

Changing Society and Same-Sex Marriage in the Context of India

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Abstract

The debate over same-sex marriage has been started from many years. Even after decriminalisation of section 377 of Indian Penal Code 1860(replaced by Bharatiya Nyaya Sanhita) gender oppression, subjugation and discrimination still continue to exist. One of the most popular case Navtej Singh Johar vs. Union of India which decriminalised Section 377 of the Indian penal code that provide two adults are engaged in consensual sexual activities, post 2018 there has been growing demand for legal recognition of same-sex marriage and multiple petitions have been filled. In response to this on Oct 17, 2023 the Supreme Court of India unanimously held that there was no fundamental right to marry for transgender and that leave over the parliament to make such provision for same sex marriage. The same-sex marriage in India reflects one of the dynamic societal issue and tension between tradition and modernity. One of primary intention of this article to explore homosexuality is not disease, but natural creation of God. In India people mind are deeply conservative they think homosexuality is mental illness and social disorder and also view that marriage is traditionally defined as union between man and women. This article also tries to explore why do some of the people of India supporting and while other not supporting. This article also tries to show decision of the supreme court of India started that endorsing same-sex marriage would conflict with the current existing provision of marriage laws and this should be addressed by the parliament. This article also tries to explain prohibition of same-sex marriage undermine right to live with dignity as guaranteed by article 21 of the Indian constitution.

INTRODUCTION

One of the most frequently term used by Indian society is that “marriages are made in heaven” it is divinely belief that when two people come together in the bond of marriage. A marriage represents a union between individual socially and legally recognised by society. Marriage is not just contract between two people but it is bonding of love, emotion, trust. In our India wedding rituals marriage are not for one lifetime but partner for seven lifetimes. It is deeply rooted and symbolise internal bond between husband and wife. When two individuals decided to come together to spend their entire life with each other in the form of marriage.

In 21st century with the emergence of post-modern world many countries of world recognise same sex marriage. Many countries legalized or acknowledging chose his/her partner in their choice and also giving legal status to same sex marriage. In India same sex marriage has been continuous controversial issues from many years. When two same gender couple want to come together in the form of marriage is called same-sex marriage. Although continuous attempts and effort to acknowledge and legalize same-sex marriage yet this is not legalized in India. In India same-sex relationship was criminalised by law under section 377 of India penal code 1860 which was criminalised by law under section 377 of the Indian penal

code 1860(replaced by Bharatiya Nyaya Sanhita) which was introduced during British rule. This section prohibited consensual sexual activities also. However, Delhi high court in the case of Naz foundation 27th July 2009 passed a landmark judgement, decriminalizing homosexual intercourse between consenting adult. Prohibition of same-sex marriage undermines the right to live and dignity under article 21 of constitution of India. Section 377 also undermines homosexual under article 14 and 15 of the constitution of India as it is discrimination of homosexual and created discrimination on the basis of sex. Under article 15 constitution protection extended beyond biological sex and their sexual orientation. In response to this Navtej Singh Johar v. union of India filed a case. On 5th 2018 supreme court of India formed constitution bench for challenged to section 377 of the Indian penal code. Finally, the supreme court of India partially nullified section 377 of Indian penal code (replaced by Bharatiya Nyaya Sanhita). The four judges unanimously held it is undermined fundamental right of the people. They found that section 377 discriminates against individual on the basis their sexual orientation and gender identities. Finally, they recognise that LGBTQ community people fully recognise their identity.

Post 2018 there has been growing demand for legal recognition same-sex marriage and several petitions has

been filed. On October 17 2023, a five judge's bench headed by D Y Chandrachud unanimously ruled against legalizing same sex marriage. In a 3:2 majority, the bench held that same-sex couple didn't have the right to form civil union and they could not adopt. All five judges agree that there is no fundamental right to marry and in a majority verdict court held it is upto legislature to decide whether to introduce same sex marriage. Justice Ravindra Bhat stated that leave it to the parliament to decide matter of marriage equality for LGBTQ couple.

