

An Overview of the Legalization of Homosexual Marriage in India

Abstract-

Marriage is a beautiful bond between two people irrespective of religion, caste, age and sex. It is considered as a basic right of the individual to have the freedom to choose their life partner. Marriage in India is governed by the personal laws and Special Marriage Act. The laws contained in such statutes are gender specific and unequal towards to LGBTQS society. The status of LGBTQS society is recently recognized in India however there are still some laws which are required to be changed in order to exercise their rights fully. Homosexuality is no longer treated as some disorder or disease in our society. They should be able to enjoy their personal rights along with dignity. Legalization of homosexual or same sex marriage will help to promote the interest of the community and protect their rights as a citizen of the nation. India is a sovereign, socialist, secular, democratic, republic nation which aims to maintain equality, justice and fraternity among its citizens. India must follow gender neutral language in the statutes so in order to ensure equal right to everyone. With the change of time the statutes need to be reformed as per the circumstances. Mere recognition of LGBTQS is not enough, formulation of legal rights in favor of them will help them to exercise their freedom of choice.

Key words-

Same sex marriage, homosexuality, LGBTQ Groups, equality, freedom, privacy, legal recognition, social acceptance, disorder, disease.

Introduction-

Marriage in India holds cultural value. Marriage is not only between two individuals but between two families and their cultural beliefs. So, it is considered as a spiritual bond between two individuals which is attained by performing their rites as per their customs and usage. It is intrinsic association of two individuals.¹ Legally speaking, marriage is a form of contract entered by two consenting adults to live together for the purpose of procreation of life and fulfilment of social as well as legal obligations.² There are various views regarding the nature of marriage as some consider it as a form of contract while some beliefs it to be a sacrament. As stated in the Brahmanas that a man is not complete and requires a female to complete him in order to acquire progeny. As per the customs

¹ Baraily, N. (2022). The Need for Legalising Same-Sex Marriage in India: A Future Possibility or a Possible Apprehension?. *Indian Journal of Law and Legal Research*.

² *Ibid*.

marriage is holy bond between male and female for the purpose of recreation of life and continuing heritage of their community.

India tends to follow the old believes and customs when it comes to their personal laws. India is now growing towards the acceptance of homosexuality as earlier the presence was considered as sinful or some sort of disease. The people of our society are gradually understanding the concept of homosexuality. Decriminalization of homosexual activities can be considered as some legal development and advancement for the LGBTQs. However homosexual couples do not have any legal right to register themselves as lawful couple.

Homosexuality is not a crime, disease or sin. The homosexual couples are equally entitled to enjoy their freedom legally. Decriminalization was one step towards the development of their rights. But no legal recognition has been provided to them as a couple.

Historical perspective-

In 1500 BC the illustration of intimacy between the females in Rig Veda, vestiges and statues was considered as fun and fertility. The documented evidences of homosexuality during the ancient time are the proof of sodomy among the tantric rits relationship. The pictures of homosexual couples in the Kamasutra, the practice of Muslim nawabs to keep young boys are some of the proofs in order to establish the existence of homosexuality during the period.³ In the Khalji Dynasty, during the period of Ala-ud-din-Khalji, a eunuch named Malik Kafur was seen. He was known for his beauty and intelligence and he was very close to sultan. The Kuran itself does not make homosexuality as punishable act.⁴ Such nature of relationships was considered as an abnormal unholy behavior and were criticized by the society. As a result of which a statutory provision was added in order to penalize such activities. In Indian Penal Code, 1860 the homosexuality is criminalized by Section 377 which clearly mentions criminalization of unnatural offences by imposing punishment of life time imprisonment or ten years of imprisonment along with fine.

Sexual feelings towards the same gender are called homosexuality. Homo is a Greek word which means same or similar and the Latin derived word sex means sex.⁵ The concept of

³ Bertram J. Cohler and Phillip L. Hammack “*Encyclopedia of Applied Psychology - Homosexuality*” VOLUME 2 , Elsevier Inc (2004).

⁴ Schmidtke, Sabine , Homoeroticism and Homosexuality in Islam: A Review Article, 62, BULLETIN OF THE SCHOOL OF ORIENTAL AND AFRICAN STUDIES 260–266, 1999.

