of the Indian Penal Code, 1860. This had been in a long run coming, the judiciary has also told the legislation to implement or vary the law.

Mythological Same-Sex Relations

These same-sex relations have not always been looked down upon as their recognition is still prevalently seen in the ancient monuments/buildings. The famous khajurao temples, which is famous for their erotic depictions contain scriptures having documented same sex relationships. Even the religion, Hinduism, traditionally recognized these kind of relations as totally natural and even joyful. Although, there are scriptures such as *Nārada-smṛiti* and the *Sushruta Samhita*, from ancient India relating to dharma and medicine, respectively, that declares homosexuality to be "incurable" and forbade homosexuality. Irrespective of that there is a well known recognition of same sex relationship and the marriage of them written in a world class renowned scripture, the *Mahabharata*. Shikhandini was born as a female and due to his recognition of himself as a male; he was banished from the kingdom. He then transformed himself into a man changing his name to Shikhandi, who then later on marries a woman. Even in the Mughal Empire same sex relations were looked down upon and punishments for zina were given.

British Empire Influence

The modern societal homophobia was introduced to the Indians in the existence of the British raj/ European colonizers. The British raj along with European companies also came with their

² WRIT PETITION (CRIMINAL) NO. 76 OF 2016

orthodox thinking and imposed section 377, which stood till 70 years even after independence.

Same-Sex Marriage validity in Indian Provisions

Every person in India has the right to choose any civil code to marry to follow for them, based on their religion or community. The laws of marriage in India, the Hindu Marriage Act, 1955, the Muslim Personal Law, the Indian Christian Act, 1872, Parsi Marriage and Divorce Act, 1936, or the Special Marriage Act. None of these codified Marriage acts although define marriage specifically between a man and woman or prohibit same sex unions but they have a "heteronormative underpinnings" and do not recognize same-sex unions. The constitution and fundamental rights provided by the legislation and judiciary in this case seem to be restrictive and violate. There is an underlying right that whomsoever could marry anyone they want and they have the right to marry and solemnize their love. International Lesbian, Gay, Bisexual, Trans and Intersex Association held a poll in 2016 where it was found that 35% were in favor of legalizing same sex marriage, where a survey by the Varkey Foundation found that support for same-sex marriage was higher among 18 to 21-year-olds at 53%. Although none of them are recognized on a legislative manner per se it has been recognized in judicial decisions. Be it for live-in relationship where sometimes the partners are given the status of being married, still there have been no legal precedent where same sex relations have been given such status.

Discussion and Conclusion

Marriage is a ceremony that two people perform to enjoy their love and celebrate it with people who approve of them and love them and want to share an important part of them with. The whole notion of homosexuality being against the state of nature is absurd and homophobic. People with orthodox thinking continued with the same old provisions. Many of the sections of this community have resolved that jobs that are against humanity to earn a living in this country. The researcher has come to the conclusion that there are no restrictions or bans explicitly on Same-Sex marriages in India. However there are no legal precedents also accepting Same-Sex marriages.

The conservative society which is patriarchal driven should leave behind this orthodox, draconian law behind and create a peace loving society where everyone is accepted equally as prescribed by the fundamental rights of our constitution.

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BARE ACTS

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- Parsi Marriage and Divorce Act, 1936,*
- The Special Marriage Act, 1954*