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A Comparative Analysis of Same-Sex Marriage Laws: India v the United States of America

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*The article discusses the recent Supreme Court decision in *Supriyo v Union of India*¹, providing a thorough analysis of the recognition of same-sex marriages in India alongside the trajectory of same-sex marriage legalization in the USA, particularly through *Obergefell v Hodges*.² It intricately dissects the complexities of the Supreme Court's verdict in India, exploring the issues of same-sex marriage recognition, adoption, civil unions, and the existing legal framework. Simultaneously, it scrutinizes the inclusive legal landscape of the USA, emphasizing principles of equality and dignity for all individuals, regardless of sexual orientation. Through an in-depth analysis of constitutional interpretations and legislative frameworks, the article highlights the contrasting legal trajectories and legislative approaches between India and the USA, accentuating global trends towards inclusivity and equal rights for LGBTQ+ individuals. It emphasizes the pressing need for ongoing legal reforms in India to dismantle barriers to same-sex marriage recognition and to harmonize with evolving societal norms, thereby fostering meaningful discourse among legal professionals and broader societal stakeholders.*

Keywords: *same-sex marriage, comparative legal analysis, India, USA, lgbtq+ rights.*

¹ *Supriyo v Union of India* (2023) SCC OnLine SC 1348

² *Obergefell v Hodges* [2015] 576 US 644

INTRODUCTION

In a pivotal legal milestone, the Supreme Court of India rendered a landmark verdict in the case of *Supriyo v Union of India*³, marking a significant decision by declining to recognize same-sex marriages. Instead, the Court catalyzed a nuanced discourse by directing the Union Government to establish a committee tasked with determining the rights of queer unions. This landmark ruling underscores the intricate nature of the ongoing debate surrounding same-sex marriage and the broader context of the right to privacy in India, within the evolving landscape of global discussions and reforms in the 21st century. Conversely, in countries like the United States of America (hereinafter the USA), same-sex marriage has already been legalized, presenting a striking juxtaposition in legal approaches. This research paper endeavours to delve into critical inquiries sparked by the *Supriyo* case, offering profound insights into the Supreme Court's findings regarding the recognition of same-sex marriages in India. Furthermore, it meticulously examines the path that the USA embarked upon to achieve legalization, providing a comprehensive comparative analysis of the differing timelines, legislative language, and legislative intent that have significantly shaped the legalization of same-sex marriage in these two countries. Through this comparative lens, the paper aims to illuminate the complexities and nuances surrounding same-sex marriage recognition while shedding light on the broader implications for legal and societal landscapes in India and the USA.

ANALYZING WHAT THE SUPREME COURT OF INDIA HELD REGARDING SAME-SEX MARRIAGE

On 17 October 2023, a 5-judge constitution bench of the Supreme Court of India reached a verdict refusing to recognize same-sex marriages in India. The five-judge bench decided on the matter after hearing 20 petitions filed by various same-sex couples, LGBTQ+ activists, and transgender persons, which challenged the provisions of the Special Marriage Act 1954, the

³ *Supriyo v Union of India* (2023) SCC OnLine SC 1348

Hindu Marriage Act 1955, and the Foreign Marriage Act 1969, seeking recognition of non-heterosexual marriages.⁴

In the verdict, all 5 judges unanimously upheld the constitutionality of the Special Marriage Act and clarified that transgender individuals in heterosexual relationships have the right to marry under existing legal provisions or personal laws. The Court emphasized that there is no explicit fundamental right to marry enshrined in the Constitution and called for the Union of India to establish a High-Powered Committee to comprehensively examine and gather the views of all stakeholders. Furthermore, the Court asserted that the authority to provide legal recognition to same-sex marriages lies outside its jurisdiction, and it cannot strike down the Special Marriage Act. The verdict also highlighted the importance of ensuring that queer individuals are not subjected to involuntary medical treatment and mentioned that state intervention in facilitating marriages for queer couples should only occur through proper legislation.⁵ The Court also affirmed that same-sex couples have the right to live together without fear of violence, force, or disruption. However, it chose not to issue any mandates for the official recognition of these relationships as marriages.⁶

The judges, however, did not agree on the matter of adoption, civil unions, and recognizing queer relationships. Regarding adoption, the minority opinion, consisting of Chief Justice DY Chandrachud and Justice SK Kaul, firmly upheld that queer couples should have the right to jointly adopt a child. They argued that excluding queer couples from adoption regulations is inherently discriminatory, emphasizing that the law cannot presume someone's parenting capabilities based on their sexuality. In contrast, the majority opinion, represented by Justices S

