

SAME-SEX MARRIAGE IN INDIA: A SOCIO-LEGAL ANALYSIS

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Introduction

MARRIAGE in the modern world, and throughout history, has been an institution that every young person was supposed to aspire to be a part of.³⁵⁸ For a concept that is so deeply entwined in society that everyone is expected to be a part of it,³⁵⁹ marriage has been exclusionary since its inception towards certain communities of people.³⁶⁰ A battle between public policy, religion, and social norms is waged every time a group of people is included, or excluded, from being able to marry. The current polarizing issue is that of same-sex marriage.³⁶¹ This paper aims to explore the social, political, and legal aspects of same-sex marriage in India. It also examines the roots of marriage, and why people are hesitant to acquiesce to a more inclusive form of marriage.

Over the course of this paper, the simple and complex definitions of marriage are explored. The contentions of the opponents of same-sex marriage are analyzed. The claim that changing the components of marriage would radically change the structure and purpose of marriage is explored. Following this social analysis, the laws of various countries are examined to look at the legality of same-sex marriages. This is followed by a comparative analysis with family law in India, and the legality of same-sex marriages under the relevant statutes. Alternative institutions like civil unions are also analyzed.

What is Marriage?

The question about what marriage is can be interpreted in both simple and complex ways. For the simple definition of marriage, the Oxford English Dictionary defines marriage as “The condition of being a husband or wife; the relation between persons married to each other; matrimony”.³⁶² However, the dictionary now acknowledges (in

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³⁵⁸ Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. LAW Q. 537–566 (2007).

³⁵⁹ Wendy D. Manning, Monica A. Longmore & Peggy C. Giordano, *The Changing Institution of Marriage: Adolescents' Expectations to Cohabit and to Marry*, 69 J. MARRIAGE FAM. 559–575 (2007).

³⁶⁰ Scott, *Supra* note 1.

³⁶¹ Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. LAW REV. 1535–1550 (1993).

³⁶² See Oxford English Dictionary (Online Ed.) (accessible at <http://www.oed.com/view/Entry/114320?redirectedFrom=marriage#eid>) (last visited August 12th, 2015)

fine print) that the term is now sometimes used with reference to long-term relationships between partners of the same sex.³⁶³

Many other definitions that were examined define marriage as a union between a male and a female.³⁶⁴ This indicates that the non-legal definition of marriage has been evolving at a slow pace. This simplistic view of marriage is problematic. The definition of marriage needs to be viewed with respect to the societal context.³⁶⁵ The meaning of marriage also changes when social factors like religion and morality are included in the definition of the nature and scope of marriage. When considering all such factors, the simple definition of marriage fails. Marriage, contrary to popular opinion, is not a personal relationship. It is a social institution that is constantly evolving, and any view contradicting popular views on marriage are repressed.³⁶⁶ Of all the factors weighing in on marriage, the religious perspectives on marriage hold more weight than any other factor in how society perceives marriage.

Religious perspective on marriage

One of the most common features of mainstream religions is the prescription of the rituals and rules of conduct of marriage. All three major religions in India, Hinduism, Islam, and Christianity,³⁶⁷ prescribe their own definitions and conduct of marriage. None of them expressly have provisions for, or even acknowledge, same-sex marriage.

In Hinduism, marriage is defined as the joining of two individuals for life, so they can pursue Dharma, Artha, Kama, and Moksha together. Hindu marriages are recognized by law and are usually between a members of opposite sex. There are a few instances where people of the same sex have gotten married, although authorities refused to give official legitimacy to the marriage.³⁶⁸ Although there are several dharmic texts that contain prohibitions of homosexuality, there are also a number of mythological stories that show homosexual experiences as natural and joyful.³⁶⁹ There has been no express mention of same-sex marriage in the mythology. In a 2004 survey, most – though not all – swamis said that they opposed the idea of a same-sex marriage that was sanctified

³⁶³ *Ibid*

³⁶⁴ marriage | the relationship that exists between a husband and a wife, , <http://www.merriam-webster.com/dictionary/marriage> (last visited August 10th, 2015).

