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Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

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Assistant professor of Law

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Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and

learning.

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THE NEED FOR LEGALISING SAME SEX MARRIAGE IN INDIA: A FUTURE POSSIBILITY OR A POSSIBLE APPREHENSION.

AUTHORED BY- ANURAG SIGOTIYA

ABSTRACT

Same-sex marriage holds the same core purpose as any marriage: it's about two individuals who share a deep bond and want to commit to each other for a lifetime. The push for legalising same-sex marriage in India stems from the core principles of equality and human rights. Denying LGBTQ+ individuals the right to marry their partners not only violates their fundamental human rights but also fosters societal prejudice and exclusion.

Basically, there are some questions that arise in this regard: can same-sex marriage be made legal in personal law? or we need a new law to govern same-sex marriage because marriage itself includes many questions such as how to devolve the property of the parents to their heirs. and in same-sex marriage, there is no law to govern this. In this paper, we used a doctrinal analysis to understand how important it is to legalise same-sex marriage in India.

Legalising same-sex marriage in India is a crucial step toward ensuring equality and inclusion in society. It is about providing equal rights and recognition to all couples, regardless of their sexual orientation. By embracing marriage equality, India can create a more compassionate and fair society that respects and values diverse forms of love and relationships. It's not just about legal rights; it's about acknowledging the dignity and worth of every individual, irrespective of who they love.

key words: same- Same sex marriage, sexuality, LGBTQ, personal laws.

INTRODUCTION

Same sex marriage refer to the marriage between the same gender. Previously, having a marriage between the same gender was considered to be taboo, or it was assumed to be some kind of mental disorder. but with the evolution of the time, in this 21st century now people started accepting it's normal and marriage to the same gender is now a matter of right.

the popularity of the same sex marriage accepted in the world wide. Almost 35 country gives a legal status to the same sex marriage and now its time for India to provide a legal status to same-sex marriages similar to heterosexual marriages.

It is a high time for all the country to treat the same sex marriage as a matter of the right. if two individual fall in love with each other and want to commit to each other for a lifetime, it is a duty of the society to treat them with the same dignity and status that is provided to the heterosexual marriage. providing a legal status to the same sex marriage is proved as a milestone in the ongoing struggle of equality.

LGBTQ+ stands for the Lesbian, Gay, Bisexual, Transgender, and Queer ("+" include the various other identities like pansexual, asexual, intersex, etc). they are diverse forms of community whose sexual orientation is different from the societal norms. each latter of LGBTQ describe the diverse form of community and identity, and every community has a different struggle and challenges in their life which demand for the equal right and opportunity which is still not provided in this 21 century. The LGBTQ+ community's journey shows a continued struggle for inclusion, visibility, and the right to exist themselves freely and openly in this modern society.

HISTORICAL ASPECT

Ancient time

In ancient times, the vedas, the kama sutra and the Mahabharata were historical books of India that discribe a deep understanding of gender and sexuality . in the kamasutra it provide a knowledge about the same sex relationship without any judgement. further In the famous tample of india like khajuraho and konark describe the diverse forms of sexual intimacy, which was accepted by the society at that time in the form of sculpture and artwok in temple. by the above observation we can say that in the ancient time there was existence of diverse form of sexual

relationship which was accepted by the society at large. ancient history of the india indicate the acceptance of diverse forms of relationship and love now the question arises as to why we not accept at this in this modern era.

medieval time

During the medieval period, same-sex marriage began to lose its diverse form and became taboo. In this era, marriage was performed according to the societal norms , legal frameworks and religious practices . marriage between the man and woman was guided by customs and norms for the procreation of children and social stability.

Manusmriti or Kautilya's Arthashastra rarely talks about same- sex marriage in regard to formal marriage . even in manusmriti, it was described that those who engage in gay and lesbian behavior were punished by fines, caste loss and whip stroke. from this era same sex marriage not consider normalize and due to fear of punishment, people began to hide their identity and even society unaccepted these kind of relationship.

