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"THE EVOLUTION OF SAME-SEX RELATIONSHIP RECOGNITION: A GLOBAL AND INDIAN PERSPECTIVE"

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ABSTRACT

Marriage is the most important institution of human society. In the Indian society and culture, marriage is between a man and women and this is sacred. This is the reason behind the rigidity and confinity of laws regarding marriage.

In India, marriage is solemnized and governed as per norms and of religion, customs and personal laws, but one thing is common that the marriage between opposite sex couple is recognized in the eyes of law and there is no recognition to the marriage between same sex person. Despite having rich history and evidences regarding homosexual relationship existence in ancient texts and scriptures, the people of LGBTQA+ community are deprived of freedom as well as their relationship is considered as social havoc to the society and Indian culture.

Keyword - Marriage, same sex marriage, LGBTQA+, human right, homosexual.

Objective of the study -

- i. To study about the marriage and history of same sex marriage.
- ii. To analyze the development in the trends of same sex relationship through judicial precedents and case laws.
- iii. To study the current status of same sex marriage across the world.

Research Methodology -

This research paper is written on the doctrinal research methodology which is based on law books, case laws, precedents, reports and articles.

INTRODUCTION: -

Marriage is the union of male and female which gives them exclusive rights against the other. As per social, cultural and traditional norms, marriage is sacred and its sanctity cannot be deprived due to dynamic changes. It confers right of adoption, inheritance, succession, maintenance, property, ownership etc. to the partner or spouse, which are governed by personal laws, laws and customs. It is an umbrella for various rights and responsibilities of partners which passes generation to generation.

Same sex marriage is where any person chooses to marry the same sex instead of the opposite as they are attracted to towards them. Attraction between the same sex person is very natural not because of mental or proper psychological disorder. These people are called as homosexuals and also termed as LGBT community. The standard abbreviation for the term LGBTQ is as follows -

L - lesbian (a woman attracted to other women)

G - Gay (a man attracted to the other man)

B - Bisexual (they are attracted to more than one sex)

T - Transgender / there identity differs from the gender they are born with.

The people of LGBT community are subjected to various inequality and discrimination to seek basic human rights. They struggled and waited for years and their patience is proved as the key to the paradise as many countries in the world give legal sanctity to their relationship. Infact in India also LGBT community members right to love, right to express and right to freedom of choice have been articulated by the Supreme Court in the Navtej Singh Johar Case. Legalizing same sex marriage not only gives recognition and social acceptance to the relationship between homosexuality homosexuals but also gives feeling of safe, comfort, stability and equality that every person deserve. But this is the matter of debate and conflicts between traditional norms and evolving social norms.

Historical Background -

- There was a character known as Shikhandi in Mahabharat who was born as a female but identifies as male and marries a woman.
- Ancient Sanskrit texts, including Naradsmriti (related to dharma) and the Sushruta Samhita state that homosexuality is unchangeable and prohibits the marriage between homosexual and partner of the opposite sex.

- Kamasutra is an evident to casual sex between men and provides that they can enter into a civil union if they are friends and trust each other.
- In Manusmriti, there are various proposals for various punishment for homosexual sex in certain cases.
- Khajuraho temple of Madhya Pradesh also depicts the presence of homosexual activities through its sculptures.
- Several Hindu gurus and priests have contended that any strong attachment including same sex attachment is a sign of connection in a former birth.
- Laws of Mughal Empire combines into the Fatawa-e-Alamgiri Mandating several types of punishment for homosexuality.
- Later British Empire also criminalized the homosexuality by incorporating section 377 in Indian Penal Code 1860.
- After legal and political battles fought by the several NGO's activists, LGBTQ community the Supreme Court on 6th September 2018, held that section 377 is unconstitutional as it infringed on the fundamental rights of autonomy, intimacy and identity, thus legalizing homo- sexuality in India. But nonconsensual sex and bestiality remain criminal offences.

Right to Marry -

Constitution of India provides various rights to the citizens and non-citizens. Right to marry is not enshrined under Indian Constitution but it has an existence in constitution through various judgement of the supreme court. There are many provisions of Indian Constitution which can play a vital role in legalizing same sex marriage.