³⁶⁵ Talal Asad, 99, *The Definition of Marriage*, 60 MAN 73–74 (1960).

³⁶⁶ Joyce Aschenbrenner, *Politics and Islamic Marriage Practices in the Indian Subcontinent*, 42 ANTHROPOLOGICAL QUARTERLY 305–315 (1969); CHRISTOPHER LASCH, *The Suppression Of Clandestine Marriage In England: The Marriage Act Of 1753*, SALMAGUNDI 90–109 (1974).

³⁶⁷ Ministry of Home Affairs, Census of India, *Distribution of Population by Religions*. Issued 2011. (Accessible at http://censusindia.gov.in/Ad_Campaign/drop_in_articles/04-Distribution_by_Religion.pdf) (last visited August 10th, 2015)

³⁶⁸ Jyotsna Singh, Gay couple hold Hindu wedding, BBC, May 29, 2001, http://news.bbc.co.uk/2/hi/south_asia/1357249.stm (last visited August 12th, 2015).

³⁶⁹ NANCY BONVILLAIN, *WOMEN AND MEN: CULTURAL CONSTRUCTS OF GENDER*, at 281 (Prentice Hall) (2001)

by the Hindu religion.³⁷⁰ Although there is only acceptance of same-sex relationships in small pockets of modern Hindu societies, this has not stopped some priests from performing same-sex marriages, with some being performed as early as 2001.³⁷¹

From an Islamic perspective, marriage is considered to be a legal contract or a “matrimonial contract” between two people. The bride is supposed to give consent to the marriage of her own free will. A religiously valid Islamic marriage requires a formal, binding contract. In Islam, there is a problem with even accepting people of the same sex in sexually active relationships. Muhammad is said to have prescribed the death penalty for both active and passive partners in same-sex activities.³⁷² The moral or theological argument behind this being that any person who performs homosexual activities challenges the harmony of God’s creation, and is therefore a revolt against God.³⁷³ Therefore, it can be presumed that members of the same sex could never be married, and even if they were married, they could never consummate such a union.

In the Christian view, there is no outright definition of marriage. There are several passages in the bible which seem to imply that marriage is a union of a man and a woman. For example, a passage in the Bible states that husbands should love their wives as Jesus loved the church.³⁷⁴ Although there is no definition of marriage, most of the traditional Christian societies and churches do not recognize same-sex unions.³⁷⁵ They believe that marriages should be restricted to “traditional” marriage.³⁷⁶ Some far-right groups even believe that homosexuals should be stoned to death due to a passage in the Old Testament.³⁷⁷

As can be seen from these examples, mainstream religions have been reluctant in accepting same-sex marriages, or even non-heteronormative sexual relationships. From the lens of mainstream theology, it is not feasible for same-sex partners to get married.

There is some hope that this problem of societal perception can be fixed through the process of changing interpretations of religion. For most of history, traditional Hindu laws excluded marriages between different

³⁷⁰ Rajiv Malik, *Discussions on Dharma*, HINDUISM TODAY, 2004, <http://www.hinduismtoday.com/modules/smartsection/item.php?itemid=1300> (last visited August 4th, 2015).

³⁷¹ *Supra* note 12

³⁷² Jim Wafer, *Muhammad and Male Homosexuality*, in STEPHEN O. MURRAY & WILL ROSCOE, *ISLAMIC HOMOSEXUALITIES: CULTURE, HISTORY, AND LITERATURE*, at 89 (NYU Press) (1997)

³⁷³ Wayne Dynes, *Encyclopaedia of Homosexuality* (New York) (1990)

³⁷⁴ 5:25-32, Ephesians, KING JAMES BIBLE.

³⁷⁵ Rory Mc Veigh & Maria-Elena D. Diaz, *Voting to Ban Same-Sex Marriage: Interests, Values, and Communities*, 74 AM. SOCIOL. REV. 891-915 (2009).

