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SAME-SEX MARRIAGES AND LEGAL CONUNDRUM IN INDIA

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I. ABSTRACT

“I am what I am, so take me as I am.” The judgment in *Navtej Singh Johar v. NCT Delhi*² starts with the famous words of the great German thinker Johann Wolfgang von Goethe. The debate about the inclusivity of the institution of marriage to people of the same sex has been going on for a long time. Various NGOs and related associations are fighting legal battles for the legalization of same-sex marriages. This article tries to present the long, convoluted history of same-sex marriages and the legal diaspora surrounding it. Besides giving a legal spectrum to this debate, the author also tries to touch upon topics of the current state of activism and how this topic is firmly taken on international fields. In the end, this article concludes that indigenous norms and colonial rules have institutionalized our minds against same-sex marriages and homosexuality. The issue of personal laws and effective options to implement same-sex marriages is also discussed in this article.

Keywords: Homosexuality, same-sex marriages, personal laws, Activism, LGBT

II. INTRODUCTION

Homosexuality, as defined by courts, is the attraction toward people of the same sex; the interest can be romantic or sexual or both. The recent problem in understanding homosexuality is the misread words ‘gender’ and ‘sex’ as the same. Henrietta L. Moore, in her paper ‘Understanding global sexualities: New frontiers’ explains that the differentiation of normative from non-normative, from female to male, the societal norms and segregations of sexual activities with the difference of race and gender mark our physical bodies, which became the heart of all these discussions. A person’s sex is the physical, biological and

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²AIR 2018 SC 4321

anatomical identity or state. It is assigned from the birth of an individual, and according to Supreme Court in the NALSA case;³ people may be born “with bodies which incorporate both or certain aspects of both male and female physiology.” Gender, on the other hand, is what one chooses to be projected as; gender is intrinsic and, as defined by courts, is the most fundamental part of one’s life.

Sexuality, as it may be defined, is the interest or desire toward another person. The cultural notion of obtaining bodily pleasures from other people forms an essential element of sexuality. Sexual orientations can be of three types- Homosexual, Heterosexual and Bisexual. Heterosexual is between one male and one female; homosexual is between two males or two females i.e., towards, same-sex and bisexual are towards both sexes. The word encompassing both homosexuality and bisexuality is LGBTIQ which stands for 'Lesbian, Gay, Bisexual, Trans- gendered People and intersex'. The Indian courts and society have often overshadowed the concept of gender and sexuality under sexual orientation. This has led to wide-ranging opposition and assigning a natural phenomenon as unnatural and against the order of society. The LGBTQI community has to go through a long wretched history of oppression and non-recognition of their Rights, giving birth to much activism from time to time.

The birth of same-sex marriages flows from the concept of homosexuality. After scrapping article 377 to the extent it derogates homosexuality in the Navtej Singh Johar case⁴, much attention shifted toward same-sex marriages, which are still illegal in India. This article explores how the institution of marriages and personal laws are drafted among various religions and how the concept of same-sex marriages, which confers on fundamental rights, stand against or in conformity with personal laws. Currently, the case of Abhijit Iyer Mishra v. NCT Delhi⁵ is going on in Delhi high court; In this case, the court is dealing with the question of whether same-sex marriages can be done under the Hindu marriage act as its language is gender-neutral. The decision of this case will give a new legal direction to the issue of same-sex marriages, not only about its legality but also how same-sex marriages will be practically included inside personal and indigenous laws. Furthermore, the petitions about

³AIR 2014 SC 1863

⁴AIR 2018 SC 4321

⁵ The case is still going on in High Court of Delhi

legalization and grant of citizenship to foreign same-sex marriages are also filed in courts since the citizenship act is also gender-neutral.

III. CONCEPTION AND HISTORY OF SAME-SEX RELATIONSHIPS

The most cardinal and main argument against same-sex marriages is that marriage as an institution is established to hold the society firm. If gay or lesbian marriages are allowed, the social fabric will be shattered. Those who are against same-sex marriages claim that in the history of India, there are very few or no instances of homosexuality because it has always been criminalized heavily. However, contrary to this, many scholars have raised evidence in scriptures and monuments which shatter the argument of homosexuality being a ‘western ideology.’

