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Love Without Boundaries: The Struggle for Marriage Equality

Tanya Sharma & Mohammed Faizan

ABSTRACT

LGBT in India has been documented for different times. From being a journey of making up of Section 377 in Indian Penal Code (modeled on the Buggery Act, 1533 by Britishers in India) to ending it up as making this section as unconstitutional (partially) from the case of Navtej Singh Johar vs. Union of India which made this section unconstitutional “in so far as it criminalizes consensual sexual conduct between adults of the same sex.” But unfortunately the same sex couples are not getting the equal status of marriage as that of a heterogeneous couples in the Indian society unlike other countries where it is legalized as none of any codified marriage acts of India explicitly interpret to recognize same sex unions as these laws have “heteronormative underpinnings”. The main objective of this paper is to check the feasibility of marriage of homosexual couples which is still absent in India and which is different from that of other countries. Still, in the present day, the pathetic state of the community is a matter of utmost shame. Hence, marriage is a sign of commitment and love. If two men or two women want to show that commitment, then it does not destroy or damages the ideals of marriage. Thus, it is necessary to legitimate same sex marriages in order to move forward in the direction of human rights and constitutional morality. Thus, at last in the paper, conclusions and suggestions have been provided. In the process of making this research paper, several journals, books and articles were referred and taken into consideration. Internet has also been a support in this process. Hence, this paper is a result of Doctrinal Research Methodology.

Keywords- national order, reasonableness, equity, good conscience, arbitrariness.

TABLE OF CONTENTS

ABSTRACT.....	2
CONCEPT OF MARRIAGE.....	4
ORIGIN OF SECTION 377 IN INDIA.....	4
THE BUGGERY ACT OF 1533:.....	5
OFFENCES AGAINST THE PERSON ACT, 1828-.....	6
OFFENCES AGAINST THE PERSON ACT, 1861-.....	6
SECTION 377 OF IPC-.....	6
DECRIMINALIZATION OF SECTION 377.....	7
STATUS OF LGBT MARRIAGE IN INDIA	9
COMPARATIVE ANALYSIS WITH OTHER COUNTRIES.....	10
U.S.	10
U.K.....	10
Europe	11
CONCLUSION	12

“Love recognizes no barriers. It jumps hurdles, leaps fences, penetrates walls to arrive at its destination full of hope.”

-Maya Angelou

CONCEPT OF MARRIAGE

The concept of marriage has been evolved a million of years ago. It is regarded as one of the greatest blessing in a person's life. Marriage has been defined differently and by different entities, based on cultural, religious and personal factors. An ordinarily and encompassing meaning of marriage is a formal union, a social and lawful agreement between two people that joins their lives legitimately, financially and emotionally. The authoritative marriage agreement typically infers that the couple has legitimate obligations to one another for the duration of their lives or until they chose to separate. Being married also gives the couple legitimacy to sexual relations. Generally, marriage is considered as a key role in preserving the morals and civilization. It is one of the universal social institutions established by human society under which a man and a woman establish their decision to live as husband and wife by legal commitment and religious ceremonies. A marriage is complete when two people have a wedding ceremony to exchange vows before God and their family. It comes up with the objectives of companionship, enjoyment, completeness and fruitfulness. The equilibrium of the marriage system depends upon the adjustment between the two partners so that the role enacted by one partner corresponds to the role expectations of the other. Thus, marriage is the process by which two people make their relationship publically official and permanent. It is the accompanying of two people in a bond which putatively lasts until death. Lastly, in ancient times, a couple was only regarded to a man and a woman or two people of opposite sex were considered as a couple but not homogeneous couple. Homogeneous couples were recognized as criminals in India which eventually gave birth to Section 377 of the Indian Penal Code.

