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ABOUT US

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LEGALIZATION OF SAME SEX MARRIAGE: INTERSECTION BETWEEN LAW AND MORALITY

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ABSTRACT

This legal research paper investigates the confluence of law and morality in the context of India's and the world's legalization of same-sex marriage. In addition, it analyses the social, ethical, and constitutional issues surrounding the legalization of same-sex marriage, as well as the numerous arguments for and against its legalization taking into account constitutional, human rights, and cultural aspects of the debate. This legal research paper examines the intersection between law and morality in the context of the legalization of same-sex marriage. The paper delves into the debate between societal morality and constitutional morality and its implications for the legalization of same-sex marriage. The Hart v. Devlin and Hart v. Fuller debates are analyzed to understand the different perspectives on the role of law in shaping moral values and the limits of state intervention in private behavior and examined the effects of legal recognition of same-sex marriage on the lives of same-sex couples and society as a whole, as well as the role of the judiciary in moulding same-sex marriage recognition. The research questions aim to understand the jurisprudential aspects of the debate on same-sex marriage and how it intersects with the concepts of morality and law.

This paper will conclude with recommendations for future policy and legal reform towards the legalisation of same-sex marriage, emphasising the importance of anti-discrimination laws, education and awareness, family law reform, and international cooperation. This research paper is intended to contribute to the ongoing discussion on the legal recognition of same-sex marriage and pave the way for greater equality and social inclusion.

INTRODUCTION

The recognition of same-sex marriage has been a controversial and hotly contested issue across the world. The 21st century has witnessed new trend and conception of marriage which calls for gender neutral relation rather than a gender specification. Since, the Netherlands' legalization of same-sex marriage in 2000, over 34 countries have legalized same-sex marriage either through legislation or through judicial court. At present more than 50 countries allows same sex couples to legally adopt children. Same-sex marriage is a phenomenon that has given a rise to moral, religious and legal debates all over the world and the legality and its morality has been hotly debated. Supporters of same-sex marriage says that in legalizing marriage between the two persons of same sex there is no immorality rather it is to ensure human rights, equality between sexual orientations and reduces discrimination in society. Proponent of same-sex marriage argues that sexual orientation is considered as a ground of discrimination in European Union law Article 21 of Charter of Fundamental Rights of the Union¹. While on the other hand, the opponents of the same-sex marriage argues that this kind of marriage gives rise to a concern that it is immoral and unnatural and it would affect the tradition and shatter the traditional family system. According to the critics, the same-sex marriage is exclusively a western phenomenon which cannot function in the country like India which is deeply religious and culture and where the institution of marriage is considered as a "sacred bond".

LITERATURE REVIEW

Countries have grappled with the intersection of human rights, societal norms, and cultural and religious beliefs with regard to the legalization of same-sex marriage. This literature review focuses on the legal and social realities of same-sex marriage.

The authors of "Same-Sex Marriage in India: Examining the Legal and Social Realities"² argue that

1 Charter of Fundamental Rights of the Union, Article 21 states that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2 Narrain, A., & Gupta, A. "Same-Sex Marriage in India: Examining the Legal and Social Realities" 7 Indian Journal of Human Rights and Law 1-22 (2013).

although the legal framework for same-sex marriage exists in India, social and cultural barriers still hinder its implementation. The authors analyse the numerous obstacles faced by the LGBTQ community in India, such as social exclusion and discrimination, and propose a road map for the recognition of same-sex marriage in India.

"Decriminalisation of Homosexuality in India: The Politics of Right-Wing Populism"³ is an article that discusses the legal and political aspects of the decriminalisation of homosexuality in India. The article contends that the Indian government's decision to decriminalise homosexuality was a response to international pressure and Indian society's changing attitudes. The role of right-wing political parties in opposing the decriminalisation of homosexuality is also examined.

One of the seminal book on the topic is "Marriage, Sexuality, and Gender" by Sylvia Tamale⁴. The book argues that traditional African values and customs need to be reinterpreted to accommodate the rights of marginalized groups, including LGBTQ individuals.