The ancient history of India depicts that India as a nation in its respective cultural diaspora was much more tolerant of homosexuality. If we talk about Hindu scriptures, queers and homosexual people can be found in many places also; this text shows the gender fluidity between humans and yaksha. In Valmiki Ramayana, when Hanuman was sent to Lanka by Lord Ram to meet Goddess Sita and give her Ram's ring, he saw many Rakshasa women there. When he returned from Lanka, he saw various physical acts between Rakshasa women happening in Ashok Vatika. The story of shikandini in Mahabharat also shows the tolerance of sexuality in those times; shikandini was raised as a son all through her life. She later changed her gender with the help of a yaksha and entered the battle and took her revenge on Bhism. There is also the story of king Bhagiratha who was born out of two women who were guided by Lord Shiva to make love for a child to be born. Eight different sorts of weddings are recognized by Kamasutra. For example, the phrase Gandharvavivah's recognized homosexual or lesbian marriage. It specifically relates to a partnership or cohabitation without parental consent.

In Muslim literature, the presence of sexuality can be found. The founder of the Mughal Empire, Babar himself, was attracted to a boy named Baburi; the extracts from Baburnama contain many which Babur wrote about him. A similar story about the great Sufi Saint Bulleh Shah and Shah Inayat can be found in Sufi poetry, which shows how sexual fluidity was found in those times. Not only is this, but the graphical evidence is also found in the temples

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of Puri and Tanjore. Rajrani temple even shows oral coitus between two women. The Khajuraho caves and temples of the Chandela dynasty also showcase the gender fluidity and prevalence of homosexuality.

These all evidence show that homosexuality and tolerance towards gender identities are a part of Indian rich culture and history. The main offset of our ideals and changing of our mindset started after the advent of British colonial rule. Historian Harbans Mukhia says on this issue,

"The British brought their own rules to India, including Section 377, which banned homosexuality and made it a criminal act. They enforced this law, but it didn't conform to India's attitude toward homosexuality. It was more to do with their Christian belief systems."

India was the first British colony where homosexuality was criminalized, and section 377 of the IPC was framed. The Britishers tried to pass similar rules in all its territories, and it's painful to see that half of the countries in the world where same-sex love is criminalized are initial British colonies. India's section 377 came from the Buggery act of 1553, which was implemented in England in the 16th century; it penalizes with a capital punishment any 'unnatural' sexual activity between people. This act transferred the offenses of bestiality and sodomy from church to State. One more controversial and brutal act, named Criminal Tribes Act, 1871, was passed by the colonial regime in India. This act described 'eunuchs' as 'hereditary criminals'; the point of consent was never taken into recognition in those times, which made section 377 an article that criminalizes Homosexuality.

The mental harm and historical setback we face today flow from colonial times. The best alternative to deal with this issue is to spread awareness and strike a balance between Indian ideals and church ideology.

IV. FROM NAZ FOUNDATION CASE TO NAVTEJ SINGH JOHAR'S CASE

The recent decision in Navtej Singh Johar. v. the union of India⁶ flows from the case Naz Foundation v. NCT Delhi⁷. In the Naz Foundation case, the Delhi high court decriminalized

⁶AIR 2018 SC 4321

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article 377 of the constitution as it criminalized homosexuality which is against articles 14 and 15 of the constitution. The court had also granted sexual autonomy to the queer community to recognize themselves independently, which was also a waited order for the LGBTIQ community.

However, the Naz judgment⁸ did not hold power for much time; the case Suresh Kumar Koushal v. Naz Foundation⁹ decided contrary to this judgment. In the Suresh Kaushal case, Supreme Court rather took an orthodox approach to back up article 377 along with shredding its duties towards legislation. It opined that these issues are to be dealt with legislation as they involve changing many acts and articles of the constitution. It even goes on to say that archaic laws also display the opinion of the Indian population; it set aside Supreme Court's own precedents, which shows otherwise. Also, the most controversial point made in the Kausal case was not giving reasons why this article is not violative of articles 14, 15 and 21 of the Constitution. It also stated that the LGBTIQ community is a minority community whose rights are to be protected by the majority, i.e., the parliament.