⁴ Nalini Sharma and Srishti Ojha, 'Same-Sex Marriage Verdict: What Supreme Court Judges Agreed and Disagreed Upon' *India Today* (17 October 2023) <<https://www.indiatoday.in/law/story/same-sex-marriage-verdict-supreme-court-bench-judgement-highlights-2450232-2023-10-17>> accessed 24 October 2023

⁵ *Ibid*

⁶ Padmakshi Sharma, 'Supreme Court Refuses to Recognize Same-Sex Marriages, Asks Union Govt to Form Committee to Determine Rights of Queer Unions' *Live Law* (17 October 2023) <<https://www.livelaw.in/top-stories/supreme-court-same-sex-marriage-equality-queer-couple-240341?infinitemscroll=1>> accessed 24 October 2023

Ravindra Bhat, Hima Kohli, and PS Narasimha, asserted that non-heterosexual couples should not be granted the right to jointly adopt a child.⁷

On the subject of civil unions, the minority opinion favoured recognizing the right to form a civil union. In their view, the freedom of the queer community to enter into unions is constitutionally guaranteed, with the CJI highlighting that this right should not be contingent on sexual orientation. However, the majority opinion maintained that there cannot be a legally enforceable right to a civil union.⁸

In the matter of recognizing queer relationships, the Chief Justice's opinion emphasized the state's responsibility to acknowledge entitlements arising from relationships between queer couples. Failing to recognize these relationships, the CJI argued, would result in systemic discrimination against queer couples, highlighting the need for legal recognition to address this issue.⁹

The issue for legalizing same-sex marriage, as highlighted by Justice Ravindra Bhatt, was the wording of different statutes relating to marriage in India. Justice Bhatt expressed that a gender-neutral interpretation, though seen as a progressive aim, may not consistently ensure fairness and could inadvertently expose women to heightened vulnerability. This is particularly noticeable when genuine attempts are made to create balance in a societal framework that traditionally favours cis-heterosexual men. The inclusion of terms like 'wife,' 'husband,' 'man,' and 'woman' in marriage laws and other regulations concerning sexual violence and harassment primarily aims to protect socially marginalized individuals.

For instance, these terms provide women who are facing violence from their partners the right to seek assistance under the Domestic Violence Act, which is designed to ensure their safety and provide relief from such injustices. Additionally, several sections within the Special Marriage

⁷ Sharma (n 4)

⁸ *Ibid*

⁹ *Ibid*

Act¹⁰, including those related to alimony and maintenance (Sections 36¹¹ and section 37¹²), grant specific rights to women. Moreover, certain grounds for divorce (such as the husband's conviction for bigamy or rape) offer additional reasons for wives to seek divorce (Section 27).¹³ Various other provisions, such as Section 2 (b)¹⁴, when combined with Part I and Part II, establish distinct categories of prohibited relationships for both males and females. Section 4 (c) explicitly uses the terms 'husband' and 'wife,' while Section 12¹⁵, section 15¹⁶, section 22¹⁷, section 23¹⁸, section 27(1)¹⁹, Section 31(1)(iia)²⁰ and (2)²¹ (which includes special jurisdiction provisions for proceedings involving wives) and Section 44²² (Punishment of bigamy) all follow a similar pattern. This pattern encompasses specific provisions that bestow certain benefits upon women, and the implications of Section 19²³, section 20²⁴, section 21²⁵, and section 21A²⁶ of the Special Marriage Act collectively lead to the conclusion that even if, hypothetically, one were to consider a gender-neutral interpretation of Section 4 of the Special Marriage Act²⁷ (the conditions related to the solemnization of special marriages), the interplay of other provisions applicable to non-heterosexual couples would result in inconsistent and unworkable outcomes.

ANALYZING HOW SAME-SEX MARRIAGE WAS LEGALIZED IN THE USA

The legalization of same-sex marriage in The USA was enforced in the case *Obergefell v Hodges*.²⁸ In this case, the Supreme Court of the USA held in 2015 that same-sex couples had

¹⁰ The Special Marriage Act 1954

¹¹ The Special Marriage Act 1954, s 36

¹² The Special Marriage Act 1954, s 37

¹³ The Special Marriage Act 1954, s 27

¹⁴ The Special Marriage Act 1954, s 2(b)

¹⁵ The Special Marriage Act 1954, s 12

¹⁶ The Special Marriage Act 1954, s 15

¹⁷ The Special Marriage Act 1954, s 22

¹⁸ The Special Marriage Act 1954, s 23

¹⁹ The Special Marriage Act 1954, s 29(1)

²⁰ The Special Marriage Act 1954, s 31(1)(iia)

²¹ The Special Marriage Act 1954, s 31(2)

²² The Special Marriage Act 1954, s 44

²³ The Special Marriage Act 1954, s 19

²⁴ The Special Marriage Act 1954, s 20

²⁵ The Special Marriage Act 1954, s 21

²⁶ The Special Marriage Act 1954, s 21A

²⁷ The Special Marriage Act 1954, s 4

²⁸ *Obergefell v Hodges* [2015] 576 US 644

the right to marry and that Same-sex marriage is a fundamental constitutional right guaranteed under the 14th Amendment.