Modern time -

In modern times, we can say that same sex marriage has go through milestone changes in legal, social, and cultural aspects. Now, it is a beginning where same sex marriage get a momentum and its start recognized by different country. Several countries, for example the Netherlands in 2001, legalizing same-sex marriage, granting equal rights, recognition, and responsibilities to couples regardless of their gender. these legal changes in different country trigger the demand of granting the equal right , protection and legal status in the other country .the struggle for legalising same sex marriage in the world wide is needed to be addressed it is a matter of choice and not of biology.

INTERNATIONAL ASPECT OF THE SAME SEX MARRIAGE

Global movement for the same sex marriage get tigger in the international level. number of the country recognise same sex marriage as a matter of the legal right and provide a same status and dignity which is similar to the heterosexual marriage. many developing countries such as the United States, France, Brazil and Denmark give legal status for the same sex marriage and many other countries are in stage to provide the same. In 1st April 2001, the Netherlands became the

first country to provide a legal status to the same sex marriage. even our neighboring country Nepal provided legal status to same sex marriage in the year 29 Nov 2023.

same sex marriage is also influenced by the cultural, religious, and historical aspects of the society in legalising a same sex marriage. even if the country legalise the same sex marriage but the society still not accept that so its become very difficult for the LGBTQ community to take the breath in the open environment, so it becomes the duty to accept this in the mental level.

there are some legal challenges faced by the LGBTQ community in some of the country gay and lesbian behavior was criminalise and who found to do some thing like that was liable for harsh punishable offence. even there were 10 countries in the world where homosexuality may be punishable by death some of them are saudi arabia, afghanistan, sudan and united arab emirates.

United Nations and Human Rights: International bodies like the United Nations have increasingly focus on the significant of LGBTQ+ rights as human rights. United Nation also give a direction on promoting equal rights, challenging discrimination, and ensuring protections for LGBTQ+ individuals worldwide.

LANDMARK JUDGEMENT

- 1- Naz Foundation v Government of NCT Delhi
- 2- NALSA v. Union of India
- 3- Justice (Retd.) K. S. Puttaswamy v. Union of India
- 4- Navtej Singh Johar v. Union of India

1- Naz Foundation v Government of NCT Delhi

In this case, the supreme court passed a landmark judgement and decriminalize section 377 the Indian Penal Code, which was homosexuality. An NGO that was Naj Foundation working for the prevention from the HIV/AIDS, filed a petition in 2001 challenging Section 377 of the Indian Penal Code, which criminalized consensual sexual acts between same-sex individuals.

This case went through a several legal proceedings, and it was stated that section 377 breached the right to equality and dignity that was guaranteed by the constitution and at the end the Delhi

High Court passed a landmark judgment and decriminalizing consensual homosexual acts between adults.

This judgement challenged in the supreme court, although the supreme court recriminalise the section 377 of the Indian Penal Code. but in the year 2018 when supreme court review its judgement by the five judges bench and it passed a landmark judgement and criminalise the section 377 of the Indian Penal Code. this judgement provide a ample of status and dignity to the LGBTQ community.

2- NALSA v. Union of India

The Supreme Court of India passed a land mark judgement in 2014 that recognized and affirmed the identity of transgender individuals in the country.

The case contemplate around the recognition of the fundamental rights of transgender people, addressing issues related to their gender identity, discrimination, and access to various rights and opportunities.

In its judgment, the Supreme Court recognized the rights of transgender community to self-identify as a their gender, national Legal Services Authority emphasize upon the significance of self-perceived gender identity as a fundamental aspect of dignity and status . The supreme court state that transgender people should be recognized as a "third gender," granting them legal right and protection under the law.

furthermore this The judgment also give focus on the rights of transgender individuals to equality, non-discrimination, and equal opportunities in education, employment, healthcare, and other areas. It directed the government to take measures to provide affirmative action and social welfare schemes for the transgender community, that can help the transgender in getting the equal status and opportunity in the society.

This case was proved as milestone judgment in the recognition and protection of transgender rights in India, laying down significant guidelines and directions for the government to ensure the fundamental rights and opportunity to the transgender.

3- Justice K. S. Puttaswamy (Retd.) v. Union of India

This case was prove as a milestone in the ongoing struggle of transgender in getting equal right, protection and privacy. its implications have played an important role in advancing the rights of transgender community in India.