In the end, the rescue of all the Navtej Singh johar case¹⁰ came to a decision on 6th September 2018, which stated that "individual orientation is naturally natural" and gave a final judgment scrapping article 377. This judgment recognized the dehumanizing effect of this article on the LGBTIQ community, however minuscule the community is. It examined the definition of the sexual act according to the section. Furthermore, this judgment provided a right to choose a life partner of his/her choice.

To come to a decision in the Navtej Singh Johar case¹¹, the court looked into several sources. The judgment itself started with a number of poets and writers' works like Johann Wolfgang Von Goethe, Arthur Schopenhauer, Shakespeare, Leonard Cohen, John Stuart Mill, and Oscar Wilde. The cases of Fazal Rab Chaudhary v. State of Bihar¹² and ShayaroBano v. Union of India¹³ were looked into to understand the importance and relevance of consent in

⁷160 Delhi Law Times 277

⁸AIR 2018 SC 4321

⁹ (2014) 1 SCC 1

¹⁰AIR 2018 SC 4321

¹¹ AIR 2018 SC 4321

¹² AIR 1983 Cr LJ 632

¹³ 2017 9 SCC 1 (SC)

carnal intercourse between people of the same sex. To understand the unnatural element, the Position Statement of the American psychological association stated that “attraction to same-sex is natural.....this build no impairment in judgment, stability, reliability, or general social and vocational capabilities”. The Yogyakarta Principles of international human rights were also looked into, which stated that there should be no discrimination based on gender and sex. Different judges also took different sources. Justice Indu Malhotra considered J.S. Verma's committee suggestion to include gender within ambit of sex; justice Mishra considered Michael Kirby's definition of LGBTIQ, and justice Nariman looked into the mental Healthcare act for the natural nature of Homosexuality.

This judgment made a transformative change in society. It was well established that the constitution should be transformed to suit the current times of social and political India and the courts have all the powers to do it. The long discriminated community after this judgment got a relatively more social acceptance as they got more ‘breathing space’ inside the society.

However, only recognition by law is not sufficient for this society. The next step should be legalizing the same-sex love in the institution of marriages, which is still illegal in India

V. SAME-SEX MARRIAGES AND PERSONAL LAWS.

Personal laws in India govern marriages, and the legal provisions around it also the laws around it, like succession and divorce laws, are also different for different communities. Detailed research shows that homosexual and heterosexual relationships do not differ in psychosocial dimensions, and marriage does nothing but provides the couple with significant psychological, social and health benefits. It is beneficial for their children as well. Most of the people of the world are culturally inclined toward marriage because it is seen as an ideal Institution of connection and commitment, and commitment, in the modernistic view, is something personal. The modern view holds that commitment is done by an individual listening to his/her heart. Hence, it should be a realm in which the state should not have any control. Thus, deliberately excluding one class of citizens from this institution can be considered as depriving them of the dignity

The question now is that if the same sex is legalized, how should it be included in the personal laws of India? Also, how far the validity of civil unions holds in today's social

environment. To answer the first question, it is important to see that there are three options to implement the same-sex marriage proposals. The first one is to authorize them by interpreting personal laws in that direction. Moreover, the Hindu Marriage Act, 1955 seems to be gender-neutral as nowhere in the act has the marriage been defined as only heterosexual in nature. The only condition is the acceptance of one person as bride and another as the groom. This approach, however may seem viable but comes with an ingrained complexity of assumption that even in same-sex marriages, the pre-set traditional roles are to be accepted to get same-sex couples to get their marriage solemnized.

The following approach can be to regard and accept LGBT as an independent community having its own custom and practices. Then self-respect marriages can be included within these customs to inculcate same-sex marriages. The Arya Samaj has done the same, which even lead the Tamil Nadu government to include section 7A within their act to recognize the same. The third and last approach is SMA, i.e., the Special Marriage Act 1954. To include same-sex marriages, only section 4C of the legislation should be amended to include special provisions for gay and lesbian marriages. Since the special marriages act will be amended if gay marriages were to be included in personal laws, this seems the most viable option.

The answer to the following question about the civil union is very controversial. Though the concept of a civil union was bought to include mainly same-sex marriages, its social acceptance is far less than the institution of marriage. In addition to this, not recognizing marriages for a gay and lesbian couple but allowing civil unions itself seems discriminatory.

