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Legality of Same Sex Marriage in India: A Moral Quandary

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ABSTRACT

Homosexuality is one of the most prominent legal issues of the present times. The issue of privacy has now confronted the judiciary with the question that whether the legislative approach of upholding LGBTQ+ as a distinct community yield with their demand of marital freedom in for the people who assert themselves to be a part of the LGBT Community? Section 377 of the Indian Penal Code was partially struck down by the apex court in the case of Navtej Singh Johar ,the Supreme Court held that Section 377 of the Indian Penal Code was unconstitutional to the extent that it penalises consensual sexual acts between adults of the same gender. The court, however, while delivering this judgement did not touch the question of legal status of marriage between persons of same gender. The matter is, as of now, being heard at the honorable apex court. This paper attempts to analyze the moral quandary of legalizing the same sex marriages.

Keywords: *Judgement, same sex marriage.*

I. INTRODUCTION

The historical evidence strongly confirms the social constructionist hypothesis about marriage. It cannot be seriously disputed that marriage is an institution that is constructed, not discovered, by societies. The social construction of marriage in any given society is fluid and mobile, and most societies we know anything about- including the west have recognized same sex unions, usually including same sex marriage at various points in their history.²

In India, marriage is a sacrament according to Hindu codified law. The conditions of a valid Hindu marriage have been provided under section 5 of the Act.³ These conditions restrict a person from having more than one partner as a spouse during the lifetime of that spouse. The persons contracting the marriage must not be of unsound mind. The persons should be capable of giving a valid consent. The persons must not be suffering from any mental illness which would make them unfit for marriage and for the process of procreation of children. The bridegroom must have completed the age of twenty-one years whereas the bride must be of

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² Eskridge, W. N. (1993). A History of Same-Sex Marriage. *Virginia Law Review*, 79(7), 1419–1513

³ The Hindu Marriage Act, 1955 (Act 25 of 1955)

atleast eighteen years at the date of marriage. The two persons must not be within the degree of prohibited relationship as a general provision. However, the law provides them the liberty to marry within the degree of prohibited relationship if the custom or usage allows them to do so. Interpreting the above mentioned provision clarifies that the Hindu codified law only permits marriage between a male and a female. The Indian law is silent on the issue of marriage between two persons of the same gender. However, Indian judiciary has time and again reiterated the idea of going with the changing fabric of society. The evolution of society with every century gives birth to newer dimensions of human behavior. The concept of live in relationship was one such change which gradually became a part of Indian society. In tune with the shift of moral compass the honorable apex court delivered a landmark verdict in the case of *Indra Sarma v. V. K. Sarma*⁴, the Supreme Court further elaborated the concept of relationship in the nature of marriage. In this case the Supreme Court distinguished the concept of live-in relationship from the relationship in the nature of marriage. The court observed that live-in relationship is an arrangement wherein if the two people involved depart, then the relationship ceases to exist. The court also observed that liberty of choice should not be curtailed due to the danger of criminal prosecution and made paraplegic on a mercurial stance of majoritarian perception. Moreover, right to privacy takes within it's sweep the right to every individual, including that of the LGBTQ+ community to prevail.⁵

II. HISTORIC DECISION OF NETHERLANDS

Same sex marriage is a new type of marriage and family, which did not legally exist in modern times before the twenty first century. During the past century, the institutions of marriage and family have undergone remarkable transformation, with non-traditional marital unions, such as cohabitation and non-marital childbearing becoming more common and accepted in many parts of the world. Also, same sex sexual acts between consenting adults have only recently been decriminalized and acknowledged in countries around the world. Nevertheless , formal recognition of same sex relationship continues to encounter discrimination, opposition, harassment and hostility.⁶

As of 2023, almost thirty-three countries have legalized same-gender marriages. However, some other nations have refrained from using the term marriage, and have thereby recognized same-sex civil unions. Same-sex marriage remains illegal in many nations. The expansion of

⁴ AIR 2014 SC 309

⁵ *K S Puttaswamy vs Union of India*(2017) 10 SCC 2

⁶ Chamie, J., & Mirkin, B. (2011). Same-Sex Marriage: A New Social Phenomenon. *Population and Development Review*, 37(3), 529–551. <http://www.jstor.org/stable/23036054>

broader queer rights has been uneven all around the world. United Nations is an international organization which issued resolution supporting LGBTQ+ rights. Human right organizations have although accused these organizations to be toothless, without any power to enforce a visible change in the social ecosystem.

