**RESEARCH PAPER**

**“SAME SEX MARRIAGE AND LEGALITY”**

**SUBMITTED BY**

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**ABSTRACT-**

The current choice of the Supreme Court of India in Suresh Kumar Koushal v. Naz Foundation[[1]](#footnote-2) (hereafter known as Koushal)upholding the validity of Section 377 of the Penal Code[[2]](#footnote-3) that criminalizes carnal intercourse ‘towards the order of nature’, majority of the discussions have focused across the simplest manner to get the choice overturned. This paper argues that it's also essential to seek felony popularity of same-intercourse relationships concurrently seeing that discrimination on the premise of sexual orientation is objectionable whether below civil or crook laws. Marriage is each ubiquitous and central. All throughout our country, in each and every region, each and every social class, each and every race and ethnicity, each faith or non-religion, human beings get married. For many if now not most people, moreover, marriage is now not a trivial matter.

Most of the debate has raged over whether homosexuality is a preference or a condition, ethical or immoral, and even whether or not it is criminal or unlawful to have interaction in such activity. The debate has accompanied many opposing and supportive arguments. Here the article tries to locate out the social response in the direction of to homosexuality and how legal guidelines deal with same-sex marriage in extraordinary jurisdictions round the world. In this paper, the writer argues that it is now not ample to in basic terms work closer to no-n discrimination of same-sex acts however it is additionally fundamental to are seeking prison consciousness for same-sex relationships and have a look at the quite a number choices that should be pursued to reap such felony recognition. The robust opposition that a vocal part of Indian society has in opposition to the aspirations of the LGBT neighborhood can't be gainsaid. In India, the place alongside with speedy modernization, there has been increase of conservative and revivalist ideas, this opposition in the title of tradition, tradition and religion, then again misguided, will be robust and will act as an obstacle to liberal legislation.

**Keywords**: Same-Sex Marriage, Homosexuality, Social Responses, Legitimately, Constitutional Law

**INTRODUCTION -**

**“MARRIAGE: THE LEGAL OR RELIGIOUS UNION OF TWO PEOPLE”**

While talking about legitimating equal same sex marriage, I am reminded of a story of a washer man and his donkey. The donkey refused to go with the heavy bundle of garments on his returned from his residence to the pond. The washer man nailed a carrot to a stick, which was once tied in the front of the animal's mouth. The donkey saved on transferring with a view to cat the priced vegetable - the ass goes on and the carrot is un-reached. In the subject of jurisprudence this suggests how some legal guidelines the proverbial ass, pursue, perpetually, the carrot of the ethical ideal. Is it now not time we woke up to the reality, that homosexuals are as everyday as you and me? According to some study, about at least 5-10% of populace is gay. You can calculate and see what the determine is for India. Even if it is now not that excessive a figure, we comprehend that it is a pretty frequent phenomenon. It’s no longer correct in the Indian society but it is a psychological phenomenon, you can now not assist it. A growing wide variety of homosexual organizations throughout the United States of America and serious questioning amongst them is considered in India in the remaining few years. Whether identical intercourse marriage must be legalized is greater of a spiritual debate then a political one. While I trust that marriage is a sacred union between man and woman, I also accept as true with that our united states was once headquartered on the precept that anyone has the proper to the pursuit of happiness. And if a man marrying a man or a woman marrying a female makes them happy then I assume it is okay. I do no longer consider it impacts everyone negatively.

Almost years have been passed because the Section-377 judgment of IPC[[3]](#footnote-4), wherein the Supreme Court of India decriminalized homosexuality. The more than 200 page judgment now no longer handiest highlights the grounds of decriminalization, however additionally a number of the remarks made with the aid of using the opposition. For example, one of the events against the judgment said,

“if Section 377 is said unconstitutional, then the own circle of relatives device that's the bulwark of social way of life can be in shambles, the group of marriage can be detrimentally affected and rampant gay sports for cash could tempt and corrupt younger Indians into this trade.”

“In India too, inter-caste couples hold to stand social stigma despite the fact that such relationships are constitutionally criminal. Hence, the very act of policing love, appears to were a fundamental a part of our collective criminal history. And it's far this policing that Guruswamy and Katju intention to mission of their subsequent project: The ‘Marriage Project[[4]](#footnote-5)’.”

This argument (and different comparable others) failed in courtroom docket. Moreover, those claims aren't subsidized with the aid of using evidence. On the contrary, with converting instances and converting social mores, our thoughts of what constitutes a ‘family’ have began to change. Eventually, the courtroom docket sided with the petitioners with the aid of using saying, “A person’s sexual orientation is intrinsic to their being. It is hooked up with their individuality, and identity. A category which discriminates among men and women primarily based totally on their innate nature, might be violative in their essential rights, and can't face up to the take a look at of constitutional morality.”