³⁷⁶ *Ibid.*

³⁷⁷ The Associated Press, *Ex-Bob Jones President Apologizes for 1980 Anti-Gay Remarks*, THE NEW YORK TIMES, March 23, 2015, <http://www.nytimes.com/aponline/2015/03/23/us/ap-us-rel-bob-jones-gays.html> (last visited August 29th, 2015); 18:22, Leviticus, KING JAMES BIBLE.

castes,³⁷⁸ remarriage of widows³⁷⁹ and divorcees. In modern society, most people would disagree with these restrictions. This can be seen in other religions as well. For example, in the Bible, it is stated that people should not eat shell fish³⁸⁰, or use mixed fabrics³⁸¹, or that people should be stoned to death for not observing the Sabbath³⁸². Most Christians no longer follow such rules.

Such change is not only possible in Religion, but also societal perceptions in general. For another example, 4% of people in the United States approved of inter-racial marriage in 1958, as opposed to 87% in 2013.³⁸³

In the long term, it is entirely possible that the weight of public opinion will change in favour of same-sex marriages in the Indian context. This does mean that in the *status quo*, same-sex relationships face an uncertain reality.

Legality of Same-sex Marriage in India

The current laws regarding same-sex marriage in India are framed in a manner that does not expressly prohibit same-sex marriage. For example, when the Hindu Marriage Act defines the people who will be eligible to marry under the act,³⁸⁴ it does not lay down any provision that states that only people of the opposite-sex can get married to each other. In fact, the only problem arising in the conditions for marriage is the section that talks about the age requirements of the bridegroom and the bride.³⁸⁵ The same thing can be observed under the Special Marriage Act.³⁸⁶ Even if the law *prima facie* does not prohibit same-sex marriages, several obstacles still exist before same-sex marriages can be legally recognized.

Criminalization of Homosexual Activities

Despite the lack of any obvious restraint on same-sex marriages, there are other factors to consider before a person enters into one. For example, consummation of a marriage is considered to be one of the salient features of Hindu

³⁷⁸ C. T. Kannan, *Intercaste Marriage in Bombay*, 10 SOCIOLOGICAL BULLETIN 53–68 (1961); Jennifer S. Barber, *Community Social Context and Individualistic Attitudes toward Marriage*, 67 SOC. PSYCHOL. Q. 236–256 (2004).

³⁷⁹ M. Bhat & R. Kanbargi, *Estimating the Incidence of Widow and Widower Re-Marriages in India from Census Data*, 38 POPUL. STUD. 89–103 (1984); Sudhir Chandra, *Conflicted Beliefs and Men's Consciousness about Women: Widow Marriage in Later Nineteenth Century Indian Literature*, 22 ECON. POLIT. WKLY. WS55–WS62 (1987); Barber, *Supra* note 21.

³⁸⁰ 11:9-12, Leviticus, KING JAMES BIBLE

³⁸¹ 19:19, Leviticus, KING JAMES BIBLE

³⁸² 23:32, Leviticus, KING JAMES BIBLE

³⁸³ Frank Newport, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958*, GALLUP (accessible at <http://www.gallup.com/poll/163697/approve-marriage-blacks-whites.aspx>) (last accessed August 11th, 2015)

³⁸⁴ See Section 2, The Hindu Marriage Act, 1955.

³⁸⁵ See Section 5, The Hindu Marriage Act, 1955.

³⁸⁶ See Section 4(c), The Special marriage Act, 1954.

marriage.³⁸⁷ However, consummation of marriage, in the case of two males getting married, would be a violation of criminal laws.³⁸⁸ *In arguendo*, even if same-sex partners were allowed to be legally married, there is always the chance that they may be prosecuted for their sexual relationship. Therefore, any marriage that might exist, at least in the case of two males getting married, would be one without any sexual activity. If the couple decides to engage in sexual activity, they would have to constantly worry about prosecution under the Indian Penal Code.³⁸⁹

With such laws still being actively enforced,³⁹⁰ it is not possible for same-sex partners to marry without being subjected to constant awareness of the fact that they could be arrested under Section 377 and sent to prison. Arguably, this is a blatant violation of such persons' right to equality³⁹¹ and right to life³⁹².