In a historic move, Netherlands become the first country in the world to acknowledge the concept of two men or two marrying each other. This right has been granted to the citizens of Netherland since first April,2001. Homosexual couples can cohabit by way of Marriage, registered partnership or via a cohabitation agreement. The right of living together has uniformity irrespective of the couple being homosexual or heterosexual. However, the right differs in respect of guardianship. A co-mother can become a child's legal parent without approaching the courts for official declaration. She is either the parent of the child from birth or she can acknowledge the parenthood of the child. The same is applicable for a same sex couple cohabiting by way of a registered partnership. If two men in a relationship are parenting a child and one of them is the child's biological father, he alone is recognized as the lawful guardian that is the father of the child. However, it is allowed for the partner of the father to acquire guardianship through either adoption or affidavit.

The inclusion of marital rights of same gender couples as a part of Netherland's civil law paved a way for a universal social change. It was the consequence of this nearly two-decade old law of Netherlands, which compelled other countries to take positive steps in the same direction towards legalizing the relationship of same gender couples.

III. INTERNATIONAL JUDICIAL PRONOUNCEMENT OF SAME SEX MARRIAGE

Although India, is still in the process of societal metamorphosis, however, some foreign nations have already paved the way for acknowledging the same sex marriages and unions. The same have been discussed in the below mentioned paragraphs.

In the case of *Obergefell v. Hodges*⁷, the Supreme Court of United States of America held that the marriages between same-sex couples must be legally recognized by states. The case was narrowly decided with the assenting and dissenting ratio being quite close. Justice Anthony Kennedy provided the opinion for the majority of the bench. Justice Kennedy in context of the said judgement, observed that same-sex couples shouldn't be compelled live in loneliness and thereby facing exclusion from one of the oldest institutions of a civilized society. These people deserve equal dignity in the eyes of the law of the land. The Constitution, impliedly has already

⁷ 135 S. Ct. 2584 (2015)

granted them that right. The Court also held in favor of the right of privacy with respect to other matters of family life.

In another landmark judgement which was delivered by the Supreme Court of South Africa, it was held, “Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.”⁸

The next breakthrough judicial pronouncement for LGBTQ+ rights came from the Supreme Court of Nepal. In the case of *Sunil Babu Pant v. Nepal Government*. *Sunil Pant*⁹, a public interest litigation was filed before the Supreme Court of Nepal asking for the acknowledgement of the rights of lesbians, gays, homosexuals and third gender persons. The Supreme Court traced the rights of LGBTQ persons to their sexual orientation within the ambit of the right to privacy. The court held that the right to privacy is a fundamental right of every individual. The concept of sexual orientation is covered under the definition of privacy. No person has the authority to question how do two adults perform their sexual activity and whether this intercourse is natural or unnatural. The Court held that all human beings have an inherent right to marry, irrespective of their sexual orientations. Throwing some light at the issue of same sex marriage, the apex court held that it is an inherent right of an adult person to have marital relation with another adult person with his or her free consent and according to her or his willingness. The Court, in conclusion, directed the government of Nepal to enact new statute or amend the existing statutes to ensure that people of all sexual inclinations and gender preferences can embrace equal rights.

IV. PRESENT LEGAL POSITION IN INDIA

Sexual orientation refers to a person's physical attraction to another person. Sexual orientation includes transgender and gender variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homo-sexual, bisexuals, heterosexuals, asexual etc.¹⁰

A judicial analysis of the rights of LGBTQ individuals in India brings to the forefront, the fact that while the legislature has been on the back foot on this matter, the judicial branch of the tree of India democracy has been quite proactive in the last few years. Specifically, in the last

⁸ National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)

⁹ Writ no. 917 of the year 2064 BS (2007 AD)

¹⁰ Transgender Persons (Protection of Rights) Act, 2019

decade, many important judicial pronouncements were delivered by the Supreme Court which paved way for recognition of basic rights of this marginalized group. The failure of the lawmakers in this regard reflects the narrow minded approach of the Parliament which had to be redressed by a liberal judiciary. The following are some of the most prominent judgements of the Supreme Court on the subject.

In the case of, *Naz Foundation v Government of NCT Delhi*¹¹, the court observed that the ambit of privacy allows people to develop human relations without involvement from the outside community or from the State governing the affairs. The existence of autonomy enables a person to achieve fulfillment, growth in self-esteem, build connections of his or her choice and attain all legitimate goals that he or she may have targeted to achieve. In the Indian Constitution, the right to live with human dignity and the right of privacy are recognized as dimensions of Article 21. Section 377 of the IPC denies a person's dignity and attaches sanctions to his or her core identity solely on the ground of his or her sexual inclination. It is not in tune with philosophy of Article 21 of the Indian Constitution. As it stands, Section 377 IPC denies a gay/lesbian person a right to full personhood which is implicitly mentioned under Article 21 of the Constitution. It is not within the constitutional competence of the State to invade the privacy of lives of citizens or control the conduct to which the citizen alone is concerned only on the basis of public morality. The penalizing of private sexual relations between consenting adults do not provide for any evidence of serious harm deems the provision's objective is both irrational and unqualified. The state interest must be legally acceptable and significant for the law to be non-arbitrary and must be in proportion towards achieving the state goals. The provision stands questioned. The nature of the provision of Section 377 of the IPC is to punish private actions of consenting adults which causes no harm to anyone else in the society per se. It has no other objective than to criminalize conduct which is not in conformity with the moral compass of a section of the population of the society. The differentiation severely impacts the rights and interests of homosexuals and deeply injures their dignity.

