

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 4

2021

© 2021 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at submission@ijlmh.com.

Do all the People have Right of Marriage?

PRATIKSHA CHOUHAN¹ AND AKANKSHA PANCHOLI²

ABSTRACT

In a democratic country like India all the peoples have right to equality. But in reality the circumstances is different from the bookish rights. The constitution of country provides the right of equality to all the citizens in all the matters, this right also includes the right to marry with anyone you want. But the society, our judicial system and the government of the country do not understand the literal meaning of the equality in all the forms. The right to equality also includes the right to marry anyone it is not essential that one should marry with the person of opposite sex, two persons belong to same sex can also marry with each other.

But the concerning matter is that what is the social status of such type of marriages. Whether the society or the law exists in the country consider it as the legal marriage or not? And why society makes such a discrimination against the same sex marriages? In this article we will discuss all of these questions. We will also discuss that what are the social and professional problems face by the couple of same sex.

Whenever the right of any person is being violated then in such case he can approach to judiciary, he have a hope that judiciary will listen his/her problem. But in case of same sex marriages the judiciary also gave very narrow judgment which is not sufficient for the protection of the rights of these couples. We all need to understand that changes in law are necessary with the change of time otherwise it leads the violation of fundamental rights of people like in case of same sex marriages.

I. INTRODUCTION

Marriage is one of the universal social institutions, established by the human society to control and regulate the sex life of men.³ Marriage is considered as the union of two souls, and it is not necessary that they must be man and women, they can be belong to same sex i.e. man and man or women and women.

Love comes in all forms and it would be wrong to say that a person cannot marry to someone just because they are not from the opposite sex. If we talk from the social point of view then

¹ Author is a student at Rajasthan School of Law for Women, Jaipur, India.

² Author is a student at Rajasthan School of Law for Women, Jaipur, India.

³ Rao CN Shankar, 2009 , P.No. 357

the marriage is the only take place between the opposite sex and the persons belong to same sex, socially do not have the marriage right. But is it right to say so?

Meaning of marriage: Marriage is a social institution governed by social norms, customs and traditions which may be vary in community to community and religion to religion. It also prescribes that who should marry with whom?

The society possesses a very rigid and exasperating view in respect of marriage, wherein the procreation of child is considered as a sole or foremost purpose of marriage. And this is the main reason that why the society do not want to give acceptance to same sex marriages. They think that these kinds of marriages would encourage and nourish social turmoil and further destroy the institution of family which often consists of man, women and child.

The approach and outlook of Indian society towards same sex marriages are not new if we look into ancient history, the attitude of society for such marriages was more worst. The present Indian society is on the same footing, if we talk about same sex marriage. Same sex marriage are not legally recognized in India and not the same sex couples offered equal rights such as civil union or domestic partnership.

In India the Supreme Court while deciding the issue of homosexuality in Navtej Singh Johar case said that marriage between two individual of same sex is not justifiable under Indian family unit, the gay marriage does not fall under Indian's sanctity according to which only biological men or biological female can marry. It is further held by the court that interference in current marriage laws may result in great destructions of stability in personal laws of the country and it may lead peculiarities in Christian and Muslim law dealing with marriage.

Thus in India marriage can only between male and female, and any other way of marriage is not at all acceptable in Indian society.

II. ATTITUDE OF WORLD'S OTHER COUNTRY TOWARDS SAME SEX MARRIAGE

The world divides itself into three parts on the matter of same sex marriage, firstly – the countries where same sex marriages are legalized, secondly- the countries where such marriages are not legalized, thirdly- the countries where the punishment of death penalty is prescribed for same sex marriage.

1. Countries where same sex marriage are legalized-

The Netherland- it is the first country in the entire world, legalize same sex marriage in the year of 2001.

The decision of Netherland afterward followed in so many countries- Belgium (2003), Canada (2005), Spain (2005), South Africa (2006), Denmark (2012), Brazil (2013), New Zealand (2013), France (2013), Greenland (2015) and Taiwan (2019, first country in the Asia who allow the same sex marriage). These are some who countries legalized the same sex marriage and allow the same sex couple to marry.

Thus lesbian, gay, bisexual, transgender and intersex association (ILGA), gay marriage is now legal in 29 countries around the world.⁴

2. Countries where same sex marriages are not legalized -

There are currently more than 71 countries that criminalize same sex marriage, according to ILGA, which includes Russia, India, Nigeria, Ukraine and many other countries.

3. Countries where punishment of death penalty is prescribed for same sex marriages-

There are some countries in the world who prescribes brutal punishment like death penalty for same sex marriages, Yaman, Iran, Bruenei, Afghanistan, Somalia, Sudan, U.A.E., and Pakistan are some countries. Most of them are the Islamic countries who give punishment of death for same sex marriage.

III. ATTITUDE OF INDIAN JUDICIARY TOWARDS SAME SEX MARRIAGES THROUGH VARIOUS LANDMARK JUDGMENTS

The constitution of India provides right to equality under article 14, says that every person is equal in the eye of law and entitles for same legal rights and remedies forthwith.