The Delhi High Court in *Naz Foundation v. Govt. of NCT of Delhi*³⁹³ stated that Section 377 of the Indian Penal Code was unconstitutional insofar as the restrictions on homosexual activity were concerned. The Court read the word "sex" with a liberal interpretation, including biological sex, as well as sexual orientation into the word. This effectively meant that any law that specifically targeted homosexuals would be *prima facie* void.

This case was later overturned in *Suresh Kumar Koushal v. Naz Foundation*³⁹⁴. The Supreme Court stated that role of reforming the law was that of the legislature, and that the judiciary could not strike down certain provisions of the law. The bench, however, only commented on the ability of the High Court to strike down the law, they did not vitiate the opinion of the Delhi High Court that Section 377 was unconstitutional.³⁹⁵

The judiciary has acknowledged, at least tacitly, that the marginalization of same-sex couples would violate the fundamental rights of such individuals. Until laws that target such people are struck down or repealed, no same-sex marriage would be safe from persecution.

³⁸⁷ W Menski, *Legal Pluralism in the Hindu Marriage*, in DAVID ARNOLD & PETER ROBB, INSTITUTIONS AND IDEOLOGIES: A SOAS SOUTH ASIA READER (1993).

³⁸⁸ See Section 377, Indian Penal Code, 1860.

³⁸⁹ Mridula Chari, ARRESTS FOR "UNNATURAL SEX" SOAR. SO DO CASES OF GAY PEOPLE BEING BLACKMAILED SCROLL.IN, <http://scroll.in/article/700121/as-arrests-for-unnatural-sex-soar-so-do-cases-of-gay-people-being-blackmailed> (last visited August 29th, 2015).

³⁹⁰ Cops arrest gay man under section 377 for cheating on arranged wife, , <http://www.legallyindia.com/201410295241/Bar-Bench-Litigation/cops-arrest-gay-man-under-section-377-for-cheating-on-arranged-wife#comments> (last visited August 10th, 2015); 600 homosexuals arrested in 2014, DECCAN HERALD, <http://www.deccanherald.com/content/451095/600-homosexuals-arrested-2014.html> (last visited August 12th, 2015).

³⁹¹ See Article 14, Constitution of India.

³⁹² See Article 21, Constitution of India.

³⁹³ *Naz Foundation v. Govt. of NCT of Delhi*, 160 Delhi Law Times 277.

³⁹⁴ *Suresh Kumar Koushal v. Naz Foundation*, AIR 2014 SC 563.

³⁹⁵ *Ibid*, paragraph 56.

Lack of Official Recognition of Same-Sex Couples

In 1993, Vinoda Adwekar and Rekha Chaudhary approached the Registrar of Marriages with the intent of obtaining a marriage certificate.³⁹⁶ The Registrar did not turn the women away immediately, but held an emergency deliberations with the judiciary and law enforcement to determine whether they could be issued such a certificate. In this case, one of the women was dissuaded from the marriage. Regardless of the lack of a definite outcome, it could be seen from the uncertainty of the Registrar that there is a lack of clarity in the family laws.

Asking whether there is law that expressly prohibits same-sex marriage might not be the best option. Rather, the question that should be asked is whether same-sex couples can get married under existing laws.

