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Same Sex Marriages: A Socio-Legal Conundrum

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ABSTRACT

The legal issue pertaining to the recognition of same sex marriage is a moot question which not only just concerns the LGBTQI+ community but it also gives a brainstorming task for the courts, legislators and researchers in academia. After the decriminalization of homosexuality among the consenting adults give to another demand i.e. legal validation of same sex unions. The same sex union has been recognized in many of the democratic countries throughout the world and the many are on the trail of giving recognition in their respective countries. The queer community has been demanding this right for the past many decades which has been prolonged due to the opposition from the institution of religion and societal norms which indicate towards non acceptance of such kind of unions. The present paper is an attempt to understand the socio-legal dynamics revolving around same sex unions and tries to explore the same with the constitutional prism; along with the role of judiciary as a guardian of queer rights.

Keywords: Marriage, homosexuality, recognition, norms, union.

I. INTRODUCTION

The institution of marriage is considered one of the fundamental structures of the society. Since the time immemorial, the union between a man and woman is recognized by the social groups and which led to the origin of the institution of marriage. The underlying purpose of such unions is to attain sexual gratification and regulate the same, the other most important feature which might led to the recognition of marriage in communities throughout the world is procreation and catering children as well as regulating inheritance. Generally, religious norms and principles regulate the conduct of parties entering into a union in most parts of the world; Societal norms and traditional beliefs plays a crucial factor in deciding the validity of any form of marriage. With the advent of industrialization the institution of marriage also witnessed drastic changes, the conduct of parties, their rights and obligations are now strictly regulated by the legal institutions. In India, under the Hindu belief and mythology, marriage is considered as a sacred union which is once tied can never be broken, it survives even after death and it is believed that the couple will reunite in the next life. Contrary to this, Muslims regulate their

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marriage as per Islamic laws and considered it as a contract with the consent of the parties and the union can be done away in certain circumstances.

Furthermore, different religious and social groups regulate their marital unions under the ambit of their personal laws with the regulations and codifications made by the state. With the span of time these unions are not just restricted to their traditional forms but have changed their outlook, apart from customary marriages newer form of unions emerged like Live-in-Relationships, open relationships, same sex unions and numerous other kind of unions of which we were not familiar in the past. The intermixing of culture and exchange of ideas led to various debates about the institution of marriage and some has challenged the authority of such institution being patriarchal and unequal, especially the feminists target this institution as a structure for the subjugation of female sex, similarly communists called it a creation of ruling class. Nevertheless, the legal validity of marriage remained intact throughout the different countries of the world. Though, the challenges to this institution being addressed by the socio-legal and political discourse and it keeps on evolving from the passage of time taking into account myriad of socio-political needs and individuals right.

II. INTERPLAY BETWEEN MARITAL AND SOCIO-LEGAL RIGHTS

In the contemporary times the major challenge that has been witnessed throughout the countries is about the recognition of different other forms of unions within the ambit of traditional institution of marriage. The underneath intent of the advocates behind the same is to seek socio-legal recognition which comes with the legal validation of marriage in any socio-political setup. There are plethora of socio-legal benefits entitled to a married couple like housing, accommodation, banking, insurance and health related medical benefits; several other benefits attached to the same like pensions, provident, adoption & guardianship, succession rights, inheritance and so on.

One of the boiling hotpot of the contemporary discourse that has taken place in the domain of personal laws is the debate surrounded to the recognition of same sex unions and treating them at par with the heterosexual unions. Globally, the trend towards the recognition of same sex marriage has been changing and many countries started recognizing the same sex unions as civil unions, registered partners or married couples; and are bestowed with legal and social guarantees at par with the heterosexual unions. The LGBTQI+ community in different countries are fighting for a more egalitarian and just society and their relentless efforts and struggle led to achievement of many rights which were denied to their community earlier. Still, the fight for gender justice and decriminalization of homosexuality is a long way to go and there are multiple

instances of discrimination and ruthless abuse are reported in different corners of the world. Due to the criminalization and non-recognition of their unions, the members of LGBTQI+ community are denied their basic fundamental rights like right to equality, right to live with dignity and right to choose a partner. Due to the non-recognition they do not have any right to approach any redressal forum and ultimately they are trapped in a chronic cycle of suffering, abuse and victimization. However, there is a change in trend in recognition of rights of queer community in most of the European states, United states of America and many other developed and developing nations.

III. INDIAN SCENARIO: LEGAL VALIDATION OF SAME SEX UNIONS

Indian subcontinent is a land of multi-cultural diversity which encompasses in itself myriad social, cultural, ethnic, religious and linguistic groups; and each group has their own traditional and customary practices which regulate their lives as well as their unions. Though the majority of the people are governed by the Hindu personal laws being sub-sects of Hinduism but still the local and customary practices are still relevant in many social groups an ethnic tribes where they govern themselves with their own traditional norms despite having a codified Hindu law which is recognized itself in the statutes as exceptions for such communities. However, other religious communities like Muslims, Christians, Parsi and Jews follow their own personal laws governing their marriages, adoption and inheritance. In most of the religious communities, their personal laws are inspired by the philosophy and the principles imbibed in their religious teaching and they are being followed sacredly within the community and any challenge and non-adherence to the same may amount to blasphemy or social outcaste. Therefore, in order to understand the dynamics revolving around the same sex marriage we need to first understand the religious approach towards the homosexuality. If we take of all the major religions in India they consider homosexuality as a sin and against the law of nature. At the time when then debate regarding the decriminalization of homosexuality was going; the basic arguments of opposition comes from orthodox and conservative religious lines. Similarly, in the current state when the petitions for the recognition of same sex marriages came up to the apex court, the same set of arguments raised as the homosexuality is opposed to religious ethics and considered as sin in the eyes of religion. So we can understand that seeking recognition of same sex unions under the personal laws of any of the religion is a herculean task. Even the judicial institution gives legal validity to the same sex union; the social acceptance of the same is far away from the social reality.