Section 1 of the 14th Amendment of the Constitution reads thus, '*All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*'²⁹

The Supreme Court's ruling confirmed that marriage is a fundamental right for every person, and it extended this inclusive interpretation of the fundamental right to marry to same-sex couples, safeguarded by both the 'due process clause' and the 'equal protection clause' of the Fourteenth Amendment within the U.S. Constitution. As a result, this decision paved the way for the legalization of same-sex marriage in all fifty states, the District of Columbia, and Guam in the United States.³⁰

Justice Kennedy articulated four fundamental principles that underpinned the conclusion that marriage is a constitutional right. First, the right to marry is considered 'an inherent fundamental right within an individual's liberty' and decisions regarding marriage are 'among the most personal and private choices an individual can make.' Second, marriage supports a 'unique two-person union with unparalleled importance to committed individuals.' Third, marriage carries significant social advantages, including the protection of children and families, benefits that should not be withheld from same-sex couples. Finally, Justice Kennedy noted that

²⁹ US Constitution, Amdt 14 s 1

³⁰ Jana Kalyan Das Senior Advocate, 'The Judgment of Obergefell v. Hodges and the Philosophical Foundations of Same-Sex Marriage' *Live Law* (11 May 2023) <<https://www.livelaw.in/articles/same-sex-marriage-american-supreme-court-judgment-obergefell-v-hodges-philosophical-foundations-228469?infinitemscroll=1>> accessed 24 October 2023

marriage offers a 'cluster of benefits' that states should not be able to withhold from their citizens solely because of their sexual orientation.³¹

A COMPARATIVE ANALYSIS OF THE USA AND INDIA

To study the comparison between the USA and India for same-sex marriage, certain aspects must be looked at, namely, the history of decisions leading up to the landmark judgements discussed earlier, the language of the legislation of marriage laws and the legislative intent of the legislature.

To understand how the Supreme Court of the USA came to its verdict legalizing same-sex marriages, we must understand its history and the cases that led up to it. The journey for LGBTQ+ rights began in the 1990s with the *Baehr v Miike*³² case in Hawaii, where three same-sex couples challenged the state's ban on same-sex marriage as unconstitutional. Their victory was short-lived, as the Defense of Marriage Act (DOMA)³³ in 1996 defined marriage as between a man and a woman, rendering same-sex marriages invalid. In 2003, the *Lawrence v Texas*³⁴ case marked a turning point by declaring laws prohibiting private homosexual activities unconstitutional. Subsequently, the Massachusetts Supreme Judicial Court ruled in *Goodridge v Department of Public Health*³⁵ that any legislation banning marriage based on gender was unconstitutional, allowing the first same-sex couples to legally marry in 2004. It wasn't until nearly a decade later, with the Supreme Court's *Obergefell v Hodges*³⁶ ruling, that same-sex marriage became legal across all fifty states, recognizing it as a fundamental right and making gender-based discrimination unconstitutional.

³¹ Daniel Fisher, 'Supreme Court Rules Same-Sex Marriage Is a Constitutional Right' *Forbes* (26 June 2015) <<https://www.forbes.com/sites/danielfisher/2015/06/26/supreme-court-rules-same-sex-marriage-is-a-constitutional-right/?sh=779722dacdd0>> accessed 25 October 2023

³² *Baehr v Miike* [1999] Haw. LEXIS 391

³³ The Defense of Marriage Act 1996

³⁴ *Lawrence v Texas* [2003] US LEXIS 5013

³⁵ *Goodridge v Department of Public Health* [2003] 798 N.E.2d 941, 949 (Mass. 2003)

³⁶ *Obergefell v Hodges* [2015] 576 US 644

In India, two key legal judgments have significantly shaped the recognition of the right to marry and the importance of personal autonomy. The Justice KS Puttaswamy v Union of India³⁷ case underscored the fundamental right to privacy, including the right to choose one's life partner. In the Navtej Singh Johar v Union of India³⁸ judgment, Section 377 of the Indian Penal Code, which criminalized consensual same-sex activities, was declared unconstitutional. This historic ruling emphasized the violation of the right to equality, privacy, freedom of expression, and dignity. These judgments have collectively evolved the legal landscape in India, highlighting the significance of personal autonomy, the right to marry, and the right to live according to one's gender identity. Additionally, the NALSA v Union of India³⁹ judgment emphasized the right to privacy as an intrinsic component of individual dignity and freedom, further underscoring the evolving legal framework in India.