WHAT IS the same-sex marriage debate about? It isn't approximately whether or not same-intercourse relationships can contain the content material of marriage: few might deny that gays and lesbians are able to friendship, intimacy, “meet and glad conversation,” and mutual responsibility, nor that they are able to have and lift kids (whether or not their personal from a preceding marriage, kids created inside their courting with the aid of using surrogacy or synthetic insemination, or followed kids). Certainly, none might deny that gays and lesbians are able to sexual intimacy. Nor is the talk, at the least currently, approximately the civil elements of marriage: we're shifting closer to a consensus that same-intercourse couples and opposite-intercourse couples must experience identical civil rights. The leaders of each predominant political events regarded to recommend this function in the course of the 2008 presidential campaign, even though handiest a handful of states have legalized civil unions with cloth privileges equal to the ones of marriage. Finally, the talk isn't approximately the spiritual elements of marriage. Most of the predominant religions have their personal inner debates, often heated, over the popularity of same-sex union.

**HISTORY –**

Homosexuality has an historical record in India. Ancient texts like Rig-Veda which dates returned round 1500 BC and sculptures and vestiges depict sexual acts among ladies as revelations of a female global in which sexuality changed into primarily based totally on pride and fertility. The description of gay acts within side the Kamasutra, the Harems of younger boys saved with the aid of using Muslim Nawabs and Hindu Aristocrats, male homosexuality with inside the Medieval Muslim records, evidences of sodomy with inside the Tantric rituals are a few ancient evidences of same-intercourse relationships.

However, those stories commenced dropping their importance with the arrival of Vedic Brahmanism and, later on, of British Colonialism. Giti claims that Aryan invasion courting to 1500 B.C commenced to suppress homosexuality via the rising dominance of patriarchy. In the Manusmirti there are references to punishments like lack of caste, heavy economic fines and strokes of the whip for homosexual and lesbian behavior. In the case of married ladies, it's far cited that 'luring of maids' is to be punished through shaving the ladies bald, reducing of hands after which parading her on a donkey. Manu's specs of greater excessive punishments for married ladies can advocate both a huge incidence of such relationships amongst married ladies or a extra attractiveness of those practices amongst single ladies. In both cases, those references factor to the tensions within side the norms of obligatory heterosexuality prescribed through Brahmanical party. Both sexual structures coexisted, in spite of fluctuations in relative repression and freedom, till British Colonialism whilst the destruction of gay expression and sexual expression in preferred have become greater systematic and blatant.

The trouble of gay behavior has come to this fore in latest felony and political debates for 3 foremost reasons:

(I). Liberalization of the law has introduced with it a alternate in social attitudes, in order that the stigma connected to the homosexual ity has to a more volume disappeared.

(II). Campaigns for lesbian and gay rights particularly in the U.S. have taken on an more and more radical character, arguing for an stop to all varieties of discrimination in opposition to homosexuality, or even for the legalization of identical intercourse marriages.

(III). The outbreak of HIV/AIDS which has been unfold in western international locations to a first-rate volume with the aid of using gay hobby among males, has caused accusations and counter-accusations, regularly of a sour kind.

**ARGUMENTS BY PEOPLE WHO DO NOT NEED IT TO BE LEGALIZED-**

This is greater of a spiritual debate then a political one. Large variety of humans specifically in India is opposing it, as they are saying its miles unnatural, uncouth and immoral. Prime Minister Mr. Manmohan Singh on asking what did he consider the Canadian regulation of gay marriages he answered it isn't appreciated. Those individuals who are opposing it their arguments are primarily based totally on spiritual and herbal regulation belief. Some humans do not keep in mind them as herbal due to the fact they do now no longer produce kids. Is it sacred if homosexual marriage is authorized God created Adam and Eve, we in no way find statements in Genesis about Adam and Steve? Why destroy God's law through permitting gay marriage If nature desired equal-sex humans to stay together, there could handiest be one intercourse instead of distinctive sexes. Our society is primarily based totally on opposite sex marriage. If homosexual marriage is OK, then why cannot I marry my cousin, or my sister, or my cat? Don't I even have the equal rights as gays or are they now above the relaxation of us. Don't overlook that the regulation is particular on this. It changed into created to maintain the material of society together. It is going in opposition to the legal guidelines of the land which has been used for masses of years and had been primarily based totally on the basis of the commandment.