The significant judgment titled as “**National legal service authority V. Union of India**” delivered by the Supreme Court whereby honorable apex court specifically held that the transgender shall be entitled for equal protection of law as guaranteed by Indian constitution in article 14. But so as far the question of same sex marriage is concerned it has not been discussed in practical manner by judiciary.

Supreme Court in case of “**Shakti Vahini V. Union of India**” held that when two adults are inclined to enter into bond of marriage, then they should consider the goals of marriage and they must consider about the consummation in their relationship. Court further said that any infringement as to question of same sex marriages cannot be termed as constitutional violation.

⁴ America, G., 2021. All of the countries where same-sex marriage is legal. [online] Good Morning America. Available at: <<https://www.goodmorningamerica.com/culture/story/29-countries-sex-marriage-officially-legal-56041136>> [Accessed 16 July 2021].

In nut shall we can say that in this judgment court totally ignored as to the validity of same sex marriages rather emphasized on existing marriage system. This judgment is also followed by the Apex court in case of “**Shafin Jahan V. Asokan K.M. and others**”.

The Supreme Court in case of “**Puttu Swamy and another V. Union of India and others**”, held that the right to privacy does not refer to rendering legal sanction to same sex marriages. The marriage system is an institution which is derived from society and it has been continuously observed by society, hence now it is having social force as it is public concept being existing system in the society.

In case of “**Navtej Singh Johar V. Union of India**” - justice Chandrachud said that to deny the members of LGBT community the full expression of the right to sexual orientation is to deprive them of their entitlement to full citizenship under Indian constitution.

Recently the central government, categorically opposed the nation of the same sex marriages in Delhi High Court, the problem is not just lack of strong political will. A large chunk of Indian society also views same sex marriage, against their ideas of culture and society as a whole.

It was evolutionary reposition for constitutional jurisprudence in India when Supreme court decriminalized homosexual intercourse between consenting adult in Navtej Singh Johar V. Union of India. In, an exquisitely written the five judges constitutional bench engaged in this litigation held section 377 unconstitutional being contrary to part 3 of Indian constitution.

This judgment was and still having legal significance as the person of LGBT community were being faced prosecution due to application of section 377 of IPC. This judgment is considered as protection with regards to LGBT community in true and meaningful sense it is precedent step in to achieve the law as to same sex marriages.

IV. PROBLEMS FACED BY MEMBERS OF LGBT COMMUNITY IN ABSENCE OF LEGAL PROVISION IN RESPECT OF SAME SEX MARRIAGE

1. **Joint bank account** – The partners in our country may approach bank in order to open a joint bank account as to maintain their financial resources or utilization of them forthwith. As far the member of LGBT community are concerned , they are not came within the purview of partners when it comes to Indian society and law as well which is prevailing in India that is to say if you have a partner of same sex then you cannot open a joint bank account in any bank.

2. **Joint insurance policy**- Insurance is the way which is used by people for reducing the risk in respective lives. Every person can obtain insurance policies by submitting their details,

the insurance policies may be for individual or may be for partners which can be obtained jointly. The situation automatically changes in case of members pertains to LGBT community. They cannot obtain the joint insurance policies, further they cannot be termed as nominee in policy which is being obtained by his partner.

3. **Medical issues-** Medical assistance is a F. R. as had in case of “**Parmanand Katra V. Union of India**” but this right cannot be exercised by the members of LGBT community in form of partners. For example – if one partner has admitted in hospital and after admission permission is required as to operation then his co- partner cannot impart his assistant as he is member of LGBT community and in India there is no significance of gay marriage.

4. **Ignorance of rights** - LGBT community is minority in our country therefore politically they cannot raise their issues. Their issues can be heard and solved by the court only. The judgment of Navtej Singh Johar is the one of the best example of it.

V. CONCLUSION

First of all ever person is human being, no matter what is his sexual orientation, or being a human being it is essentially the right of a person to decide to whom he wants to marry. India is a democratic country and individual liberty is the essence of democracy, therefore political parties should come forward to protect the right of same sex couples and also spread awareness among the mammoth of people. Same sex marriages are more than necessary in modern world. As far as the matters of same sex marriages are concerned the problem lies in the society itself, because society does not want to give acceptance to these kinds of marriages which are different from traditional form of marriage, which often consists of biological men or women.

The society should understand that we can love anyone we want, it is not necessary that love should take place between persons opposite sex only. The people of same sex can also live happily with each other. Thus it can be said that acceptance to same sex marriages also give hope to the members of LGBT community that they can also live their life happily like the other people and choose their partners. This community has already suffered lot of discrimination and now it is necessary to give them right to decide with whom they wants to marry irrespective of gender and sex.

At the last we can say that members of LBGT community, they are not crying for moon, but they only want same rights, liberties and opportunities available to everyone in this world including right to choose their life partners.