A question might be raised as to how important State recognition of a marriage is. In order to answer this question, the origins of the State authority of marriage must be considered. In pre-modern times, at least in Europe, marriage was a secular matter, so religious involvement was not needed. The Clergy merely blessed the institution as they did other secular undertakings.³⁹⁷

Over time, with increasing pressure from the upper classes, the blessing ceremony moved from outside the church to inside. Eventually, the ceremony that is followed today evolved over time. The state's takeover of marriage was not completed until the French Revolution, when it was declared that the only valid marriages would be civil ceremonies that were registered by an officer of the State.³⁹⁸

In the case of Hindu marriages, it is not unusual for people to get married and not get the official documentation of the marriage. In case the need for legal intervention was necessary, the judges would examine evidence of the marriage. Evidences like photographs and recordings are used to see if two people were married. The need for following the ceremonies is emphasized. Not following the ceremonies could result in the marriage not being legitimate.³⁹⁹ If the ceremonies cannot be proved, there can be no valid Hindu marriage.⁴⁰⁰

Even though they might have completed all the required procedures and ceremonies for marriage, same-sex couples have not been able to get official recognition. The couples involved would have been married in every sense of the word, in accordance to the rites and ceremonies prescribed by religion, however, they would not be considered married from the perspective of the State.⁴⁰¹ This would leave the couples of the same sex in the same

³⁹⁶ Page 84, IGLHRC Book India, INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION (2003)

³⁹⁷ Ruth Vanita, *LOVE'S RITE* (Palgrave) (2005)

³⁹⁸ Vanita, *Supra* note 40.

³⁹⁹ *Vishnu Prakash v. Sheela Devi*, (2001) 4 SCC 729.

⁴⁰⁰ *Margaret Palai v. Savitri Palai*, AIR 2010 Ori 45.

⁴⁰¹ Vanita, *Supra* note 40.

legal grey area that is reminiscent of the gay marriages in US States, where same-sex marriages performed before a State ban left such relationships in a state of limbo.⁴⁰²

This lack of a legal recognition means that these couples will not get the benefits and protections available to other couples. For example, married people would be able to avail more financial aids than non-married couples. This would be a violation of the principles of equity, as people are being discriminated against solely based on their sexuality.

Legality in other Jurisdictions

Until the beginning of the 21st century, there was no modern law enacted that recognized the legality of same-sex marriages. Polls across the Americas⁴⁰³ and Europe⁴⁰⁴ show that support for same-sex marriage has been rising at a steady rate.

On the other end of the spectrum, there has been a trend of African countries criminalizing homosexuality and enforcing extremely harsh penalties. Examples of this are the draconian laws enforced by Nigeria⁴⁰⁵, Uganda⁴⁰⁶ and several Central African countries⁴⁰⁷.

However, the most contentious of the battles is raging in the United States. Most Supreme Courts have struck down laws that prohibit same-sex marriages. This chain of judgements was started in 2013, when the Supreme Court ruled in favour of the rights of same-sex couples in *Hollingsworth v. Perry*⁴⁰⁸ and *United States v. Windsor*⁴⁰⁹. In these judgements, the Supreme Court ruled that any ban on same-sex marriage would be unconstitutional and that the Federal Government would have to recognize any marriages that were conducted at

⁴⁰² Tara Siegel Bernard, *Social Security Benefits in Limbo for Some Same-Sex Couples*, THE NEW YORK TIMES, August 19, 2015, <http://www.nytimes.com/2015/08/20/your-money/social-security-benefits-same-sex-couples.html> (last visited August 29th, 2015).

⁴⁰³ Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP (2011) (accessible at <http://www.gallup.com/poll/147662/First-Time-Majority-Americans-Favor-Legal-Gay-Marriage.aspx>) (last accessed August 10th, 2015); Margarita Corral, *Support for Same-sex Marriage in Latin America*, in LATIN AMERICA PUBLIC OPINION PROJECT, "INSIGHTS" SERIES (2010) (accessible at <http://www.vanderbilt.edu/lapop/insights/I0844.enrevised.pdf>) (last accessed August 13th, 2015).

⁴⁰⁴ Most Irish people support gay marriage, poll says, PINKNEWS (2011), <http://www.pinknews.co.uk/2011/02/24/most-irish-people-support-gay-marriage-poll-says/> (last visited August 15th, 2015).