ORIGIN OF SECTION 377 IN INDIA

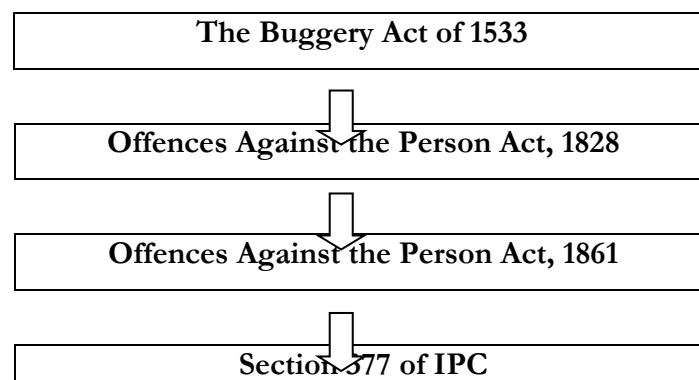
Section 377 is a section of the Indian penal code which was presented in 1861 during the British rule in India. This section was modeled on the Buggery Act of 1533 which makes sexual activities “against the order of nature” illegal. Section 377 is defined as:

“Unnatural Offences- whoever deliberately has carnal intercourse against the order of nature with any man, woman or animal will be punished with imprisonment for life, or with imprisonment of either portrayal for a term which may extended to ten years and shall also be liable to fine .

Explanation- Penetration is adequate to constitute the carnal intercourse important to the offense portrayed in this section.”

In India homosexuality was regarded against the Indian culture, contrary to man and against the science. It was expressed as unethical and immoral. Homosexuality was considered as a crime according to the scriptures and was regarded as unnatural. It was believed that in a society, a family is made up of a man and a woman, not a woman and a woman, or a man and a man. In 2008, Additional Solicitor General, PP Malhotra said- “Homosexuality is a social bad habit and the state has the ability to contain it. Decriminalizing homosexuality may create a breach of peace. If it is permitted then the evil of AIDS and HIV would additionally spread and harm the individuals. It would lead to a big health hazard and degrade moral values of the society.”

Section 377 of Indian Penal Code was not made in a day. Before its decriminalization, it had been 158 years of its establishment. Thus, the hierarchy of making section 377 is explained below-



THE BUGGERY ACT OF 1533:

It was an act of the Parliament of England that was passed during the reign of Henry VIII. This law characterized “Buggery” as an unnatural sexual act against the desire of god and man. Thus, this criminalized anal penetration, bestiality and in a broader sense homosexuality.

CHAPTER VI.

AN ACTE for the punysshement of the vice of Buggerie.

FOR ASMOCHE as there is not yett sufficient and condigne punysshment appoynted ad lymytted by the due course of the lawes of this Realme for the detestable and abhomyable vice of buggery cōmyttid with mankynde or beaste; It may therfore please the Kynges Hyghnes with the assent of his Lordes spūall and temporall and the Cōmyns of this p̄sent parliament assembled, that it may be enacted by auctoritie of the same, that the same offence be from hensforth adjudged felonye, and suche order & forme of proces therein to be used ayenst the offendours as in cases of felonye at the cōmē lawe; and that the offenders being herof cōvicte by verdicte confession or outlarye shall suffer suche peynes of dethe and losses and penalites of their good^e catallis Dettes londes tenement^e and hereditament^e as felons byn accustomed to doo accordyng to the order of the cōmē lawes of this Realme, and that no pson offendyng in any suche offence [shabbe'] admyttid to hys clergie: And that Justices of pease shall have power and auctoritie within the lymitt^e of their cōmissions and jurrisdiccion, to here and detmyne the seid Offence as they do use to do in cases of other felonyes: this acte to endure to the last day of the next Parliamente.

OFFENCES AGAINST THE PERSON ACT, 1828-

In 1828, the act was revoked and replaced by the Offences against the Person Act, 1828. This act broadened the definition of unnatural sexual acts, and allowed for easier prosecution of rapists, but also homosexuals. This is the Act which is considered to be the inspiration for section 377 of The Indian Penal Code.

Sodomy-

XV. And be it enacted, That every Person convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall suffer Death as a Felon.

OFFENCES AGAINST THE PERSON ACT, 1861-

In years to come, this act was repealed by the British and was replaced by the Offences against the Person Act, 1861.

Unnatural Offences.