Sometimes this argument is placed a little differently: marriage is set the safety of children, and we recognize that youngsters do great in a domestic with one father and one mother, so there's a valid public interest in assisting a group that fulfills this purpose. Put this way, the argument, again, gives a valid public motive to prefer and assist heterosexual marriage, though it's far much less clean why it offers a motive to limits same-sex marriage (and marriages of these too antique to have kids or now no longer wanting kids). Its primary problem, however, is with the facts. Again, and again, mental research have proven that kids do quality after they have love and assist, and it seems that two-figure families do higher at that process than single-figure families. There is no evidence, however, that opposite-sex couples do higher than same-sex couples. There is a considerable feeling that those consequences can’t be right, that residing in “immoral” surroundings need to be awful for the child. But that feeling rests at the spiritual judgments of the primary argument; whilst the health of children is classified in a religiously impartial way, there's no difference.

The argument in favor of same-sex marriage is straightforward: if humans need to make a dedication of the marital kind, they need to be accredited to do so, and except for one magnificence of citizens from the advantages and dignity of that dedication demeans them and insults their dignity.

**WHAT IS THE “RIGHT TO MARRY”?**

In our constitutional tradition, there may be common talk of a “right to marry.” In Loving, the Court calls marriage “one of the primary civil rights of man.” A later case, Zablocki v. Redhail 434 U.S.374, 98, S.C*[[5]](#footnote-6)*acknowledges the right to marry as a essential right for Fourteenth Amendment purposes, seemingly under the Equal Protection clause; the Court states that “the right to marry is of essential significance for all individuals” and keeps with the statement that “the selection to marry has been located at the equal level of significance as selections referring to procreation, childbirth, baby rearing, and own circle of relatives relationships.” Before courts can find out the problem of equal-intercourse marriage, they ought to determine out things: (1) what's this “right to marry”? And (2) who has it?

Nowhere, however, has the Court held that a state should provide the expressive blessings of marriage. There could look like no constitutional barrier to the selection of a country to get out of the expressive recreation altogether, going over to a regime of civil unions or, even extra extremely, to a regime of personal agreement for marriages, wherein the nation performs the same role it performs in every other contractual process.

Again, the issues are turning on equality. What the cases continuously maintain is that once the state does provide a standing that has each civil blessings and expressive dignity, it should provide it with an excellent hand. This position, which I’ve called “minimum,” isn't so minimum while one seems into it. Laws in opposition to miscegenation had been in pressure in 16 states on the time of Loving.

**HOW LAW DEALS WITH IT IN INDIA -**

There is no express point out of homosexuality or hemophilia in any of the statute books of India. A character can't be prosecuted for being a gay or hemophilic. But the sexual act of sodomy is a criminal offence. The essential provisions of criminalization of same-sex acts if discovered in the Section 377 of the Indian Penal Code (IPC) of 1860.Whoever voluntarily has carnal sex towards the order of nature with any man, female or animal will be punished with imprisonment of both description for a time period which might also additionally increase to 10 years and must additionally be at risk of fine. The time period Carnal Intercourse used on this segment refers to sexual sex among guys or in different phrases, gay relationships. Section 377 of the Indian Penal Code, become enacted via way of means of the British in 1860.The Indian regulation towards homosexuality appears to be too harsh. The Constitutional validity of section-377[[6]](#footnote-7) of IPC becomes challenged in the Delhi High Court as being violative of essential rights assured below Indian Constitution. Here it could be cited that, in nearly all crimes towards human frame indexed below the Indian Penal Code, a few type of bodily violence or coercion is an vital detail of crime. The simplest exception is in the favour of section-377, which criminalizes sexual interest that leaves no victims. In the records of the statute from[[7]](#footnote-8) there has been simplest 30 instances in the High Courts and Supreme Court. “The small wide variety of instances filed below this section suggests that this section is redundant and old and needs to be repealed. The Central Government has informed the Delhi High Court that homosexuality can't be legalized in India because the Indian society is intolerant to the exercise of homosexuality/lesbianism. To paraphrase, 3 matters may be stated approximately the government's stance:

[a] the country has now no longer only a characteristic to, however surely a obligation to prevent unnatural intercourse, otherwise the social order might damage down, regulation free its legitimacy

[b] that our society does now no longer tolerate homosexuality, and however the universality of human rights or the general applicability of our essential rights and freedoms, its criminalization is consequently justified, and

[c] That it's far actually now no longer our thing, it’s something that occurs available in the west, we now ought no longer to replica that. In different phrases the 3 pillars of the traditional subculture arguments to criminalize the likes of us.