In "Same-Sex Marriage and the Constitution" by Evan Gerstmann⁵, from a constitutional standpoint, the author examines the various arguments for and against same-sex marriage. The author argues that the Constitution guarantees the recognition of same-sex marriage as a fundamental right and that any laws prohibiting same-sex marriage are unconstitutional.

The "Same-Sex Marriage: A Constitutional and Social Debate"⁶, the author in this article provides a comprehensive overview of the constitutional and social issues surrounding same-sex marriage in the United States. It is a valuable resource for scholars, policymakers, and advocates seeking to understand the legal and ethical dimensions of the debate.

RESEARCH OBJECTIVE

3 Rao, Rahul. "Decriminalization of Homosexuality in India: The Politics of Right-Wing Populism." 14 International Journal of Law in Context 248-262 (2018).

4 Tamale, S. (2011). Marriage, Sexuality and Gender. Makerere University Institute of Social Research.

5 Gerstmann, Evan. "Same-Sex Marriage and the Constitution." 63 Political Research Quarterly 503-515 (2010).

6 Cruz, D. B., & Engel, S. M. "Same-sex marriage: A constitutional and social debate" 66 Journal of Social Issues 287-302 (2010).

The objective of a legal research project on the legalisation of same-sex marriage and its intersection with law and morality is to examine critically the legal, social, and moral issues surrounding the acceptance of same-sex marriage.

Specifically, the objective of this project is to examine the tensions between societal and constitutional morality in the context of same-sex marriage. Further, to investigate the Hart v. Devlin and Hart v. Fuller debates and their implications for the legalisation of same-sex marriage. This project intends to contribute to the jurisprudential understanding of the relationship between law and morality and the role of the judiciary in shaping societal values through its analysis.

In addition, the project also considers the moral and ethical implications of legalising same-sex marriage, as well as the impact of societal norms and values on the debate. The project also investigates and explores how the law and society have influenced each other's perspectives and how those perspectives have changed over time. It evaluate the impact of public opinion and political will on the issue, as well as the role of the judiciary in influencing the legal recognition of same-sex marriage.

HYPOTHESIS

- The legalisation of same-sex marriage in India will result in a positive shift towards a constitutional morality that prioritises the rights and well-being of LGBTQ people, their families, and society as a whole.
- Legalizing same-sex marriage will increase social acceptance of LGBTQ people, reduce stigma and discrimination, and promote equality and inclusion.

RESEARCH QUESTIONS

Here are some potential research questions for a legal research project on the legalization of same sex marriage and its intersection with law and morality:

1. What is the attitude to same sex marriage around the world?

2. How has the Hart v. Devlin debate influenced the legal and social discourse around same-sex marriage?
3. How do societal and constitutional morality intersect in the context of same-sex marriage, and what implications does this have for the legalization and recognition of same-sex unions?
4. How do religious and cultural beliefs and values impact the legal and moral debates around same-sex marriage, and what role should they play in the decision-making process?
5. What are the advantages and disadvantages of legalizing same sex marriage?

RESEARCH METHODOLOGY

The doctrinal research methodology has been used and relied on both primary sources like Acts, Constitution, conventions and secondary sources like journal articles, case laws, websites and reports.

METHOD OF CITATION

The Indian Law Institute (ILI) Method of citation has been used.

1. HISTORICAL AND CULTURAL FACTORS THAT HAVE INFLUENCED THE DEBATE ON SAME SEX MARRIAGE:

Several historical and cultural factors impact the debate on same-sex marriage in India. The colonial legacy of Section 377 of the Indian Penal Code, which criminalised sexual activities "against the order of nature," including same-sex sexual activities, is one of the most significant factors. This law was inherited from British colonial rule in India and remained in effect until 2018, when the Supreme Court of India invalidated it in the landmark *Navtej Singh Johar v. Union of India*⁷ case. Religion and traditional cultural values, which have been used to justify discrimination and stigma against LGBTQ individuals, are another factor. Hinduism, which is the dominant religion in India, has a rich and varied history, and attitudes towards same-sex relationships vary greatly among Hindu