Another important verdict on sexual orientation is *NALSA v. Union of India*.¹²In this case, the supreme court observed that,

“Gender identity, therefore, lies at the core of one’s personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A trans gender’s personality could be expressed by the trans gender’s

¹¹ *Naz Foundation v Government of NCT Delhi* 160 Delhi Law Times 277

¹² AIR 2014 SC 1863

behavior and presentation. State cannot prohibit, restrict or interfere with a trans gender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognize those rights."

In the recent case of, Justice (Retd.) K. S. Puttaswamy v. Union of India,¹³ which also popularly known as the privacy judgement, constitutional Bench unanimously held that the right to privacy is provided constitutional protection as an intrinsic part of the right to life and personal liberty under the Indian Constitution. Also, as a facet of the liberties guaranteed by third part of the Constitution of India. This judgement did not reiterate the previous judgments of the Supreme Court in *M.P. Sharma* and *Kharak Singh*¹⁴, as in these aforesaid judgements, it was held that the right to privacy was not recognized within the purview of the Indian Constitution. Apart from including the place of the right to privacy as a fundamental right, this case also emphasized on the need for the implementation of a new legislation relating to privacy of personal data. It led to expansion the scope of privacy in personal spaces and upheld privacy of a person as an intrinsic virtue. Moreover, the right to privacy is inextricably bound up with all exercises of human liberty – both as it is specifically enumerated across Part III, and as it is guaranteed in the residue under Article 21. It is traced across the various articles in the third part. *Navtej Singh Johar v. Union of India*.¹⁵

The court in the instant case, also held that members of LGBTQIA+ community were entitled to full range of rights including liberties protected by the constitution. Society always keeps on evolving and therefore the legislations should also be altered with time, taking into consideration the present concept of morality and values followed in the societal set up provided they are in line with the existing constitutional morality.

Moreover, the LGBT persons should not be penalized simply for choosing a partner of the same sex, as the constitutional guarantee of choice of partner extends to the LGBT persons as well. Learned counsel for the petitioners and the supporting interveners have submitted that sexual orientation, being an innate facet of individual identity, is protected under the right to dignity. To bolster the said argument, reliance has been placed upon *Francis Coralie Mullin v.*

¹³ AIR 2017 SC 4161

¹⁴ 1964 1 SCR 332

¹⁵ AIR 2018 SC 4321

Administrator, Union Territory of Delhi¹⁶ and Common Cause (A Registered Society) v. Union of India¹⁷ wherein it was held that the right to life and liberty, as envisaged under Article 21, is meaningless unless it encompasses within its sphere individual dignity and right to dignity includes the right to carry such functions and activities as would constitute the meaningful expression of the human self.

The Supreme Court of Canada¹⁸, while providing a detailed interpretation of the institution of marriage by including same-sex unions within its sphere, in the case, has observed that the frozen concepts reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation which is that Canadian Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.

V. CONCLUSION

It is time to pay heed to the fact that there exists a group amongst us which conforms to a different sexual inclination than heterosexuals and that sexual preference is only one perspective of their existence. They are as human as any other common human being. Social inclusion aimed towards engagement of this section of the society should be the focal point of legislature. This should be the new normal, and the taboo attached with this vulnerable section of our society should be mitigated. There is no need to be a moral police in respect of the choice of sexual partners, it is a personal choice. A categorical legislation can be extremely effective not only in bringing about a sense of uniformity in legal equality in respect of social, economic and cultural rights but also it will provide a uniform pathway to ensure justice. A legislation will empower them to be vocal about instances of abuse, force and discrimination. It will provide them a platform for grievance redressal when it comes to disputes related to their right to cohabit.

A basic premise of the historical development underlying the same gender marriage movement is that for many, marriage is a religious institution, but from a legal viewpoint, marriage is a state created civil institution subject to changing social needs.¹⁹

¹⁶ (2014) 9 SCC 1

¹⁷ (1997) 1 SCC 416

¹⁸ In Re: Same Sex Marriage [2004] 3 S.C.R. 698

¹⁹ KINDREGAN, C. P. (2010). THE EVOLUTION OF SAME-SEX MARRIAGE. *Family Advocate*, 32(3), 8–9. <http://www.jstor.org/stable/25806836>

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