⁴⁰⁵ Adam Nossiter, *Nigeria Tries to "Sanitize" Itself of Gays*, THE NEW YORK TIMES, February 8, 2014, <http://www.nytimes.com/2014/02/09/world/africa/nigeria-uses-law-and-whip-to-sanitize-gays.html> (last visited August 12th, 2015).

⁴⁰⁶ Paul Semugoma, Chris Beyrer & Stefan Baral, *Assessing the effects of anti-homosexuality legislation in Uganda on HIV prevention, treatment, and care services*, 9 SAHARA-J J. SOC. ASP. HIVAIDS 173–176 (2012).

⁴⁰⁷ *Review of Legal Frameworks and the Situation of Human Rights related to Sexual Diversity in Low and Middle Income Countries*, JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS (UNAIDS) (2009)

⁴⁰⁸ *Hollingsworth v. Perry*, 133 S. Ct. 2652

⁴⁰⁹ *United States v. Windsor*, 133 S. Ct. 2675

the state level. In 2015, the Supreme Court ruled in *Obergefell v. Hodges*⁴¹⁰ that states cannot refuse to issue same-sex marriage licences, effectively legalizing gay marriage across the United States.⁴¹¹

The general trend in other jurisdictions has been a slow change in the legal status of same-sex marriages. In most of the western nations, homosexuality is de-criminalized⁴¹² and are well on the way to recognizing same-sex marriage.⁴¹³ The areas that have started criminalizing homosexual behaviour is limited to the Middle-East⁴¹⁴ and Africa⁴¹⁵, with some notable exceptions like Russia.⁴¹⁶ With the recent judgements like *Koushal*, India might have chosen a track that goes against the global trend in the aspect of same-sex relationships.

Alternatives to Marriage

As many communities struggled with the idea of non-traditional marriages, in a lot of places there was a compromise between the two possibilities, with the proposal that other forms of relationships could be legally recognized. This chapter recognizes and analyses such options.

Live-in Relationships

Live in relationships, also called cohabitation relationships, have been growing increasingly popular in various countries, including India. In most places, people who do not have an option of getting married or recognized in any official capacity resort to this option.⁴¹⁷

In India, they have been recognized as official marriages in certain circumstances.⁴¹⁸ Although same-sex marriages are still not recognized, even if they fall under the same circumstances.

⁴¹⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584

⁴¹¹ Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, THE NEW YORK TIMES, June 26, 2015, <http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html> (last visited August 29th, 2015).

⁴¹² E.g. *Toonen v. Australia*, [1994] PRIV. LAW. P. RPR 33; *Lawrence v. Texas*, 123 S. Ct. 2472.

⁴¹³ See *Obergefell v. Hodges*, *Supra* note 53.

⁴¹⁴ Frank Bruni, *Gay and Marked for Death*, THE NEW YORK TIMES, August 21, 2015, <http://www.nytimes.com/2015/08/23/opinion/sunday/frank-bruni-gay-and-marked-for-death.html> (last visited Aug 29, 2015); Robert Mackey, *Attack on Gay Pride Parade Shakes Israel's Self-Image as Bastion of Tolerance*, THE NEW YORK TIMES, July 30, 2015, <http://www.nytimes.com/2015/07/31/world/middleeast/attack-on-gay-pride-parade-shakes-israels-self-image-as-bastion-of-tolerance.html> (last visited August 29th, 2015).

⁴¹⁵ Gay Africans Seeking Asylum in New York, LENS BLOG, <http://lens.blogs.nytimes.com/2014/09/26/gay-africans-seeking-asylum-in-brooklyn/> (last visited Aug 29, 2015).

⁴¹⁶ The Associated Press, *AP Poll: Russia Anti-Gay Views on Rise; Teachers Face Brunt*, THE NEW YORK TIMES, April 2, 2015, <http://www.nytimes.com/aponline/2015/04/02/world/europe/ap-eu-russia-gays-under-pressure.html> (last visited Aug 29, 2015).