⁵ Parasar, A. (2007). Homosexuality In India–The Invisible Conflict.

Homosexuality is not a new concept, it was present back then and was considered as some disease, mental disability, unnatural and abnormal.

In 2018 the Section 377 of the Indian Penal Code, 1860 was decriminalized. As the matter was raised several times by the social groups and activities. Finally, in the case of Navtej Singh Johar v Union of India⁶ criminalization of homosexual activities was abolished and it leads towards the acceptance of homosexuality. The decriminalization is just one step towards the protection of their rights. In true sense it only decriminalizes the activity but does not provide any legal protection to such couples as there is no legal protection provided to same sex marriages in India.

Concept of homosexuality-

In Encyclopedia of Applied Psychology, 2004 the term “homosexuality” has been explained by the Bertram J. Cohler as involvement of exclusive or just about exclusive sexual stimulation for others of the same sex. It is simply referred to as human desire and not some sort of mental disorder or disease.⁷

It can be understood as behavior, desire and identity. It is crucial to develop understanding of the fact the congruence may not remain the same within an individual at a particular point of time. It has the capacity to give rise to internal conflicts. Same sex attraction is homosexuality.⁸

Also, there is a difference between the term gender and sex. Usually, the term sex is understood as female or male. On the basis of their biological characteristics the sex of the individual is determined. Their roles, characteristics, social attributes help in determination of their gender.

Broadly speaking there are majorly three kinds of sexuality –

- Homosexuality- which means sexual attraction towards the same sex.
- Heterosexuality- it refers to sexual attraction between opposite sex.
- Bisexuality- sexual attraction towards both the sexes.

⁶ AIR 2018 SC 4321; W. P. (CrI.) No. 76 of 2016; D. No. 14961/2016.

⁷ Robert L. Kinney III, Homosexuality and scientific evidence: On suspect anecdotes, antiquated data, and broad generalizations, 82, THE LINACRE QUARTERLY, 364-390, 2015.

⁸ *Supra* note 1.

Psychological aspect-

The thought of homosexuality was considered as some curse, mental disability, psychological disorder. The thought process of people back then was strict to one pattern that male is supposed to be attracted towards the female and female are required to be attracted towards the male. So, when there were instances of homosexuality firstly the individual finds it hard to accept themselves and secondly if they confront it to their parents then their parents try to hide such feeling.⁹

The shift in the mentality of people towards homosexuality as a disorder, sin and disease shifted to a normal sexuality in late 20th century. Now days few sections of our society find it normal to have attraction towards the same gender. Homosexuality is not a disfunction, disease, instability and any vocational incapability. It has been proved by various research that people who have homosexual desires are normal human beings.¹⁰ The mental, medical health professionals consider homosexuality as variation of sexuality.¹¹ So now the concept of homosexuality is not considered as some psychological disfunction in the individuals but a natural desire of a person.

Sacramental Union – Marriage as per Hindu law-

As per the Rig Vedic Hindus, marriage is a pure union of male and female.¹² It is considered as an important part of life as a man's half is his wife. According to Veda the Dharma should be practiced by man along with his wife. The purpose of woman is to be a mother and the role of men is to be father in the society.¹³ It is considered as a holy, sacramental union of man and woman for the fulfillment of the religious, spiritual duties and procreation of offspring.

Later on in 1955, Hindu Marriage Act came into existence for the regulation. Section 5 of the Hindu Marriage Act, 1955 provides for the conditions for valid marriage, the subsequent conditions restrict the usage to male and female only. As per Hindu Law the institution of marriage can take place only between male and a female. Section 7 of the act talks about the ceremonies for a Hindu marriage which is also a gender specific law required to be performed in between bride and bridegroom.

⁹ Chowdhary, R. Homosexual in Contemporary India.

¹⁰ Vanita, R. (2016). Same-sex relations in India, globalised homophobia and globalised gay rights. *Human Rights in Postcolonial India*, 315.

¹¹ T. S. Sathyanarayana Rao, K. S. Jacob "Homosexuality and India" 54(1):1-3, *Indian Journal of Psychiatry*(2012).

