
COMPARATIVE STUDY OF LGBTQIA+ LAWS IN INDIA WITH SPECIAL REFERENCE TO THE U.S

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ABSTRACT

Section 377 of the Indian Penal Code condemned unnatural sex between two people and expresses that whoever willfully has salacious intercourse against the request for nature with any man, lady or creature is culpable with detainment up to life or with the detainment of one or the other portrayal for a term which can be up to 10 years, and will likewise be obligated to pay a fine. On 6th September 2018, as a final ruling to the case Navtej Singh Johar v Union of India,¹ the Supreme Court unanimously held that Section 377 was unconstitutional "in so far as it criminalizes consensual sexual conduct between adults of the same sex". This paper aims to analyse the path that was taken in terms of the cases which lead to the decriminalization of Section 377 of the IPC in comparison to the path that the United States of America took in legalizing same-sex marriage. The U.S legalized same sex marriage on 26th June, 2015 through the landmark case; Obergefell v. Hodges.² By analysing the effects of both changes on the two contrasting societies, this paper would like to further delve into whether India is ready for a drastic change, such as the one the U.S has made; whether the decriminalization of Section 377 of the IPC is paving the way for the legalization of same sex marriage in India and moreover whether society is truly ready to accept the concept of same-sex marriage in India. The paper seeks to understand this through comparing the laws of the United states of America with the laws of India in regards to the LGBTQ+ community.

Keywords: Decriminalization, IPC, Legalize, LGBTQ+, Marriage, Society

¹ Navtej Singh Johar v Union of India, (2018) 10 SCC 1

² Obergefell v. Hodges, (2015) 576 U.S. 644

Introduction

The LGBTQ+ community is a vast population of individuals that define as; lesbian, gay, bisexual, transgender, queer, and more. As this is an ever-evolving and inclusive list, there are a number of terms that are constantly being added. Each term has a different definition that elucidates an individual's sexual orientation and personal preference. For example; Gay is a term that essentially alludes to a homosexual individual or has the attribute of being homosexual. These people are involved in a never ending battle for equality for themselves and fight for the same rights that heterosexual and cisgender people have. This way of thinking in society has evidently emerged out from the Christian Belief System introduced by Britishers throughout the British era of colonization and it has been transmitted from generation to generation, given that history seems to have enough substantiation and expressive narratives regarding the existence of homosexual relationships throughout the middle ages and colonial times.

They fight for the right to be treated as human beings, and for equal representation as active members of society across all bodies of media, despite their sexual orientation and gender identification. They hope to be seen for who they are and not have opportunities denied from them only due to their personal choice. Within the last decade, two landmark judgments from two very different countries posed as an incredible win for the LGBTQ+ community. The more recent one is the decriminalization of section 377 of the Indian Penal Code. Section 377 was first introduced in 1861, during the British rule of India, in the Indian Penal Code and is modeled based on the Buggery Act that was established by the Parliament of England in 1533; Buggery referred to anal intercourse and covered bestiality, and was considered as an act against the will of God. The section vastly affected the LGBTQ+ community because this section criminalized consensual gay sex between two adults hence interfering with people's rights and freedom. However, on 6th September 2018, a landmark judgment was released in relation to the case *Navtej Singh Johar v Union of India*,³ in which the Supreme Court unanimously held that Section 377 is unconstitutional "in so far as it criminalises consensual sexual conduct between adults of the same sex". This meant that the ban on gay sex was lifted and that sex between two homosexual adults was no longer considered as a crime by the state, therefore decriminalizing this portion of Section 377, marking it as a landmark judgement, resulting in a victory for the LGBTQ+ community.

³*Navtej Singh Johar v Union of India*, WP (CRIMINAL) NO. 76 OF 2016

The other judgement was an even bigger accomplishment that was achieved in the United States of America where same-sex marriage was legalized through the landmark judgement of the case *Obergefell v. Hodges*,⁴ on 26th June, 2015. This gave the LGBTQ+ community the same liberty as heterosexual and cisgender couples which is the biggest leap the USA had taken towards the equality for the LGBTQ+ community. Although this was a big step for America, this was still only a little step for mankind because as of today there are still only 28 out of 195 countries in the world that have legalized same-sex marriage so far. However, this still did not beat the discrimination that the LGBTQ+ community faced in day to day life, in both India and America.