**WHY SHOULD BE LEGALIZED?**

Arguments in favor of decriminalizing Homosexuality: Gay and lesbian rights activists from a variety of components of the nations have been protesting for their rights and for decriminalizing the gay conduct. There is a large debate in our use too- whether or not it needs to be legalized or not. I am giving some of the arguments in favor of decriminalizing it, especially in Indian context- in view of Section-377 of the Indian Penal Code.

(1) **It violates proper to liberty assured under Article-21 of the Indian Constitution**which covers personal consensual sexual relations. The crucial proper to liberty (under Article-21) prohibits the country from interfering with the non-public private things to do of the individual. The thought of privateers is so huge that no complete and all-encompassing definition of the time period can be given. In the case National Coalition for Gay and Lesbian equality V. Ministry of Justice, the South African court docket held that, Privacy acknowledges that we all have a proper to a sphere of non-public intimacy and autonomy which lets in us to set up and nurture human relationships except interference from the backyard community.

(2) **Criminalization of gay behavior is unreasonable and arbitrary:**

Infringement of, the proper to equal safety earlier than regulation requires the willpower of whether or not there is a rational and goal groundwork to the classification introduced. There need to be a simply and practical nexus between the classification and the object sought to be executed by way of the legislation. Section-377 of IPC, its legislative goal is to criminalize all the sexual things to do which are in opposition to the order of nature, for that reason punishing the unnatural sex. Section-377 assumes that herbal sexual act is that which is carried out for procreation. Hence, it thereby labels all varieties of non-procreative sexual act as unnatural. Hence, the legislative intent of developing a public code of sexual morality has no rational nexus with the classification created.

**(3) Section-377 discriminates on the foundation of sexual orientation:**Article-15 prohibits discrimination on countless grounds, which consists of Sex. By prohibiting discrimination on the groundwork of sex, article-15 establishes that there is no well-known behavioral sample connected to the gender. The prohibition on non-procreative sexual acts imposed by way of section-377 prescribes usual sexual family members upon guys and women.

An interesting point that Guruswamy and Katju make is that ‘India may be a marriage country’. Indian society, and most societies within the world, typically recognizes just one sort of relationship: a heterosexual one. And even this type of relationship isn’t without its own history of violence and struggle. On June 12 1964, the U.S Supreme Court during a unanimous decision in **Loving v. Virginia**[[8]](#footnote-9), struck down state laws that banned interracial marriage. In India too, inter-caste couples still face social stigma albeit such relationships are constitutionally legal. Hence, the very act of policing love, seems to possess been an integral a part of our collective legal history. And it's this policing that Guruswamy and Katju aim to challenge in their next project: the wedding Project.

The remarkable aspect of the Section 377 judgment was that it placed the LGBTQ+ community within the ambit of the constitutional compact as sexual minorities wanting the rights and freedoms, which were hitherto denied to them. Justice Indu Malhotra rightly said[[9]](#footnote-10):“History owes an apology to the members of this community and their families, for the delay in providing Redressal for the ignominy and ostracism that they need suffered through the centuries. The members of this community were compelled to measure a life filled with fear of reprisal and persecution. The legal issue is that in a country like India, present marital preparations core round a bundle of rights. These rights decide who you can co-sign on a lease, which you can depart your inheritance to, who you can nominate for existence insurance, and so on. These civil liberties are prolonged with the aid of the State to blood members of the family and legally identified spouses. In India, such rights presently do no longer lengthen to same-sex couples, and this is the criminal problem.

The social element of the marriage venture alludes to India being a ‘marriage country’. From their many interactions with younger human beings during the size and breadth of the country, **Guruswamy and Katju** mentioned that younger Indians—gay or straight, Hindu or Muslim, higher caste or decrease caste, male or female, all desired the equal thing—a lasting lengthy time period relationship diagnosed via society and by way of the law. In fact, section of what makes for a healthful lifestyle is no longer simply occupational success, however additionally non-public success. The core section of many people’s happiness comes from having anyone in their lifestyles whom they can love and whom the regulation of the land recognizes as a legitimate associate or partner helpful of recognition. India is, after all, a kin-based society and a household society.