Historical evidence that proves Homosexuality is not Disorder

Homosexual person had been part of Indian history. In ancient India epic, transgender character and theme show in meaningful way. Indian epic showing that people recognise and respect gender diversity. Transgender commonly comprises of hijras, kothis, Aravanis, Jagappas, Shiv Shaktis etc. in Jain text it is as mentioned as "psychological sex" which emphasis psychological makeup of individual distinct from their sexual characteristic. In

Mahabharata one of the greatest epics, Shikhandi was born female but later identifies as male plays a crucial role. Shikhandi become means defeats Bhīma. Aravan, the son of Arjun and Nagakanya in Mahabharata offer to sacrifice their life goddess Kali to ensure the victory of the Pandavs in Kurukshetra war only conditions that he made was to spend the last night of his life in marriage. Since no woman was willing to marry one who going to kill. Krishna assumes the form of beautiful women called Mohini and married him. In Ramayana hijras are blessed by lord Rama. When Rama is exiled, he instructed his followers to return to the kingdom. When he returns after 14 years, he finds the hijras still waiting for him. Impressed by their loyalty blessings to him blessings people and auspicious occasions like child birth, marriage and also at inaugural function. It is showing that ancient period provides existence of homosexuality but now many thinks homosexuality is disease and mental disorder. The world association for sexual health (WAS) asserted that homosexuality is not disease. Homosexuality was removed from international classification of disease in 1973(DSM) and 1990 (WHO). The declaration of sexual right in article 4 proclaims the right to sexual equality. This refers to freedom all forms orientation, class, religion, age, race, emotional disability (WAS,1999). If homosexuality is disease or mental disorder if correct that would affect equality and wellbeing of individual expressing sexual diversity and might increase stigma

and violation of the basic human rights. In 2018, Indian government decriminalised section 377 of Indian penal code 1860 and recognise that LGBTQ community people fully expressed their identity.

Same-Sex Marriage in Global Sphere

In global sphere many countries recognise same-sex marriage. Recently Greece become first Christian orthodox majority community their parliament legalize same-sex marriage in the year of 15 Feb 2024. Netherlands was the first country that recognises or legalize same-sex marriage in the year of 2001. In Belgium and Spain such union got recognise in the year of 2004 and 2005. In 2015 USA supreme court recognise same sex marriage if it would not give then that will violate 14th amendment guarantee of equal protection under the law. In Australia the parliament legalize same-sex marriage in the year of 2017. Switzerland and Ireland also way to popular vote for recognition of LGBTQ marriage. South Africa recognises same-sex marriage in the year of 2006. In 2010 Argentina first Latin American country legalized same-sex marriage. The Canadian parliament officially acknowledged same sex marriage in the year of 2005.

In Indian scenario Supreme Court refuses to recognize same sex marriage and said that marriage between biological man and women is holy union. Centre said that discrimination of article 377 doesn't mean that it is fundamental right for same-sex couple to marry. It also argued that same sex marriage doesn't compare with men and who live together with family and children born out of the union. Centre also held that same-sex marriage against Indian costume, ritual, societal value, and cultural ethos. The supreme court of India leave over the parliament to make provision for same-sex marriage.

Right to marriage - A fundamental right

In India right to marry is a fundamental right although it is not explicitly mentioned in the constitution but supreme court of India has interpreted it Is part of fundamental right guaranteed under article 21 which provides right to life and personal liberty. The universal declaration of human right article 16 provide all adults without any limitation of their race, religion, nationality have the right to marry and create a family with free consent. many cases like Shakti Vahini v. union of India (2018) held that marriage is a fundamental right for all adult individual and right to marry should available for every person. After recognition of LGBTQ community Navtej Singh Johar case again rise question for homosexual marriage filled several petitions. Recent judgment of Supreme Court provides right to marriage only available for heterosexual couple not for homosexual couple. This judgement has significant impact over the mental health and wellbeing of LGBTQ community. The refusal of legal recognition of same-sex marriage reinforces stigma and social disorder in society. For LGBTQ community marriage represent legal status of their marriage and it is proof of their relationship and their identity. This judgement may lead emotional distress like anxiety and depression. Marriage provides sense of stability in their relationship and LGBTQ couple may feel less secure in their relationship. It is therefore necessary to provide legal recognition for same-sex marriage.