- **ARTICLE 14 -**

It provides about equality before law. Therefore, denying same sex couples right to marry will lead to discrimination based on sex orientation which violates the principle of equality. Article 14 permits classification but it must be reasonable and just whereas treating same sex couples and opposite sex differently on the basis of sex orientation is not a reasonable classification under Article 14.

- **ARTICLE 15 -**

It provides about prohibition of discrimination on the grounds mentioned. Discrimination on the basis of sex is prohibited as it is one of those grounds which are

given in Article 15. Denial of right to marry gives mental agony. and they feel neglected which can lead to severe consequences in their life and mental health.

- **ARTICLE 19 -**

It provides about freedom of speech and expression. Marrying someone is form of an expression to show love, commitment and respect to partner. To disclose identity and social orientation and accept it is also coming under the purview of Article 19.

- **ARTICLE 21 -**

It provides about protection of life and personal liberty. Many rights emerged through this article and one of them rights to privacy which includes personal choices like right to marry, whom to marry etc. and nobody can interfere on the decision if the couple are adults. Many researchers and experts believe that this can be argued in support of recognizing same sex marriage as marrying someone is a matter of personal liberty, and its denial can lead to infringement to their fundamental right.

Decision of Supreme Court -

- **Lata Singh vs State of U.P (2006)** In this case, court recognized right to marry but a boy or girl should be major and it should be ensured that they should not subject to any threat or violence on the basis that they have undergone inter- caste marriage or inter-religion marriage. In this case, the Court said that India is a free democratic country and once a person becomes a major he or she can marry whoever he/she likes.
- **Justice, K.S. Puttaswami (Retd) and another vs Union of India and others (2017)-** In this case, it was held that right to marry is a fundamental right under Article 21, and also it was discussed that that it can contain various other rights and interest under purview of it like right to live with dignity, right to choices, preferences, procreation, family, marriage and sexual orientation.
- **Shakti Vahini vs Union of India (2018)-** This case is about honor killing and the main reason behind honor killing is right at of choice against the family and community. Here it has been said that right to choose comes under right to live with dignity which is protected under Article 21. It was held by the court that when two adults choose each other as a partner none can interfere in this & interference with lead to violation of their right which is protected and preserved are under Article 19 and 21 of Indian

Constitution.

- Navtej Singh Johar vs Union of India (2018)- In this case, Section 377 of Indian Penal Code 1860 was challenged where supreme court held it as unconstitutional to the extent it criminalized consensual sex between adults, rest part is operative. It recognize & the rights of LGBT community and give positive remark in respect of sexual orientation.

Current Scenario in India and worldwide -

I. Global overview -

The step of giving recognition to same sex marriages varies country to country. Many countries have recognized such marriages while many are still stuck to the Traditional norms and practices that marriages can solemnized between heterosexual couples.

Article 16 of UDHR (Universal Declaration of human rights) which provides that adult men and women, have right to marry and to found a family without any discrimination but both should constitute a marriage with free consent.

Article 2(d) of Protection of Human Rights Act, 1993, defines human rights. Under this, all humans have right to right to life, liberty, equality and dignity which is protected by the constitution and international covenants.

Countries which legalized same sex marriage -

- (1) Netherlands was the first country which gives recognition and allow same sex marriage in 2001 whereas in 2004 Massachusetts became the first state in US to recognize same sex couples and allows same sex rights and benefits to them as heterosexual couples.
- (2) Till now, i.e. 2025, 38 countries have recognized and legalized same sex marriages, Estonia, Greece, Liechtenstein and Thailand are the latest countries recognizing same sex marriage.
- (3) In the region like Eastern Europe, Asia and Africa, same sex marriage is not legal yet. Only few countries like South Africa, Taiwan and Thailand legalized such marriages. Countries where Islamic law is followed, same sex marriage is prohibited.
- (4) It has been seen that countries having law based on principles of human rights are more likely to accept same sex marriages as compared to other countries.
- (5) Here legalizing same sex marriage does not guarantee full acceptance. Homosexuals can marry but cannot adopt the child.
- (6) Majority of developed countries has legalized same sex marriage whereas some recognized civil unions (Italy and the Czech Republic)