61. Whosoever shall be convicted of the abominable Crime of Sodomy and Buggery, committed either with Mankind or with any Animal, shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Ten Years.

62. Whosoever shall attempt to commit the said abominable Crime, or shall be guilty of any Assault with Intent to commit the same, or of any indecent Assault upon any Male Person, shall be guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for any Term not exceeding Ten Years and not less than Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.

63. Whenever, upon the Trial for any Offence punishable under this Act, it may be necessary to prove carnal Knowledge, it shall not be necessary to prove the actual Emission of Seed in order to constitute a carnal Knowledge, but the carnal Knowledge shall be deemed complete upon Proof of Penetration only.

Offences against the Person Act 1861

SECTION 377 OF IPC-

This section was drafted by Thomas Macaulay around 1838 but just brought into impact in 1860 in the light of the Sepoy Mutiny (First War of Independence), 1857. This law in British India was modeled on the Buggery Act, 1533 which was enacted under the reign of King Henry VIII. This section is intended to punish certain unnatural offences like sodomy, buggery and bestiality. The offence consists in having carnal knowledge against the order of nature by a person with a man or in same unnatural manner with a woman or by a man or woman in any manner with an animal.

377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with transportation 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.

It is not necessary to prove that the act was against the will or without the consent of the person upon whom the offence is committed. If that person is consenting, both are guilty of the offence.

But later as the time passed and the society changed, the need for decriminalizing the section arose as it was considered to be violative of Articles of Constitution.

DECRIMINALIZATION OF SECTION 377

The struggle for decriminalization of Section 377 started began over two decades ago. Originating from various pieces of the nation with differing religion, age, sex and different foundations, the solicitors said that area 377 legitimizes the disgrace related with sexual direction and its appearance something which is basic and fundamental. The Supreme Court has rejected Section 377 of the IPC, decriminalizing the 158-year-old provincial law which condemns consensual gay sex. In a milestone choice, the preeminent court has at long last struck down a nineteenth century law condemning homosexuality in India. A bench involving of chief justice Dipak Misra and judges DY Chandrachud, AM Khanwilkar, Indu Malhotra, and Rohinton Fali Nariman began hearing petitions against section 377 of the Indian Penal Code in July this year. On September 06, in a consistent decision, the court decided that homosexuality is never again a wrongdoing in India, and that the individuals from LGBTQ people group have indistinguishable sexual rights from other residents. Chief justice Misra and justice Khanwilkar said in their judgment that: “Section 377, to the degree it condemns sexual acts between consulting adults whether gay and heterosexual is unlawful”. The timeline for the struggle of Section 377 which began over 20 years ago is mentioned below:

- **November-December 1991-** An archive enumerating the experiences of gay individuals in India is discharged by the AIDS Bhedbhav Virodhi Andolan (ABVA)¹, an association battling victimization those influenced by HIV or AIDS. The 70-page report uncovers the stunning degree of coercion, blackmail, and brutality that gay individuals confronted, particularly on account of the police.
- **May 1994-** Discussion ejects after Kiran Bedi, examiner general of the Tihar prison in Delhi, won't give condoms to detainees, saying it would empower homosexuality, other

¹ Naz Foundation vs. Govt. of NCT of Delhi, 160 Delhi Law Times 277 (Delhi High Court 2009)

than conceding that detainees enjoy it. Accordingly, ABVA documents a writ request in the Delhi high court, requesting that free condoms be given and that segment 377 be perceived as unlawful. Notwithstanding long-running endeavors to assemble support, the appeal is in the long run rejected in 2001.