Various marriage laws in India

India's legal system recognise multiple personal laws that enable to individual marry under their religious and cultural norms or common law of civil marriage. Indian marriage law upholds the validity of marriages between a husband and wife and applicable to heterosexual couple. The Hindu marriage act in 1955 is applicable for Hindu, Sikhs, Jains, Buddhists. Section 5 of this act says that marriage may be applicable

between any two Hindus, if bridegroom has complete age of twenty-one year and the bride the age of eighteen years age at the time of marriage. Under the section 60 of the Indian Christian marriage act 1872, started men cannot marry if he has not attended the minimum legal age as like Hindu marriage act. The special marriage act 1954 permits individual from different religion and caste to marry legally. The act provides only marriage between heterosexual couple. Thus, Indian doesn't have any recognition that legalize same-sex marriage. However, Naz foundation and Navtej Singh Johar case has made significant contribution improving legal status of LGBTQ community. Their efforts continue till the recognition same sex marriage. Special marriage acts capable of being interpret and same sex marriage.

To address such conditions is that recognition of same-sex marriage under Hindu marriage act. Legalizing same-sex marriage brings several benefits to LGBTQ community such as inheritance right, they eligible for other benefits provided to heterosexual couple. One of the most important things is that they can adopt child continue their lineage.

Future of Same-Sex Marriage in India

Although same sex marriage has gained recognition from many parts of world. Its future in certain region uncertain due to cultural, traditional and legal barrier. The path forward same-sex wedding largely depends on continuous advocacy, public awareness, legal support and cultural shift is essential for marriage equality. the debate over marriage of same sex couple in india is ongoing, with facing legal and cultural obstacles but public discourse and activism may influence future policy change. Despite legal hurdle and cultural barriers, the conversation around same sex marriage in india growing, with increasing support from younger generation. To foster greater acceptance, continuous activism and awareness campaign essential for increasing understanding and acceptance. Beyond recognition and legal protection of LGBTQ+ people and couple must be strengthened. Even in many places marriage equality is given, gaps remain in various area such as healthcare benefit, insurance, inheritance right, educational policy, adoption policy and discrimination. Ensuring complete equality require for addressing such issue, providing comprehensive right, equality ad protection against any bias.

Conclusion

The former president of USA John f Kennedy said that “change is the law of nature” that means change is inevitable part of society and human life. Everything changes with changing circumstances. Everything from season to human life constantly evolve and changing. despite societal norms of india so rigid but with the increasing awareness and humanity, homosexual relationship can be understood without restriction of social, religious and moral norms. One of the most disturbing things is that many people of India believe that they are different from us but we have to understand as human are just like everyone. Every person has the freedom to lead their life according to their own wishes. What is the issue if a man wishes to marry to marry another man or women want to marry another woman? In India, many think it is crime under belief of religion and moral reason. Many religious leaders also blamed this but religion promotes kindness, compassion, and humanity. Every religious teaches that love is greatest of all emotion. Forcing someone to marry at their will and against sexual identity not only disturb their life but also harm their partners life. I firmly believe that same sex marriage will be recognizing in India upcoming year. As society continue to progress, changing and conversation around inclusiveness and human right. it is imperative the parliament to discuss ad legislation on same-sex marriage. Recognition of same sex marriage is not just a matter personal choice but a fundamental step toward achieving broader social justice

and equity.

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