7 (2018) 10 SCC 1

communities. However, many conservative Hindu organisations have opposed the legalisation of same-sex marriage on the grounds that it violates traditional family values and moral standards. Other major religions in India, including Islam, Christianity, and Sikhism, have also opposed same-sex marriage. In India, this has created a religious and cultural barrier to same-sex relationships and marriage. In addition, historically, Indian society has been patriarchal and hierarchical, with rigid gender roles and norms that have contributed to the marginalisation of LGBTQ individuals. The intersectionality of caste, class, and gender exacerbates the stigmatisation and discrimination experienced by LGBTQ individuals.

These historical and cultural factors have shaped the debate on same-sex marriage in India, creating a complex and contested landscape for the recognition of LGBTQ individuals' rights. Recent legal and social changes in India, including the repeal of Section 377 and the growing visibility and advocacy of LGBTQ individuals and their allies, have created new opportunities for the recognition of same-sex marriage and the promotion of greater equality and inclusiveness.

2. RULES AND REGULATIONS REGARDING MARRIAGE IN INDIA:

There are different countries and regions in the world which are different from each other on the ground of their own unique religious characteristics, cultural, political and social awareness level of people which would definitely plays a significant role in shaping their own laws regarding the legalization of same-sex marriage. The country with the people of liberal notion will have different approach from the country which have conservative and traditional culture following citizen.

Basically, same-sex marriage is the union of two persons belonging to the same gender in which a man marries a man and a woman marries a woman. However, traditionally marriage is considered as a union of two opposite gender which depicts a socially and legally recognized union of husband and wife which means i.e. male and female. In India marriage is very significant and important social institution that involves the union of two opposite gender and considered a sacred bond between individuals and their families.

There are two ways of legalizing any marriage in India

1. By Personal Law,
 - The Hindu Marriage Act, 1955
 - The Muslim Marriage Act,
 - The Christian Marriage Act,

2. By Special Marriage Act, 1954

In each of the above mentioned laws, there are essential requirements to be followed for entering into a legally valid marriage which contains the age, consent, soundness of mind and most importantly the requirement of biological male and female.

3. SPECIAL MARRIAGE ACT, 1954

The Special Marriage Act of 1954 is a secular statute that permits the registration of marriages between people of different religions, castes, or nationalities. Moreover, it permits the registration of same-sex marriages. However, same-sex marriages are not explicitly mentioned in the act; only "bridegroom" and "bride" are mentioned.

In its 2009 decision in *Naz Foundation v. Govt. NCT of Delhi*⁸, the Delhi High Court ruled that the Special Marriage Act does not prohibit same-sex couples from marrying. The court noted that the act does not specify that the bride and groom must be of different sexes and that it is possible to interpret the act so that same-sex couples are permitted.

The decision in *Naz Foundation* was later upheld by the Supreme Court of India in its 2018 landmark decision in *Navtej Singh Johar v. Union of India*⁹, which decriminalised homosexuality and recognised the rights of same-sex couples to live with dignity and enter into legal partnerships comparable to marriage. The court also ordered the government to provide same-sex couples with equal legal protection and rights.

⁸ (2009) 111 DRJ 1 (Delhi HC 2009)

⁹ (2018) 10 SCC 1

In states where the Special Marriage Act of 1954 has been implemented, same-sex couples may now register their marriage. However, not all states have implemented the act, and in those states same-sex marriage is not legally recognised.

4. THE GLOBAL SCENARIO:

The 1970s saw a rise in LGBT rights movement, particularly in the western world, during the contemporary era. Although homosexual individuals initially had no desire in getting married because they thought it was a conventional institution, they were successful in establishing these unions. Between the 1980s and 1990s, a movement to legalise same-sex relationships began to take hold. In 1989, Denmark paved the way by becoming the first country to officially recognise same sex relationships. The Netherlands was the first country to formally recognise same-sex unions in 2001, followed by Belgium in 2003, Spain and Canada in 2005, South Africa in 2006, Norway in 2008, Sweden in 2009, and Portugal in 2010.