- **December 2001-** The Naz Foundation, a sexual wellbeing NGO working with gay men, documents public interest litigation (PIL) in the Delhi high court, testing the defendability of area 377 and requiring the sanctioning of homosexuality.
- **September 2004-** The Delhi high court expels the case, saying there is no reason for activity and that simply scholarly issues can't not be analyzed by the court. A survey request recorded by the Naz Foundation is likewise expelled a couple of months after the fact.
- **February 2006-** After the Naz Foundation records a special leave petition (SLP) for the case, the preeminent court restores it in the Delhi high court, refering to the way that it is an issue of public interest. In the coming months, Voices against 377, an alliance of NGOs, joins the appeal, while India's service of home issues documents a sworn statement against the decriminalization of homosexuality.
- **July 2009-** In a milestone judgment, a Delhi high court bench comprising of chief justice Ajit Prakash Shah and justice S Muralidhar chooses to strike down segment 377, saying it disregards the key rights to life, freedom, and uniformity as revered in the Indian constitution. In any case, pundits, including Suresh Kumar Koushal, a Delhi-based stargazer, challenge the Delhi high court's choice in the preeminent court.
- **December 2013-** The LGBTQ people group endures a huge blow when the preeminent court topples the Delhi high court's judgment, saying segment 377 "doesn't experience the ill effects of the bad habit of illegality and the announcement made by the division seat of the high court is legitimately impractical." This was in the case of Suresh Kumar Kaushal vs. Naz Foundation².
- **June 2016-** Navtej Singh Johar, an honor winning Bharatanatyam artist, files a writ petition in the Supreme Court testing area 377, alongside four other prominent Indians, including cook Ritu Dalmia and hotelier Aman Nath.
- **August 2017-** A nine-judge Supreme Court bench hearing petitions against India's biometric program Aadhaar collectively decides that protection is a central right. In its judgment, the court additionally says, "Sexual direction is a basic quality of protection. Victimization a person based on sexual direction is profoundly hostile to the pride and

² Civil Appeal No. 10972 OF 2013

self-esteem of the individual," raising the expectations of those crusading against area 377. This was given in the case of Justice K.S. Puttaswamy (Retd.) and Anr. Vs. Union of India and Ors³.

- **April 2018-** Top hotelier Keshav Suri, who distinguishes as gay, joins the battle, documents a request with the Supreme Court.
- **July 2018-** A five-judge bench of the Supreme Court, including chief justice Dipak Misra, starts hearing the petitions recorded by Johar and others against area 377. While supporters of the law guarantee the spread of explicitly transmitted ailments and the crumbling of India's social texture as motivations to hold it, a significant number of the judges offer empowering remarks.
- **September 2018-** In a unanimous verdict of case Navtej Singh Johar vs. Union of India⁴, the Supreme Court decides to scrap section 377, which chief justice Misra describes as “irrational, indefensible and manifestly arbitrary,” marking a triumphant end to a lengthy struggle for justice.

Through this immense struggle of petitioners, finally section 377 of Indian Penal Code came to an end.

STATUS OF LGBT MARRIAGE IN INDIA

India doesn't perceive same-sex marriage or common associations. Also, it doesn't have a bound together marriage law. Each Indian resident has the option to pick which common code will concern them dependent on their locale or religion. In spite of the fact that marriage is enacted at the government level, the presence of numerous marriage laws convolutes the issue. The acts which cover the Indian Marriage Acts are as follows-

- Indian Christian Marriage Act, 1872
- Special Marriage Act, 1954
- Hindu Marriage Act, 1955
- Parsi Marriage and Divorce Act, 1936
- Muslim Personal Law (Shariat) Application Act, 1937

³ WRIT PETITION (CIVIL) NO 494 OF 2012

⁴ W.P. (Crl.) No.76 of 2016

But none of any codified marriage acts explicitly defines marriages as between a man and a man or between a woman and a woman. As all of these acts have “heteronormative underpinnings”, they have been interpreted not to recognize the same sex marriages. LGBT people in India are confronting legitimate and social troubles which are not experienced by non-LGBT people. The nation has revoked its colonial period laws that legitimately victimized gay sex and transgender distinguishing proof, yet numerous lawful assurances have not been provided including anti-discrimination laws and same-sex marriage. In spite of late political developments for LGBT rights, there stays a lot of homophobia present among the Indian people, with around half of Indians questioning same-sex marriage as indicated by an ongoing assessment of public sentiment. Thus, LGBT people in India are experiencing numerous problems in getting legal status of their marriage.