¹² Lal, E. A. (2021). Homosexuality in India and Status of Same-Sex Marriages. *Law Essentials J.*, 2, 241.

¹³ Manu, IX, 96.

The Hindu Marriage Act, 1955 is gender biased statutory provisions for personal laws of Hindus leading to impose gender or sexuality-based restrictions on the individuals of the society.

Homosexual Marriage should be legalized-

Homosexual couples should have the right to get married legally in order to enjoy their married life. Without legalizing the marriage, the couples face many problems as in adoption, maintenance, social acceptance. The society in India is halfway through the acceptance of homosexuality. As per Hindu law the object of marriage is the wellbeing of the couple and procreation of offspring. However, the purpose can be fulfilled by homosexual couples as well through the medium of adoption, artificial insemination.

Legal Status-

Marriages are governed by Hindu Marriage Act, 1955 and Special Marriage Act, 1954. Both of the acts deal with marriage between male and female only. There is no provision for marriage between male with male or female with female. There are no laws regarding the recognition of legality of homosexual marriages. Irrespective of legal recognition of homosexual marriage by the government homosexual couples are getting recognition in the society in a positive manner. As there are many gay couple getting married with the blessing of their family and friends and in some of the industries gay couples can open their joint account during their employment.

Article 14 mentions about equality in two ways that is equality is to be established before the law and everyone should get equal protection under the law. Article 15 strictly restricts any sort of discrimination. Article 21 mentions about the safeguard of life and liberty of the Constitution of India, 1950 are violated by Section 377 of the IPC, 1860.

Several applications were raised against the validity of this as it infringes the rights of LGBTQs community. In *Suresh Kaushal and Anr v NAZ Foundation and Ors*¹⁴, the court mentions that it is the responsibility of the Parliament to change such laws. The judgment was overruled by the *Navtej Singh Johar & Ors v. Union of India* case¹⁵ which finally decriminalize consensual sexual activities between the individuals of same gender. It turns out to be a turning point for the gay and lesbian couples but ultimately the effect of this judgment only decriminalizes the sexual activity between them but it does not provide any legal recognition to such couple. So ultimately, they are facing the challenges in living

¹⁴ Civil Appeal No. 10972 OF 2013.

¹⁵ *Supra* Note 6.

together and continuing their family together.¹⁶ Recently PIL was filled before the Supreme Court for the legalization of homosexual marriages. The Special Marriage Act, 1954 was challenged for Section 4 as it infringes Article 14 (equality), Article 15 (non-discrimination) and Article 21 (protection of life and personal liberty) of the Constitution of India, 1950. The outcome of such efforts resulted in catching the attention of the Supreme Court. The Supreme Court issued a notice to Centre, Attorney General to look into the matter. But after several moments by the LGBTQ+ community the Supreme Court held its sitting and discuss the matter. However, at present the Supreme Court has reserves its verdict on the matter.

Recognition of LGBTQ community rights has undergone major changes resulting in maintaining justice. The following development has transformed the legal status of the LGBTQ community -

1. The activities that are un-natural were held as punishable as per the Indian Penal Code, 1860. The British government inserted Section 377 in the IPC, 1860 to penalize homosexual activities.
2. Later on in the late 1990s with the increased social awareness about legal rights LGBTQ+ Communities were formed to protect the people and fight for legal recognition.
3. In 2001, the Naz Foundation filed a PIL against the decriminalization of section 377 by challenging its constitutionality.
4. In 2018, the Supreme Court held that Section 377 of the Indian Penal Code, 1860 is unconstitutional.
5. In 2019 the Transgender Persons (Protection of Rights) Act was passed to provide legal protection to the transgender community.

Marriage is the key to social acceptance, respect and rights-

The personal laws and Special Marriage Act govern the marriages in India. Both the substantive laws are gender specific in matter related to marriage and clearly mentions that marriage is between a male and a female.