History

The first crucial step that the United States of America took towards equality for the LGBTQ+ community was in 2003 with a decision similar to the decriminalization of Section 377 of the Indian Penal Code, where the law against same-sex sodomy in Texas was struck down in the case *Lawrence v. Texas*.⁵ The basic premise of this case is that the police barged in on Lawrence and his male companion engaging in consensual intercourse and proceeded to arrest them, take them into custody and moreover charge them for sodomy, which resulted in them paying a guilty fine of \$200. The Lambda Legal Defense and Education Fund, a national legal organization dedicated to gay rights, later took the case on appeal on the grounds that it violated their equal protection. This was a landmark judgement in which the U.S supreme court held that the American laws that prohibit homosexual activity between consenting adults is unconstitutional. Through this, the sodomy laws in several other states were invalidated.

The next major step that was taken, is none other than the legalization of same-sex marriage. In *Obergefell v Hodges*, fourteen same-sex couples filed suits in the district courts of their respective States, challenging the constitutionality of the state bans of same-sex marriage or their refusal to legally recognize same-sex marriages. They argued that this violated the 'Equal Protection' clause of the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each district court ruled in favor of the plaintiff and so the case was taken on an appeal. Finally, the Court held that "the Due Process Clause of the Fourteenth Amendment guarantees the right to marry as one of the fundamental liberties it protects, and that analysis applies to same-sex couples in the same

⁴*Obergefell v Hodges*, 576 U.S (2015)

⁵*Lawrence v. Texas*, 539 U.S. 558 (2003)

manner as it does to opposite-sex couples”. Hence this meant the fundamental right to marry is guaranteed to same-sex couples, marking this as the biggest win for the LGBTQ+ community in the U.S.

Just like the U.S, the journey to equality for the LGBTQ+ community in India has also been a painstaking battle. The journey to decriminalizing Section 377 of the Indian Penal Code began with the case of *Naz Foundation v National Capital Territory of Delhi*,⁶ in 2009. The Naz Foundation (India) Trust is a non-governmental organisation (NGO) that works on HIV/AIDS and sexual health and is based in New Delhi. In December, 2002, Naz Foundation filed a public interest litigation, challenging the constitutionality of Section 377 of the Indian Penal Code. Following through as a case, The Court held that to the degree Section 377 condemned consensual non-vaginal sexual acts between adults, it abused a person's fundamental rights to equality under the law, freedom from discrimination and to life and personal liberty under Articles 14, 15 and 21 of the Constitution of India. The High Court didn't strike down Section 377 in its totality. It held the section to be substantial if there should be an occurrence of non-consensual non-vaginal intercourse or to intercourse with minors, and it communicated the expectation that Parliament would authoritatively address the issue.

Building upon this, Section 377 of the IPC was struck down in its totality almost 10 years later through *Navtej Singh Johar v Union of India*. Navtej Singh Johar, among a few other people, filed a writ petition before the Supreme Court, and challenged the constitutionality of Section 377 of the IPC, with special regard to the section rendering punishment to consenting adults partaking in sexual intercourse. The Court relied on its own decision in *National Legal Services Authority v. Union of India*,⁷ where it reiterated that “gender identity is intrinsic to one’s personality and denying the same would be violative of one’s dignity.” It would be violative of their fundamental right to privacy if they discriminate against the LGBTQ+ based on the ground that they form a minority of the population.

Although in comparison, the U.S may be more progressed in terms of liberty for the LGBTQ+ community, India too, seems to be on the right track towards liberal freedom for the LGBTQ+ community. If we look at judgments in comparison, it seems to be that India is following in the path of the U.S; Both *Lawrence v Texas* and *Navtej Singh v Union of India* provide for the same cause - the decriminalization of sodomy, aka the legalization of homosexuality. Despite

⁶*Naz Foundation v National Capital Territory of Delhi*, 160 Delhi Law Times 277 (2009)

⁷*National Legal Services Authority v. Union of India*, WP (Civil) No 400 of 2012

the fact that India is progressing at a later pace, this proves that India too has a promising future in terms of legalizing same-sex marriage if it continues on this path.