2015 marked the legalisation of same-sex marriage in the United States, following a landmark Supreme Court decision in *Obergefell v. Hodges*¹⁰. On June 26, 2015, the United States Supreme Court ruled in a landmark decision that the 14th Amendment requires all states to license marriages between same-sex couples and to recognize all marriages that were lawfully performed out of state. Since then, thousands of same-sex couples across the country have been legally married. Legalising same-sex marriage has been credited with promoting greater legal and social equality for LGBT individuals and contributing to a larger cultural shift towards greater acceptance and inclusion.

According to a 2017 national postal survey on same-sex marriage¹¹, the majority of Australians support legalising same-sex marriage. In 2018, the Australian Parliament passed legislation legalising marriage between individuals of the same gender¹². The legalisation of same-sex marriage in Australia has been credited with increasing social acceptance and inclusiveness of LGBT individuals and relationships.

¹⁰ 576 U.S. (2015).

¹¹ Australian Marriage Law Postal Survey can be found on the official website of the Australian Bureau of Statistics available at: <https://marriagesurvey.abs.gov.au/results> (last visited on May 03, 2023).

¹² Marriage Amendment (Definition and Religious Freedoms) Act, 2018

For the western minded person who engages in same-sex relationship, which may culminate into marriage, it is his/her fundamental right to marry whoever he/she wants, and does not matter whether or not such a person is of the same gender. It is important to note that this conception is basically a libertarian view in which case what one does with his/her body, but that does not constitute harm to the society, is his/her own right.

5. INTERSECTION BETWEEN LAW AND MORALITY

The legalization of same-sex marriage is a complex issue that intersects law and morality. On one hand, it is a legal issue because marriage is a legal institution that is regulated by the state. On the other hand, it is a moral issue because marriage is also a social and cultural institution that is deeply rooted in religious and cultural traditions.

The set of guidelines and expectations for human social behaviour known as morality or moral standards establishes shared beliefs and notions about right and wrong, good and evil, conscience, honour, duty, and other topics. Other aspects of society's moral and spiritual existence. The development and application of legal regulations are spiritually based on moral principles. It may be claimed that many times, people in society follow certain legal requirements not because they are aware of and comprehend the law, but rather because they were raised with certain moral values. But there will inevitably be disagreements and conflicts as law and morality are applied to social life. Generally speaking, there are no significant inconsistencies between morality and law because they both aim to the human race. Progressive legislation, however, still has to regulate the social order even as it places individuals at its centre, therefore it occasionally falls short of what people morally require. Consequently, there are actions that, while not illegal, are seen as morally wrong. However, as the law was established to defend moral ideals, breaking the law is frequently a moral transgression. A decent and civilised society must, after all, guarantee that all of its members are equal in every way.¹³

Legally, the issue of same-sex marriage revolves around the interpretation of constitutional rights and the extent to which the state can regulate marriage. Equal protection and due process are violated by

¹³ Same-Sex Marriage from the Perspective of Tradition, Morality and Law in Vietnam available at: <http://www.law.unimelb.edu.au> (last visit on May 05, 2023).

denying same-sex couples the right to marry, according to proponents of same-sex marriage. They contend that there is no valid reason for the state to deny same-sex couples the same legal benefits and protections as heterosexual couples. Opponents of same-sex marriage argue that marriage is a sacred institution defined as the union of one man and one woman. They maintain that allowing same-sex couples to marry undermines the traditional definition of marriage and poses a threat to the institution itself. They also argue that marriage serves a reproductive function, which same-sex couples cannot fulfil.¹⁴

In India, same-sex marriage remains a topic of debate and discussion. Existing Indian law does not recognise same-sex marriage, and there is no legal framework for same-sex couples to register their relationships.

Article 14 of the Indian Constitution protects the right to equality and non-discrimination, which is a fundamental right. The Indian Supreme Court has acknowledged the rights of the LGBTQ+ community in a number of landmark decisions, including *Navtej Singh Johar v. Union of India*¹⁵, which decriminalized consensual same-sex relationships and held that sexual orientation is an essential characteristic of privacy and personal autonomy.