Recently the story of a homosexual couple has been highlighted. Parth Phiroze Mehrotra and Uday Raj a homosexual couple are raising two children. They have been a couple since past 17 years. But

¹⁶ Hunt, S. J. (2011). Conservative Hindu reactions to non-heterosexual rights in India. *International Journal of Sociology and Anthropology*, 3(9), 318-327.

they have no legal recognition. Their marriage as well as their relationship with the children has no lawful protection.¹⁷

Gay couples should also have the freedom to live their life with respect. The right to marriage is a right of the individual and it should be available to them in order to have a decent life with their desired life partner. In the case of *Lakshmi Bhayva Taneeru v Union of India and others*¹⁸, the court stated that right to life includes right to have meaningful family life.

There are several benefits which are un- available to them because of their sexual preferences. However, if proper laws are available to them then they can adopt children or have children by surrogacy or ART.¹⁹ Other rights such as automatic rights to consortium, inheritance, maintenance and tax benefits. They are beneficiaries of employment statutes. The state's protection to a spouse in the form of pension.

Consequences of legalizing homosexual marriage –

The purpose of legalizing homosexual marriage is to acknowledge the rights of homosexual couples. After legalization, the couples will be able to enjoy their rights. However, it may have some consequences on the society.

In the society the union of homosexual couples is considered as unholy and against the nature. There are about 35% of the population that believe in the concept of marriage as a union of male and female and finds homosexual couples unacceptable in the society. It is believed that homosexuality is a western culture and it has impacted on India. People believe in their Indian beliefs and customs and find homosexuality as unnatural and against their customs.

Arguments in support of legalization-

1. Marriage is a personal right and choice of a person. The discrimination based on their sexuality infringes on their fundamental rights and freedom as well.²⁰
2. The status of the LGBTQ+ community will be uplifted by providing equal rights to them. Society does not fully accept the community and mistreats them mostly so providing legal recognition to homosexual couples will provide them equal protection under the law.
3. Legalization of homosexual marriages will protect homosexual couples so that they can also enjoy their freedom free from any objections and restrictions. This will help in the mental wellness of the LGBTQ+ community.

¹⁷ Goswami, G. K., & Goswami, A. Next Generation Rights to LGBT Communities.

¹⁸ W.P.(C) 5533/2021.

¹⁹ Chaturvedi, N., Sharma, P., & Makkar, K. (2011). Surrogate Parenthood for Indian Homosexuals–Dream or Reality?. Available at SSRN 1757784.

²⁰ Maurya, A. (2018). Is legalisation of homosexuality a threat to Indian society.

4. Legalization of same-sex marriage will help in the fulfilment the object of the constitution. As in the constitution, the preamble states that India is a democratic as well as secular nation.

Arguments against legalization-

1. The customary definition of marriage defines marriage as a union of male and female only the concept of same sex marriage does not fit in the definition of marriage.
2. As per Hindu Law the object of marriage is procreation for the welfare of humanity. The only purpose of marriage can't be fulfilled by homosexual marriage. The fruits of marriage such as procreation, building heritage can't be fulfilled.²¹
3. People in India are firm believer of deities, gods, idols and as per the customs gay marriage is against the believes of gods. And it is considered as un-natural and immoral.²²
4. The society believes in the parenting system which involves active participation of both father and mother. They believe that children raised by same-sex couples will have behavioral disabilities as the couple will not be able to justify the parenting.²³

Global scenario-

Currently nations of other countries are having mixed approach towards legalizing homosexual marriage. In Belgium, Netherlands, Brazil, Canada, South Africa and Germany along with some 25 more countries the same-sex marriage has gained legal status.²⁴ In Switzerland, vote was passed to allow same-sex marriage by Swiss Senate. The Chile's president has also passed an equal matrimonial rights bill. Every individual has their right and freedom to live their life as they want to so when it comes to marriage an individual should have equal right in respect to choose their partner as per their will. The first-time gay marriage was legalized was in The Netherlands. It is the very first country to legalize gay marriage by breaking the stereotype thinking of the people and providing the homosexual couples equal rights.

Although homosexuality is considered as crime in more than 70 nations. Mauritania, Pakistan, Nigeria, Saudi Arabia, Iran, Sudan, Afghanistan, United Arab and Yemen and to lifetime incarceration in Burma, Bhutan, Georgia, Indonesia, Maldives, Singapore, the United Arab Emirates and Yemen etc. People thinks gay marriage as wrong against the nature. As they believe that unethical and immoral union is false as it can't fulfill the purpose of marriage that is creation of new

²¹ Mathew, S. K. (2022). Clash between Morality and Law in Same-Sex Marriages. *Issue 5 Indian JL & Legal Rsch.*, 4, 1.