The language of the legislation of the USA ensures gender neutrality, fostering inclusivity and equality within the legal framework. This approach recognizes the importance of laws that do not favour one gender over another and are equally applicable to all individuals, regardless of their gender identity. For instance, within family law, numerous states have adopted gender-neutral language, replacing terms like 'husband' and 'wife' with more inclusive terms such as 'spouse'. This change, notably in the context of same-sex marriage, guarantees equal legal rights and recognition for all couples, irrespective of gender. Federal and state anti-discrimination laws, like Title VII of the Civil Rights Act 1964⁴⁰, employ gender-neutral language to protect individuals from discrimination based on gender, sexual orientation, or gender identity. This expansion of protection under Title VII has become increasingly significant for LGBTQ+ individuals.

The use of such gender-neutral language highlights that the legislature intended to give equal rights to all genders that exist. Changes in procedures for name changes and gender markers on identification documents have further promoted gender neutrality. Numerous states now allow

³⁷ *K.S. Puttaswamy and Anr v Union of India* (2017) 10 SCC 1

³⁸ *Navtej Singh Johar v Union of India* (2018) 1 SCC 791

³⁹ *National Legal Services Authority v Union of India* (2014) 5 SCC 438

⁴⁰ The Civil Rights Act 1964

individuals to align their name and gender markers on identification documents, such as driver's licenses and birth certificates, with their gender identity.

In contrast, the legislative language in India focuses on specific genders, which is the reason why the Supreme Court could not legalize same-sex marriage. In India, personal laws governing marriage, divorce, and inheritance for various religious communities often use gender-specific language. For instance, the Hindu Marriage Act, applicable to Hindus, Buddhists, Jains, and Sikhs, frequently refers to 'husband' and 'wife' reinforcing traditional gender roles. Similarly, Muslim personal law, based on Islamic principles, can perpetuate patriarchal interpretations through gender-specific terminology. Christian personal laws, governed by the Indian Christian Marriage Act and the Indian Divorce Act, also employ gender-specific terms. Sikh personal laws show similar tendencies.

It is essential to underscore that within the traditional legal frameworks governed by these personal laws, the legislative intent never contemplated or intended the inclusion of same-sex couples in the institution of marriage. This historical oversight and absence of provisions for such unions further emphasize the need for comprehensive legal reforms to align these laws with the evolving societal understanding of inclusivity and equity. This would be a step towards the process of legalizing same-sex marriages in India

RECOMMENDATIONS

Legalizing same-sex marriage in India is not only a matter of civil rights but also a fundamental step towards upholding principles of equality and human dignity. By observing the successes of countries like the United States, Canada, and the United Kingdom, India can learn valuable lessons and implement similar legislation to ensure that all individuals, regardless of sexual orientation, have the right to marry the person they love. Denying individuals the right to marry while affording them the legal right to engage in sexual activities appears contradictory and ineffectual. Marriage is deeply ingrained in our social fabric, serving as a cornerstone of society. Denying same-sex couples the opportunity to marry undermines the institution itself and perpetuates discrimination. Legalizing same-sex marriage is a testament to our commitment to

inclusivity and diversity, promoting respect for individual autonomy and fostering family and community support for LGBTQ+ individuals. Moreover, legal recognition grants same-sex couples access to crucial legal protections and benefits, including inheritance rights, healthcare decision-making, and parental rights, among others. It sends a powerful message of acceptance and inclusion, signaling that society values and respects the rights and dignity of all its members. By embracing diversity and promoting equality, India can take a significant step towards building a more inclusive and equitable society for all.

CONCLUSION

In summary, the legal landscapes for same-sex marriage in India and the United States differ significantly. India's recent decision in the *Supriyo v Union of India*⁴¹ case reflects the complexities surrounding this issue, with a historical reliance on gender-specific language in personal laws hindering the recognition of same-sex marriages. In contrast, the United States has made substantial progress in recognizing same-sex marriage rights, culminating in the *Obergefell v Hodges*⁴² ruling in 2015. Ongoing legal reforms are essential for India to align with evolving norms of inclusivity and equity. These distinct paths to same-sex marriage recognition illustrate the unique legal, cultural, and societal contexts in each country. However, the global trend toward greater inclusivity and equal rights for LGBTQ+ individuals highlights the ongoing importance of legal and societal discussions to ensure that love and commitment are universally celebrated, regardless of gender.

⁴¹ *Supriyo v Union of India* (2023) SCC OnLine SC 1348

⁴² *Obergefell v Hodges* [2015] 576 US 644