Nonetheless, legal recognition of same-sex marriages remains a contentious issue. In *Naz Foundation v. Govt. of NCT of Delhi*¹⁶, the Delhi High Court ruled that Section 377 of the Indian Penal Code, which criminalized same-sex relationships, violated the right to equality and be treated equally and without discrimination. The court did not, however, address the issue of same-sex marriage. In 2020, a petition seeking recognition of same-sex marriage under the Hindu Marriage Act of 1955 was filed with the Delhi High Court. The petition asserted that denying same-sex couples the right to marry violates their fundamental rights and that the Hindu Marriage Act, 1955 does not define marriage as being between a man and a woman.

The issue of same-sex marriage in India is, in conclusion, a complex intersection of law and morality. Despite the fact that the Indian Constitution guarantees the right to equality and nondiscrimination

14 Shruti Narayan "Same Sex Marriage in India: A Legal and Moral Quagmire" Harvard International Review (2020).

15 Supra note 9.

16 Supra note 8.

and the Supreme Court has recognized the rights of the LGBTQ+ community, the legal recognition of same-sex marriage is still a matter of debate and discussion. The outcome of the pending case before the Delhi High Court will be a significant turning point in India's ongoing fight for LGBTQ+ rights.

6. HOW DOES THIS POPULAR MORALITY EVOLVE AND WHAT IMPACT DOES IT HAVE ON SOCIETY

6.1 RELIGIOUS AND CULTURAL BELIEFS AND VALUES

Granting marriage right to same sex couples would legitimize morally wrong union as marriage has always viewed from religious point of view. Marriage has always been seen as the union of a man and a woman. Under Hindu scriptures Apasthamba stated that Marriage was meant for doing good deeds and for attainment of Moksha, performing religious duties and begetting a son who enables a man to get deliverance from suffering of hell.¹⁷ Thus, it raises an issue that it is impossible in the case of same sex marriage to beget a son. Thus, it would defeat the very purpose of the marriage i.e. Moksha. Marriage is defined by Raghunandan as the acceptance by the groom of a girl being given away by her guardian.¹⁸ In case *Gopal Kishan v. Mithilesh Kumari* the Allahabad High Court observed that marriage is not performed for emotional gratification and it is regarded as part of the life of the soul. It is holy spiritual union corresponding to consortium omntum vitoe of Rome, a process by which the husband and wife become one.¹⁹ Under Muslim Law Marriage is a contract for the purpose of legalizing sexual intercourse and procreation of children and the object of marriage is to restraint of sexual passion, the ordering of domestic life, the increase of the family, the discipline of the same in the care and responsibility of wife and children and the upbringing of virtuous children.²⁰ Consequently, in every personal law the marriage is seen as culturally or traditionally whether it is considered sacrament or contractual there is some essential conditions to be fulfilled firstly, there shall be two opposite gender and secondly, the purpose of the marriage is to procreate children and perpetuate the family line on the other hand, the purpose of the same sex marriage is only personal gratification of two individuals so, if state allows same sex marriage it would not fulfil

17 R.K. Agarwal, Hindu Law 36 (Central Law House, Allahabad, 25th edn., 2017).

18 Id. at 38.

19 AIR 1979 All. 316.

20 Aqil Ahmad, Mohammedan Law 109 (Central Law Agency, Allahabad, 26th edn., 2016).

the purpose of marriage because it does not involve two opposite sex and in such kind of marriage they cannot naturally or biologically procreate children which would not add to the survival of human race. They can only have children by adoption or by surrogacy and it is said by some authors that the well-being of the whole community requires that children should, so far as possible, be raised by their own parents within the family which would involve both the father and mother. These children would be lacking of either the awareness of the fatherhood or motherhood.²¹

Personal laws governing marriage and family law in India are specific to different religious communities, and there is no universal civil code applicable to all citizens. This is one of the primary obstacles to the legal recognition of same-sex marriage in India.