Societal Perspective

Regardless of how developed the U.S is, it is still a country that is widely populated with traditionalists amongst many of which are orthodox Christians that believe homosexuality to be a sin. This is very similar to the mindsets of a large portion of the Indian population that believes that legalizing homosexuality is against Indian values and culture and considers this judgment to be leading the country towards the path of moral degradation. Although the struggle for marriage, adoption, and inheritance will still continue to pose a problem for the LGBTQ+ community in India, this judgment still paves the way for a brighter future. Nonetheless, this minor opening, still caused an uproar amongst enraged citizens, so following in the path of the U.S in legalizing same-sex marriage is bound to create even more chaos. However, regardless of how slow and minute a positive change is, it is still progress and still shines light and gives hope to the millions of people that hide amongst each other within the LGBTQ+ community.

In the circumstances of both India and the U.S, the legal implications are only the beginning. Millions of people face bullying, harassment, and discrimination are ostracized even to this date for being themselves. Getting the legal system to approve of these people was only the first step, the true obstacle is society itself. As no one can physically force anybody to change their mindsets, activists are working untiringly to peacefully educate society, more laws emerge to ensure the protection of equal rights, and rallyists continue to abuse their freedom of speech for good. Endless protests and rallies happening around the world show that most of society is coming around to the concept of change, so just like the skies cleared up for the LGBTQ+ community in 2015 in the U.S, there is light emerging from the clouds for the LGBTQ+ community in India since 2018.

Recommendations

The only logical and viable way to provide marriage rights to the LGBTQIA+ seems to be to modify the Special Marriage Act of 1954,⁸ through an amendment. This essentially should not

⁸ Special Marriage Act, 1954, Acts of the parliaments (India)

incite religious animosity because it does not chain people to any religious laws and sentiments and could be utilized by individuals who choose not to be confined by their own personal laws.

Despite appearing to be secular and inclusive, the fact that Section 4(c) of the Special Marriage Act, states that "the 'male' and 'female' must have attained the age of 'twenty-one' and 'eighteen' years respectively, for the purpose of marriage," demonstrates that the Act is aimed towards heterosexual people, thus putting homosexual people at a disadvantage.

Currently, some legal rights like maintenance, inheritance, retirement pensions, and so on are exclusively exercised and held by partners that have a marriage that is legally enforceable by the law, and not by LGBTQ+ couples that are unable to avail a legally licensed marriage.

Furthermore, because the Central Adoption Resource Authority (CARA) established adoption rules, individuals that do not have a domestic partner, as well as same-sex couples have struggled to adopt children, and because LGBTQ+ relationships are not recognized as a valid marriage, this is a struggle that is difficult to overcome without any validity and amendments to the pre-existing and future laws.

Conclusion

Whether society agrees or not, change is truly inevitable. The world has been progressing from day one and it will continue to progress despite any hurdles along the way. As taboo as homosexuality was just over two decades ago, the last decade has seen an impeccable change in the laws regarding homosexuality in both the United States of America and India. Even though India might be a mile behind, they are slowly catching up towards the liberal freedom that each individual deserves regardless of their personal preference. As both societies reacted to the said judgments in similar ways, it shows that irrespective of society's negative views on a positive change, humanity will continue to pursue their rights, so essentially it can be seen that there is a significantly large possibility for to legalize same-sex marriage as well with due time.

Aside from matrimony representing their community's fundamental right, a marriage recognized by the law might open the way for additional legal rights and numerous physiological, societal, and economic benefits which can aid same-sex partners, contributing to their social and legal acceptance.

The issue is that recognizing marriage privileges as well as social and legal recognition to the aforementioned minority is not quite as simple in a conservative country like India as opposed to how it has been in Western societies. Nevertheless, despite that, it is past time for the Legislature to come up with a conclusive answer, possibly by amending the Special Marriage Act of 1954 to be inclusive of the LGBTQIA+ community. Doing so could further pave the way to creating a solid solution to the discrimination and can build a foundation for an unprejudiced future.