²² Goswami, A. JOURNAL FOR LAW STUDENTS AND RESEARCHERS.

²³ Hunt, S. J. (2016). The queer case of Hinduism: Religious discourse and the legitimacy of non-heterosexuality. In *The Ashgate research companion to contemporary religion and sexuality* (pp. 223-239). Routledge.

²⁴ Santoshi, I. (2012). Homosexuality in India: A Controversial Issue.

life. In India Father Felix Jebasingh of Piliyakulam Church during the time of decriminalization of Section 377 of Indian Penal Code, 1950 approached the District Court and ask people not to support the gay marriage. “Please do not support the court judgement on Sec.377 (of IPC). The Jesus Christ is arriving. His arrival is imminent. This type of marriages will lead to total destruction of the society”.

Judicial Aspect-

The issues regarding the acknowledgment of rights of homosexual people and couple has always been a challenge in the society. However, with recent awareness in the society has led to change in the laws. Firstly, the declaration of Section 377 of the Indian Penal Code, 1980 as unlawful has been the first step towards the homosexual community. In the case of *NALSA v Union of India*²⁵, the court held that the Constitution of India is there to protect rights of the non- binary individuals. The protection provided under Article 14,15,16,19 and 20 of the Constitution of India is equally available to every individual irrespective of their biological sex. The courts have shown a positive outlook towards the concept of homosexuality.

However, such decriminalization does not solve the other problems associated such as legal recognition of homosexual couples leading to various applications filed by the homosexual couples, activists and lawyers for the legalization of homosexual marriage. The Solicitor- general of Delhi High Court, believes that homosexual marriage will violate “our laws, judicial system, societal norms, and morals.” But the gay community still fight for the cause and filed a Public Interest Litigation in the Supreme Court against the same cause and as a result of which the court.

Suggestions-

There is a huge requirement of changing the perspective of society which can only occur if there is a legal sanction behind it. In order to be a developed nation not only technological advancement is required but also the development of society play a crucial role in it. With the passing of time people are recognizing their interest and as a developing nation the state must take measure in order to acknowledge the change itself and should try various measure in order to educate the general public. India is a populated nation and a major section of the nation is uneducated and belong to lower section of the society so in orders must be take in order to educate them the natural phenomena of homosexuality. This could be achieved by advertising adds on public platform about the homosexuality, creating small groups in every state with the motive of educating and creating awareness in the society, making policies in favor of homosexual couples.

²⁵ 2014 INSC 275.

1. Creating awareness about the issue will help to create a knowledge of the issues faced by the community. Rallies, seminars, protests, Campaigns, education and advertising should be done to reach out to the people and grab their attention towards the concerned problems.
2. Counselling and support should be provided to the community so that their wellness is maintained. The LGBTQ+ community faces a lot of challenges and issues daily so to protect their mental peace proper support should be provided.
3. Anti-discriminatory laws should be formulated so that all the people of the nation can enjoy equal protection of the codified laws and ensuring safety from the laws. Gendering the laws leads to discrimination against the other members of the society.

Conclusion-

In India there has been a drastic change in the society. The concept of homosexuality is not new in India it has its traces from ancient period. Many steps have been taken to protect the rights of the individuals. However due to lack of gender-neutral language in the statutes leads to failure of recognition of legal right of marriage to homosexual couples. Leading to inequality and problem in adoption, maintenance etc. So, the government should make gender-neutral rules in respect to marriage so that homosexual couples can also enjoy the rights of legally married couple. However, society has mixed thoughts about the status of homosexual couples. Few of them think that legalizing homosexual marriage will destroy the culture of our nation. Such relations are against nature and will only destroy our heritage. Such Orthodox thinking acts as a barrier to development as in this century people are free to follow their wants, needs and desires. Homosexuality is nothing to be ashamed of. In my opinion, legal recognition of the couple will surely help by providing them equal protection by the law. To gain people's acceptance efforts must be taken by the government in the form of conferences, drama, advertising, campaigns and clubs.