6.2 SOCIETAL MORALITY VERSUS CONSTITUTIONAL MORALITY

The issues of societal morality versus constitutional morality, as well as the Hart-Devlin and Hart Fuller debates, are indeed relevant to the study of same-sex marriage and its intersection with law and morality. These debates revolve around the extent to which the law should reflect and enforce prevailing social morality, and whether there is a duty to obey the law regardless of its content.

The Hart-Fuller debate focused on the idea of a "law's inner morality" and whether there is a necessary connection between law and morality. Hart argued that there are certain principles of legality that are necessary for a legal system to function properly, such as the principle that laws should be general, public, and prospective. Fuller argued that law and morality are inherently connected, and that laws must meet certain moral standards in order to be considered legitimate. Fuller criticized Hart's view as being too narrow and technical, and argued that it failed to take into account the social and moral purpose of the law.²²

The Hart v. Devlin debate is a classic illustration of the conflict between the concepts of morality and individual liberty. The debate argues on whether or not the state has the authority to legislate morality. The Hart v. Devlin debate is especially pertinent in the context of the legalisation of same sex marriage because it raises the fundamental question of whether the state has the authority to regulate

21 Sir Alfred Denning, *The Changing Law* 121 (Universal Law Publishing Pvt. Ltd. 2nd edn., 2012).

22 Farber, D.A. & Sherry "Same Sex Marriage and the Socially Constitutive Function of Law" 79 *Virginia Law Review* (1993).

sexual behaviour and relationships.

H.L.A. Hart, a legal philosopher, argued that the law should not enforce moral standards that are unnecessary for the protection of individual rights. Hart argued that there should be a distinction between immorality and illegality. He believed that the government should only intervene when there is an obvious risk to others. This argument has been used by proponents of same-sex marriage who believe that consenting adults have the right to engage in a consensual relationship, and the state should not interfere in their private lives. They argue that the role of the state should be limited to safeguarding individual rights and preventing harm to others²³.

In order to safeguard the moral fabric of society, Devlin argued that the state has the authority to legislate morality. This argument has been used by opponents of same-sex marriage who believe that the legalization of same-sex marriage would undermine the traditional moral values of society.²⁴

These debates are relevant to the study of same-sex marriage because they raise fundamental questions regarding the relationship between law and morality. Should the law reflect prevailing social morality, or should it protect the rights and liberties of individuals? Is a connection between law and morality required, or can they be separated? When analysing the legal and moral implications of same-sex marriage, it is crucial to consider these questions.

In recent years, courts all over the world have been debating whether same-sex marriage is a constitutionally protected fundamental right. The Hart v. Devlin debate has shaped the arguments presented in these cases significantly. Those who argue for the legalisation of same-sex marriage frequently cite Hart's views on the importance of morality, while those who argue against the legalisation of same-sex marriage frequently cite Devlin's views on the importance of morality.

In general, the Hart v. Devlin debate illuminates the intricate relationship between law, morality, and individual freedom. It has significant repercussions for the legalisation of same-sex marriage and the ongoing fight for LGBTQ+ rights.

23 David Archard "The Devlin-Hart Debate and the Moral Limits of Law" *Journal of Social and Legal Studies* (2002)

24 Ibid.

7. POTENTIAL ADVANTAGES AND DISADVANTAGES OF LEGALISING SAME SEX MARRIAGE IN INDIA:

7.1 ADVANTAGES OF LEGALIZING SAME SEX MARRIAGE

Legalising same-sex marriage would provide LGBTQ individuals and their families with increased legal recognition and protection. This would include access to benefits such as health insurance, inheritance, and property rights, as well as the ability to make medical decisions for their spouse. Legalising same-sex marriage would assist in reducing stigma and discrimination against LGBTQ people and their families. This would contribute to the development of an inclusive society and increase social acceptance. The legalisation of same-sex marriage has been shown to improve the mental and physical health of LGBTQ individuals by reducing the stress, anxiety, and depression associated with discrimination and lack of legal recognition. Economic benefits include increased economic activity and job creation, as well as increased tax revenue from same-sex couples, if same-sex marriages are legalised.