**THE IMPACT OF KOUSHAL CASE –**

Koushal holds that there exists a presumption of constitutionality of statutory provision, and opined that there is a presumption that the legislature would act in the pleasant pastimes of the people. Secondly, the Court held that the classification between these indulging in carnal intercourse in the everyday route and towards the order of nature is intelligible, in order to preserve that Section 377 used to be no longer violative of Article 14 of the Constitution[[10]](#footnote-11)These unnoticed precedents which require a justification of theclassification in relation to the mentioned goal being pursued[[11]](#footnote-12).Thirdly, the Court held that Section 377 did no longer violate Article 15, offering no reasons whatsoever. This is specifically ordinary considering the most powerful and fascinating part of Naz Foundation furnished the judicial reasoning as to why discrimination on the grounds of sexual orientation was violative of Article 15 and that the time period “sex” in the Article covered “sexual orientation”. Similarly, the Koushal bench mentioned numerous landmark cases under Article 21 however did no longer furnish any reasoning as to how Section 377 is not in violation of Article 21.

Finally, the Court noted that the selection to repeal Section 377 had to be left to the Parliament, successfully directing a team that it recognizes as minority that its rights ought to be covered with the aid of the majoritarian arm of authorities’.e.g. -Parliament[[12]](#footnote-13). In fact, each phase of the emphatic case made for a necessary proper to autonomy for each person to choose his very own “gender” identity and would practice in equal measure to autonomy in deciding on a sexual identity.[[13]](#footnote-14) This paper, therefore, does no longer proceed on the foundation that Koushal is the stop of the judicial road for LGBT rights.

**WHY THERE IS NEED FOR LEGAL RECOGNITION?**

A current finds out about of sexual practices in rural India by way of the United Nations Population Fund (UNFPA) discovered that `male-to-male intercourse is now not uncommon. In truth a greater proportion of guys in the learn about pronounced having male-to-male intercourse than intercourse with intercourse workers. This used to be actual of each married as properly as single man. Close to 10 per cent single guys and three per cent married guys pronounced having had sexual intercourse with different guys in the previous 12 months." The survey protected 50 villages in 5 districts of 5 states with comments on sexual practices from shut to 3,000 respondents and in- depth interviews on intimate habits from 250 people. The records are indicative of a truth the authority is either unable or unwilling to see.

Love is love. The actual hazard to marriage is the alarmingly excessive divorce rate. Marriage is additionally a felony becoming a member of of two individuals. People who are no longer spiritual pick to get married in a registry workplace and now not in church. Marriage suggests the strongest dedication you can make to one another. Gay guys and lesbians are simply as human and have the equal desires and wishes as heterosexual human beings. I fail to see what God has to do with this Marriage in this occasion is no longer religious, however a criminal joining. Getting married is the final way of displaying your love and dedication to your partner, so why must gay humans be disadvantaged of this right. Who are we to take a seat and decide anyway? Same intercourse marriages need to be legalized. If human beings discover homosexual relationships opposite to their religion, it is up to them to refrain. Those who do no longer share their non secular opinions ought to be free to make their personal desire on this as on different issues. Gay guys and lesbians are simply as human and have the identical wishes and needs as heterosexual human beings.

**CONCLUSION -**

Homosexuality is a feeling or desire involving sexual attraction to people of one’s own sex. In common usage, the term homosexual is used to refer to both same-sex oriented males and females. The word ‘Gay’ is often used as a synonym for male homosexual behavior while the term ‘Lesbian’ is referred to a woman who is sexually attracted to another woman. In terms of sexual orientation of individuals, a bisexual person is sexually attracted to both men and women. Although homosexuality has a long history in India, the gay movement is relatively nascent. Until recently, most homosexuals in 220 India did not have many social and cultural avenues to express their sexuality. This is changing now, thanks to greater awareness and education. Many men of homosexual orientation are choosing to identify themselves as 'gay' and embracing a lifestyle that resists marriage and other conventions of an otherwise heterosexual society. They remain largely invisible and form networks that shy away from the public glare for fear of social and familial backlash.

On the basis of the total dialogue on the factor of identical intercourse marriage that is should it be legalized or not. This is greater of a non-secular debate then a political one. In which I have given my arguments in favor of decriminalizing it, I ultimately conclude by using pronouncing that homosexuality is now not an offence, it is simply a way of pursuit of happiness, a way to acquire sexual happiness or desire. I can see simply no reason, aside from blind prejudice, which prevents two gay human beings going via a civil ceremony which will provide them the rights and securities which heterosexual couples enjoy. Marriage is a signal of dedication and love.

If two guys or two females choose to exhibit that commitment, how does that wreck or injury the beliefs of marriage. In my view, it certainly demonstrates it. Aren't we residing in an age which respects the individual's proper to pick out Isn't India supposed to be the land of the free In our society humans have branded homosexuals as queer? Yet homosexuality is no longer new nor is it in opposition to the Indian culture, it has usually existed and with lots lesser prosecution, that underneath Section-377 of the IPC, which is primarily based on British Offences towards the Persons Act.

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