VI. ACTIVISM AROUND HOMOSEXUALITY AND SAME-SEX MARRIAGES

The relatively new LGBTQ+ movement (activism) is challenging the hegemony of the ‘heterosexual’ state. The current discourses (much widespread now) against the activism are more or less ignoring (and trying to erode) the difference between homosexuality being ‘normal’ and ‘legal’. ‘Illegality’ (at least in some countries) is used as a proxy for ‘abnormality’. In some other nations (where the illegality has been revoked recently), many times, ‘tradition’ and ‘culture’ are evoked as the bases of laws and repealing such laws is

looked down upon as ‘erosion of culture’ or ‘influence of hegemons’. Quite interestingly, the challenge to the hegemony of heterosexuality is seen as an attempt to establish the hegemony of homosexuality. Religion is often employed as a weapon against this activism, with some claiming homosexuality to be something against the will of God. In some instances, even the state actively supports such notions, thereby trying to do what can be called ‘disciplining desire’.

The LGBTIQ movement can be categorized as a lifestyle movement, well within the sphere of identity politics. Its emergence can be linked to the emergence of The New Left in the 1960s and 70s while The Civil Rights movement was going on. That was the time when the first advocates of homosexuality being normal came out. The movement prescribes that heterosexuality is not the only form of expression and thus gives a wider meaning and scope to the word ‘expression’ (Freedom of expression being a fundamental right in many countries, including India). It describes ‘disciplining’ desire as unethical as sexuality is something very personal and innate to an individual. There exists an inherent paradox when the activists include the state. On the one hand, they hold it responsible for the ‘disciplining’ exercise, while on the other, it also demands protection from it.

The first major act of courage was the release of the movie ‘Fire’ in 1998, which depicted lesbian relationships between women. It was seen as an assault on their indigenous culture by the right-wing, and a no. of organizations were formed to ‘fight’ the influence of alien culture. A ban was also demanded on the movie. Much before that, in the years around independence, there were widespread protests against the IsmatChughtai novel ‘Lihaaf’, which dragged the author to the courts of law.

The first struggle against Article 377 of IPC was initiated by AIDSBhedBhav Virodhi Andolan (ABVA), a Delhi-based NGO, when it filed a PIL for its repeal citing contradictions with the fundamental rights under Article 21 of the Indian constitution. However, the desired aim was not reached. Another PIL by the Naz foundation also met the same fate.

The first Indian lesbian group, ‘Sakhi,’ was set up to dispel many rumors and myths about lesbianism in India, while the first gay pride parade in India happened in 2003. More recently, the cyber world has also stepped into the movement. One notable example is Equal India Alliance, a virtual community that presents itself as a non-profit organization that aims

to build welcoming environments for India's LGBT community, principally at colleges and workplaces. Another online space is Orinam, a social support group with an associated website. These online mediums have a significant advantage over other conventional mediums - the anonymity they provide to the member. It is of utmost necessity as it boosts confidence and builds up the user base.

In the present context, the sensitized new generation in the colleges is striving to create safe spaces for LGBTIQ members. The burst of mass media and globalization has given the much-needed thrust to the movement in India. Though section 377 of the IPC has been suitably read down by the Supreme Court in the Navtej Singh Johar case¹⁴, the campaign still has a long way to go. It is time now for the move to shift the focus towards the social realm, training and sensitizing the young to shape a better future

VII. CONCLUSION

The above discussion clearly establishes the fact that the need for same-sex marriages is paramount. If the decision of the Abhijit Iyer case¹⁵ comes in favor of the LGBT community, then the scope of including same-sex marriages will be in the personal laws of India. However, the wide outrage of unions like RSS will be a much more difficult problem to be dealt with. Besides personal law, there is also scope for the special marriages act to include this provision. In a nutshell, quite a long overhaul of Indian personal laws and the possibility of civil union included in provisions is much needed. The reason can be much more clearly seen in Former Chief AP Shah's words

"If there is one constitutional tenet that can be said to be [the] underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that [the] Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations."

¹⁴AIR 2018 SC 4321

¹⁵The case is still going on in High Court of Delhi