Discussing the benefits of the legalisation of same-sex marriages is important, but we must not lose sight of the difficulties involved. Legalising same-sex marriage could be met with opposition from conservative religious and cultural groups, who may argue that it violates traditional family structures and values. Some individuals may view same-sex relationships as morally objectionable or unnatural, and may oppose the legalization of same-sex marriage on these grounds. This may be based on personal beliefs, cultural norms, or social conventions. Legalising same-sex marriage would necessitate legal reforms and changes to existing statutes, which could be time-consuming and complicated. Making legal same-sex marriage would require government and legislative support, which may be challenging to obtain due to political and social factors. The legalisation of same-sex marriage may face social backlash, including protests.

7.2 DISADVANTAGES OF SAME SEX MARRIAGE

1. IT VIOLATES NATURAL LAW

Marriage is not just relationship between two persons but it is rooted in human nature and governed by natural law. Natural law's primary purpose is that good is to be done and evil is to be avoided. A man by his natural reason can perceive what is morally right or wrong for him. If we allow

homosexual marriage it will violate the natural law as the true marriage is the union of heterosexual couple for the purpose of procreating children and contributing to continuation of human race.

2. CHILDREN ALWAYS LACKING OF EITHER OF A FATHER OR MOTHER

It is in the best interest of children that they should be raised under the influence of their both father and mother and which is not possible in same sex marriage. It is evident from difficulties faced by orphans or children those were raised by single parent, relative or foster parent and also that the well-being of the whole community requires that children should, so far as possible, be raised by their own parents within the family which would involve both the father and mother otherwise, these children would be lacking of either the awareness of the fatherhood or motherhood.²⁵

3. IT DOES NOT CREATE A FAMILY BUT A NATURALLY STERILE UNION

Same sex marriage is inherently sterile. Same sex couple can't naturally or biologically procreate babies, they can only have children by adoption or by employing artificial means or surrogacy. Therefore, we cannot call the same sex union a marriage and give it the benefits of true marriage.²⁶

4. MAY LEAD TO DEMAND FOR POLYGAMY, INCEST, PEDOPHILIA AND OTHER SEXUAL IMMORALITY

Those who demand that same sex marriage must be legalized have an obligation to explain that why marriage is not appropriate for any other deviant sexual pattern adults and minors who would wish to enter into marriage. If same sex marriage must be legalized then why should not polygamy, incest, pedophilia and other sexual immorality? How will these practice be denied if "same sex marriage" is granted.²⁷

8. ROLE OF JUDICIARY:

In many countries, the judiciary has played a crucial role in shaping the legal recognition of same sex marriage. In numerous instances, courts have interpreted constitutional provisions and human rights

²⁵ Sir Alfred Denning, *The Changing Law* 121 (Universal Law Publishing Pvt. Ltd. 2nd edn., 2012).

²⁶ 10 Reasons why Homosexual Marriage is Harmful and must be opposed available at: <http://www.catholicahawaii.org> (last visited on May 07, 2023).

²⁷ Andrew F. March, "What Lies Beyond Same Sex Marriage? Marriage, Reproductive Freedom and Future Persons in Liberal Public Justification" 27 *Journal of Applied Philosophy* (2010).

laws to grant same-sex couples legal recognition. This has frequently been driven by the recognition of individuals' fundamental rights, such as the right to equality and nondiscrimination. In a number of nations, judicial decisions have paved the way for legislative action to legalise same sex marriage.