COMPARATIVE ANALYSIS WITH OTHER COUNTRIES

U.S.

The U.S. Supreme Court on June 26, 2015 made a landmark ruling that granted same-sex couples a constitutional right to marry. In the case of *Obergefell vs. Hodges*⁵, the court legalized same-sex marriage nationwide, including in the 14 states which did not previously allow gays and lesbians to marry. The decision rested in part on the court’s interpretation of the 14th amendment; the justices ruled that limiting marriage to heterosexual couples violates the amendment’s guarantee of equal protection under the law. In U.S. the marriage of same sex couples and opposite-sex couples are recognized as equal by the law as referred to as marriage equality. In U.S. marriage is recognized as a fundamental right which is guaranteed by both the Dual Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution from the case of *Loving vs. Virginia*⁶.

U.K.

Today, LGBT residents have the vast majority of indistinguishable lawful rights from non-LGBT residents and the U.K. gives the most elevated level of freedom in the world for its LGBT communities. Since the turn of the 21st century, LGBT rights have progressively strengthened in help. Some discrimination protections had existed for LGBT people since 1999, but that as it may stretch out to all areas under the Equality Act, 2010. In 2016, Her Majesty’s Armed Forces removed its ban on LGBT individuals serving openly with the Armed Forces Act, 2016 though it had adopted a policy of non-enforcement in 2000. The age of consent was

⁵ 576 U.S. 135 S. Ct. 2584

⁶ 388 U.S. 87 S. Ct. 1817

equalized, regardless of sexual orientation, in 2001 at 16 in England, Scotland and Wales. The age of consent was brought down to 16 in Northern Ireland in 2009; already it was 17 regardless of sexual direction. Transgender people have reserved the option to change their legitimate sexual orientation since 2005. The same year, same-sex couples were considered the right to go into a civil partnership, a similar lawful structure to marriage, and furthermore to adopt in England and Wales.

EUROPE

The greater parts of the countries that permit same-sex marriage are in Western Europe. Same-sex marriage has been legalized in the Netherlands (2001), Belgium (2003), Spain (2005), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Denmark (2012), France (2013), 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; it's parliament, however, approved civil unions for same-sex couples in 2016. The European Union does not require its members to recognize same sex marriage, through a 2018 ruling by the European Union's top court which says they must uphold same-sex couples right to freedom of movement and residence. Support for same sex marriage is weaker in Eastern Europe. A 2013 European Parliament report on human rights and democracy "encourages" European Union institutions and member states to recognize same-sex marriage or civil unions as "a political, social and human and civil rights issue", however, the Europe an union can't force such approach changes on its members.

CONCLUSION

Thus, marriage is a sign of love and commitment. If two men or two women want to show that commitment then it does not destroy or damage the ideals or morals of marriage. Thus, homosexuality is not an offence; it is just a way of pursuit of happiness, a way to achieve sexual happiness or desire. Thus, LGBT people should be given the same legal status as provided to other couples and they should be provided the same rights and securities which are provided to a heterogeneous couple. Also to provide legal status to LGBTQ couple in India uniform civil code should be made. A draft of Uniform Civil Code that would legalize same-sex marriage was proposed in 2017. In this act, marriage is defined as: “the legal union as prescribed under this Act of a man with a woman, a man with another man, a woman with another woman, a transgender with another transgender or a transgender with a man or a woman.” Uniform Civil Code portrays a partnership which characterized the living of a man with a woman, a man with another man, a woman with another woman, a transgender with another transgender, or a transgender with a man or a woman. The draft also mandates registration of all marriages. In addition to this, it also states that “all married couples and couples in partnership are entitled to adopt a child. The sexual orientation of a married couple or the partners is not to be a bar to their right to adoption. Non-heterosexual couples will be similarly entitled to adopt a child.” In this way Uniform Civil Code is essential for giving lawful status to homogeneous couple. Homosexuality was never against Indian culture, it has always existed and with much lesser prosecution, that under section 377 of the Indian Penal Code, which is based on the British Offences against the Persons Act.