⁴¹⁷ Kathleen Kiernan, *Cohabitation in Western Europe: Trends, Issues, and Implications*, in ALAN BOOTH, ANN C. CROUTER & NANCY S. LANDALE, JUST LIVING TOGETHER: IMPLICATIONS OF COHABITATION ON FAMILIES, CHILDREN, AND SOCIAL POLICY (2002).

⁴¹⁸ *Indra Sarma v. V.K.V. Sarma*, AIR 2014 SC 309

Common Law Marriages

Common law marriages are informal agreements to get married without a wedding license.⁴¹⁹ The couples agree that they are in a marital relationship, they tell others that they are married and cohabit. They are officially recognized in several jurisdictions, but are slowly dying out as the environment which facilitated the rise of common law marriages no longer exists.⁴²⁰ They can be legally recognized in India if all the ceremonies or procedures that are prescribed in the relevant laws are followed⁴²¹.

Civil Unions

Some countries have the alternative to marriage known as Civil Unions, they carry all the benefits and protections of marriage. They also carry all the responsibilities of marriage.⁴²² They were meant to be a compromise, where same-sex couples got all the benefits of marriage, although the definition of traditional marriage would be unchanged, therefore avoiding the conflict with religious entities.

The problem is of course, with the attempt to reinstate a system of separates but equals that defined the Jim Crow laws in the United States before the Civil Rights movement.⁴²³ It shows that same-sex partners are being treated in a way that is considered to be “lesser” than the institution of marriage, which is reserved for straight couples, who would be considered more “natural” or “pure”.⁴²⁴

Such unions have no equivalent in India.

Conclusion

Same-sex marriages in India are not considered legitimate in general society. This arises from the fact that many people consider that their respective religions and cultures tell them that such relationships are “unnatural” or “unholy”. This leads to a system of institutionalized prejudice against the LGBT community.

Although same-sex marriages are not expressly prohibited in India, there is also no law that makes it possible to get married without ambiguity. There have been instances of same-sex marriages being performed in India, although they have not been officially recognized by the Government of India. Many religious scholars actually

⁴¹⁹ Robert Black, *Common Law Marriage*, 2 UNIV. CINCINNATI LAW REV. 113 (1928).

⁴²⁰ Jennifer Thomas, *Common Law Marriage*, 22 J. AM. ACAD. MATRIM. LAWYERS 151 (2009).

⁴²¹ *Supra* note 42; *Supra* note 43.

⁴²² William N. Jr Eskridge, *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALBANY LAW REV. 853 (2000).

⁴²³ LESLIE VINCENT TISCHAUSER, JIM CROW LAWS (2012).

⁴²⁴ Alison Avery et al., *America's Changing Attitudes toward Homosexuality, Civil Unions, and Same-Gender Marriage: 1977–2004*, 52 SOC. WORK 71–79 (2007); Paul R. Brewer & Clyde Wilcox, *Same-Sex Marriage and Civil Unions*, 69 PUBLIC OPIN. Q. 599–616 (2005).

consider that the scriptures do not condemn such relationships, and that they were relatively common in ancient Indian society. However, post-colonial changes in the way society perceives culture has led to ignorance of this knowledge, leading to people proclaiming such relationships as foreign and against Indian Culture.

With the upholding of the statutes criminalizing homosexuality, there is no possibility of marriage being consummated without penal consequences, even if they are performed and recognized. They also take away the ability of the people to live their personal lives in their own interest, without the State enforcing its interpretation of morality.

Even alternatives like Civil Unions are not present in India to allow same-sex couples to live a life with the benefits and protections that are extended to other married people.

As of today, same-sex marriages are not feasible in India, insofar as official recognition is concerned. Even alternatives to marriage are not available. It is the conclusion of this paper that this leads there is no legal or social recognition of same-sex marriage in India. The rights of gay individuals are being violated. They are denied the right to be a part of the institution of marriage, which is held in such high regard in Indian society, thus preventing them from being integrated into society.