II. In India -

- 1) India is a country with full of culture and diversity. Here, institution of marriage is considered as sacred practice which can only be performed by opposite sex i.e. male and female. This is the reason, India is one of those countries which has not legalized same sex marriage as it will defile the culture and tradition.
- 2) Although with the effect of declaration of Section 377 of Indian Penal Code unconstitutional, it led same sex marriage relationship not unlawful in India.
- 3) In the recent judgement of Supreme Court in case Supriya Chakrabarty and Anr vs Union of India W.P.C No. 1011 of 2022, the constitutional bench of the Supreme Court has declined to recognized the right of same sex couples to marry or enter into civil unions.
- 4) On 1st July 2024, The Indian Penal Code 1860 was replaced by the Bhartiya Nyaya Sanhita, 2023, which is silent on the section 377 that deals with unnatural offences which creates lacuna in the law and denies rights of homosexuals. There is no provision to address nonconsensual sexual acts between adults or with animals which again leaves a legal gap and negates the intent of the Supreme Court's ruling in Navtej Singh Johar vs Union of India.

Arguments in favour -

1. The Hindu Marriage Act states that marriage can be solemnized "between two hindus". The act itself does not use gender-specific words like 'man' and 'woman', instead it employs the term 'bride' and 'groom'. This can be interpreted in favour of same-sex couples for marriages and civil unions. This interpretation could give rise to many other rights and recognition to them.
2. A well-drafted Uniform Civil Code could explicitly provide provisions for the same-sex couples as it will provide uniform laws over all personal laws. One of the reasons for not recognising the same is that giving recognition will lead to change for many other laws as legislators have to change and modify provisions for adoption, maintenance, inheritance, etc. but if a uniform law is drafted it will fill all the gaps.
3. By denying the rights that same-sex couples also entitled to through international laws and covenants infringes the human right, and it violates the Article 14 and Article 21 of the Indian Constitution.
4. Giving recognition to same-sex couple marriage can strengthen social bonds and protect them from social stigma and discrimination faced by LGBT community members.

5. The previous judgement on decriminalization of homosexual act as a beacon to the homosexual couples in us respect of legality and sanctity of their marriage and civil union.

Arguments against the issue -

- i. Indian society leans toward traditionalism and conservatism.
- ii. Legalizing same sex marriage raises complex legal issues related to adoption, inheritance and spousal support. It will require legislators and law makers to make necessary amendments in the existing laws and also enact new laws accordingly which itself is in havoc.
- iii. Recognizing same sex marriage hamper family structure, religion and culture of the country, As India is still developing country and the above factors might be the reason for non-acceptance of same sex marriages or civil unions.

Conclusions -

Currently, the views of the executive and legislative branches of the Indian government suggest that same sex marriage is not compatible with the traditional Indian family structure and would be detrimental to the society. Somehow, Judiciary has also played significant role in this matter by decriminalizing Section 377 of Indian penal code 1860. But recently it has given the judgement in case of Supriya Chakraborty that it is the matter which can be only dealt by the government and its legislative, judiciary cannot interfere on this. On one side India is progressing in every expects like employment, gender equality, economy, security, resources etc. and on the other side not giving recognition and acceptance to same sex couples due to our orthodox perceptions. Society and country need to change as per the dynamic changes and existing requirements and trends. If acceptance to their basic human and fundamental rights to choice, marry, express is not possible then we can go towards other forward thinking and adopt practices like civil unions and domestic relationship which are followed in countries like France and in northern Europe.

References -

- ❖ J.N. Pandey, Constitutional law of India (56th ed. 2019)
- ❖ Lannatti, P. (2007). The influence of Same-Sex Marriage on the Understanding of Same-Sex Relationship. *Journal of Homosexuality*, 53(2), 135-151.

- ❖ Recognition of same-sex unions in Asia - Wikipedia
- ❖ <https://main.sci.gov.in>
- ❖ Supriya Chakrabarty and Anr vs Union of India, Writ Petition (Civil) No. 1011 of 2022 (Supreme Court of India, 2023)
- ❖ Lata Singh vs State of U.P., Writ Petition (Criminal) No. 208 of 2004, [2004] 3 Supp. (3) S.C.R. 350 (India)
- ❖ Navtej Singh Johar and others vs Union of India, (2018) 10 SCC 1