IV. JUDICIAL ACTIVISM AND PROTECTION OF QUEER RIGHTS IN INDIA

In the past few decades, we have witnessed an era of judicial activism, when the courts stepped in for safeguarding the constitutional and civil rights of its citizen, when the organs of the state fails to do so. Though the separation of power between the three organs of the state clearly describes their limits; nevertheless, these limits are not watertight compartments and whenever there is need of intervention one may take up the role of another. Indian judiciary has been actively playing this role to fill the legislative gaps and strikes against the arbitrary actions of the executive. From the decriminalization of homosexuality to the recognition of transgender identity, judiciary has been a catalyst of change for the queer community.

In the year 2018, a landmark verdict of the Hon'ble Supreme Court in the case titled as *Navtej Singh Johar v. Union of India*², through which homosexuality was decriminalized and all consensual sex among consulting adults were legalized. The court also ruled that LGBT people in India are entitled to all constitutional rights, including the liberties protected by the Constitution of India. It further held that "the choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behavior are intrinsic to the constitutional protection of sexual orientation. The most important part of the judgment which gives a reflection of courts sympathy towards the LGBT community reflected in the note of Hon'ble Justice Indu Malhotra, "History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality." The judgment also made note that LGBT community is entitled to equal citizenship and protection under law, without discrimination.³

Aftermath *Navtej singh's* case another landmark case which has given momentum to the LGBT cause was *Justice K. S. Puttaswamy (Retd.) & Anr. vs. Union Of India & Ors.*⁴, also known as the **Right to Privacy verdict**, is a landmark decision of the Supreme Court of India, which holds that the right to privacy is protected as a fundamental right under Articles 14, 19 and 21 of the Constitution of India⁵. It further held that the human element in the life of the individual

² AIR 2018 SC 4321

³ *Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice*, W. P. (CrI.) No. 76 of 2016 (Supreme Court of India).

⁴ AIR 2017 SC 4161

⁵ Bhandari, Vrinda; Kak, Amba; Parsheera, Smriti; Rahman, Faiza. "An Analysis of Puttaswamy: The Supreme Court's Privacy Verdict". *IndraStra Global*. 003: 004. ISSN 2381-3652.

is integrally founded on the sanctity of life. Dignity is associated with liberty and freedom. No civilized state can contemplate an encroachment upon life and personal liberty without the authority of law. "Neither life nor liberty are bounties conferred by the State nor does the Constitution create these rights." The right to life has existed even before the advent of the Constitution. In recognizing the right, the Constitution does not become the sole repository of the right. It would be preposterous to suggest that a democratic Constitution without a Bill of Rights would leave individuals governed by the State without either the existence of the right to live or the means of enforcement of the right. The right to life being inalienable to each individual, it existed prior to the Constitution and continued in force under Article of the Constitution. These two major legal developments give rise to debate between constitutional morality and social morality. The advocates of same sex marriage argues that the constitution is supreme and the constitutional guarantees enshrined under Articles 14, 19, 20 and 21 applies equally to all individuals irrespective of their personal laws. They further contend that the right to privacy and right to choose ones partner is an individuals choice and no state interference should be allowed in exercise of such rights until or unless it led to violation of any other parallel legal obligation or infringes someone's fundamental rights. In contrast, the opponents of same sex marriage, vehemently argue that such types of recognition is against the traditional family system and could create a chaos in the society. They further emphasize that if such unions are allowed then it would create an un contemplated situation in the sphere of personal laws and also open the flood gates for pseudo liberal interpretations.

V. CONCLUSION

Nothing is constant in the universe except universal laws. Change in the social structure of any society takes place gradually with the change in cultural norms, behavior patterns and human interactions; and this ultimately leads to entire social transformation. Historically, we have witnessed massive social transformation; influx of ideas and rational discussions led to acceptance of different approaches and perspectives. With the emergence of globalization our social norms, ethics and morality has seen a sudden transformation and we are still trying to analyze its impact on the present social structures and its institutions. Marriage is one such institution which has evolved itself with the passage of time and trying to accommodate new perspectives of human unions, shift from the gender binary norm to a multi spectrum sexuality has engendered myriad of socio-legal, civic and political discourses. Legal validation and recognition of same sex marriage is one such discourse which is creating its space across international boundaries and becomes a moot proposition for debate between different societal groups. The global trend reflects a positive development with more and more countries

recognizing the same sex unions either as civil unions, partnership agreement or a complete marriage, at par with heterosexual counterparts. Nonetheless, a large section of queer community in different parts of the world is still struggling for their basic fundamental rights and always remains under the threat of violence, physical and sexual abuse and vulnerable to the discrimination by the mainstream societal groups. The grant of recognition and legal validity to the same sex unions would be a further step towards a more egalitarian and just society.