Notably complex and dynamic is the relationship between the judiciary, public opinion, and political will. And vice versa, judicial decisions can shape public opinion and influence political will. In certain instances, the judiciary has been perceived as taking the lead on LGBT rights issues where political leaders have been reluctant to act. In other instances, political leaders have pioneered the legalisation of same-sex marriage, followed by the judiciary. In the end, same-sex marriage recognition is the result of a complex interaction between legal, social, and political factors. In India, the judiciary has played a crucial role in shaping the legal recognition of same-sex marriage. In 2009, the Delhi High Court issued a landmark judgment in the case of *Naz Foundation v. Government of NCT of Delhi*, which decriminalized same-sex sexual activities between consenting adults. The court held that Section 377 of the Indian Penal Code, which criminalized same-sex sexual activities, violated the fundamental rights of LGBT individuals to life, liberty, and equality guaranteed under the Indian Constitution. Since then, there have been several legal challenges seeking recognition of same-sex marriage in India. In 2013, the Supreme Court of India in the case of *Suresh Kumar Koushal v. Naz Foundation* upheld the constitutionality of Section 377, effectively overturning the Delhi High Court's ruling. However, in 2018, in the case of *Navtej Singh Johar v. Union of India*, the Supreme Court struck down Section 377 as unconstitutional, recognizing the rights of LGBT individuals and paving the way for the legal recognition of same-sex relationships.

Despite this landmark ruling, same-sex marriage is not yet legally recognized in India. However, there have been several petitions and legal challenges seeking its recognition, and it remains a topic of significant public debate and discussion. The judiciary continues to play an important role in shaping the legal recognition of same-sex marriage in India, with several cases pending before various courts seeking its recognition.

In terms of public opinion and political will, India remains a conservative society with deeply ingrained societal norms and values around marriage and family. While there is growing support for LGBT rights and recognition of same-sex relationships, there remains significant opposition from

conservative groups and political leaders. The issue of same-sex marriage remains a politically sensitive one, and there is currently little political will to take up the issue of its legalization. However, as public opinion continues to shift and as legal challenges seeking recognition of same sex marriage continue, it is possible that India may eventually join the growing number of countries legalizing same-sex marriage.

CONCLUSION

Marriage has always been considered a sacramental union of a man and a woman in India and around the world as well but a drastic stroke to this notion of society was seen in the 21st century when the people from LGBTQ community came forward and filed a petition to legalize the same sex relationship and finally after the long struggle in 2018 they got the same sex relationship legalized by decriminalizing the section 377 of IPC in the case *Navtej Singh Johar v. Union of India*. As the relationship has been legalized they are demanding for the marital relationship because being in just a civil relationship will not allow them to be entitled to various benefits of the laws of Indian for instance one partner cannot be the nominee of the other under Insurance Act, adoption and inheritance. Same sex marriage is a very complex and sensitive issue as India is culturally and ethically rich country where the institution of marriage is considered only sacramental and the largest democracy in the world as well. Thus, there are two groups of people, the supporters and the critics of legalizing same sex marriage. Supporter says that it is a significant step towards ensuring equality and the right to marry for all individuals, regardless of their sexual orientation. It promotes inclusivity, human rights, and equal treatment under the law. Many countries and jurisdictions have already legalized same sex marriage, recognizing it as a fundamental civil right, on the other hand the critics view the legalizing of same sex marriage morally wrong as it is against the natural law which requires two opposite sex for entering into legally and culturally valid marriage. The purpose of marriage is to procreate and the continuation of human race which the same sex marriage can't provide.

RCOMMENDATIONS

1. Many children in India are in state custody. Various agencies have reported that Covid has slowed the rate of adoption and fostering in the country. On the other hand, same sex couples are willing to

sign up and lessen the strain. Ensuring elimination of discrimination would provide the dual benefit of parenthood to couples and support system to the children.

2. The consensus-based analysis by the ECtHR may be problematic. States may not have reasonable and objective justification behind the unequal or difference in treatment among the people that may in consequence affect the interest of minorities while dealing with sensitive moral or ethical issues. Therefore, ECtHR is required to apply a strong assertive role in protecting and promoting equal marriage rights rather than applying more consensus-based approach analysis.

3. The “European consensus” used in determining margin of appreciation is ambiguous and vague as not properly defined by the court nor is the court consistent in its application. Further, it also provides no crystal clarity regarding interpretation or application of Article 12 ECHR in context of same-sex couples. Consensus among states may be dependent upon various grounds: national laws, practices, social and emerging trends etc. Therefore, court may consider social and emerging trends along with legislations of states as a ground of existence of European consensus rather to focus on lack of legislation on same-sex marriage in certain member states.

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