In this case supreme court recognition the "Right to privacy" as a fundamental right which play a important role in the life of transgender community. It refine the dignity and status of individuals in determining their identity, including gender identity. This landmark judgment laid down principles that have been used to support the rights of transgender community to determine their self-identify as a "third gender" without fear of discrimination or intrusion into their private lives.

Transgender individuals often face challenges related to privacy, particularly concerning their personal identity and the disclosure of their transgender status as when anybody know about this they do not treat them as a human and this lead to violation of their right to privacy . The Puttaswamy case's recognition of the right to privacy as a fundamental right has provided a foundation for protecting the privacy and autonomy of transgender individuals in India.

It has boost the rights to confidentiality concerning their gender identity and personal information. This recognition forms a basis for policies and legal frameworks aimed at ensuring the protection of transgender individuals' privacy rights, safeguarding them from undue intrusion, discrimination, or harassment based on their gender identity.

moreover, the principles and guidelines provided in the Puttaswamy case have been proved as an instrumental which was used in framing the laws and policies that aim to protect the privacy of transgender individuals in various spheres, including healthcare, education, employment, and access to public services, fostering a more inclusive and respectful environment for the transgender community in India.

4- The Navtej Singh Johar v. Union of india.

This case proved as a watershed judgement in the battle of providing a equal right, status and privacy to the LGBTQ community. In this case Navtej singh johar was a petitioner who challenge the constitutionality of Section 377 of the Indian Penal Code which is related to the consensual

homosexual activities.

In the year 2018, a five-judge bench of the Supreme Court of India heard the case and delivered a historic judgment. The court declared that consensual adult homosexual acts were not illegal and striking down Section 377 of the Indian Penal Code. This verdict effectively decriminalized same-sex relations in India, and also strengthen the right of the LGBTQ+ community.

The judgment in the Navtej Singh Johar case emphasized the principles of equality, dignity, and non-discrimination among the LGBTQ community irrespective of their sexual orientation. It marked a significant shift in societal perceptions and legal recognition, promoting and acceptance of the LGBTQ+ community in India and which also shows the acceptance of diverse form of relationship in india.

ARGUMENT IN FAVOUR OF SAME SEX MARRIAGE

same-sex marriage emphasis upon the legalization of various fundamental principles and human rights. Here are some key fact in favor of same-sex marriage:

Equality and Human Rights:

It state that denying same-sex couples the right to marry is a violation of their basic human rights and equality under the ambit of constitution . They argue that all individuals, apart from their sexual orientation, should have equal right to marriage and this right should not be based upon their sexual orientation.

Love and Commitment:

we presume that Marriage is a symbol of love and commitment. when heterosexual couple are in love they make a commitment to marry each other that give a legal status and dignity to there relationship in the society, so just because of different sexual orientation i.e (same sex) they are not allowed to get married it's violation of their fundamental right.

Legal Protections and Benefits:

Marriage grants various legal protections and benefits, such as inheritance rights, healthcare decision-making, access to joint health insurance, tax benefits, and adoption rights. Denying

same-sex couples the right to marry just because of their different sexual orientation denies them from these legal protections and societal benefits.

Family and Stability:

by Legalizing same-sex marriage is give equal status similar to the heterosexual relation which strengthen families and promote stability. Allowing same-sex couples to marry allows them to create stable and supportive family, which benefits to both couple and thier child which they may raise.

Social Acceptance and Inclusion:

Legalizing same-sex marriage is presume to step forward to the social acceptance and inclusion of LGBTQ+ individuals. It promotes a more inclusive society where diverse relationships are recognized and respected.

Overall, the argument for same-sex marriage is grounded for the demand of equality, fairness, and the recognition of the rights and dignity of LGBTQ+ individuals to form loving, committed relationships and acceptance of diverse form of relationship in the society.

ARGUMENT IN AGAINST OF SAME SEX MARRIAGE

Opponents of same-sex marriage often present arguments based on various social, moral, religious, and traditional perspectives. Here are some common arguments against same-sex marriage:

Religious Beliefs:

opponent of same sex marriage presume that marriage is a religious sacrament and it only perform between the male and female, and they believe same sex marriage is not a marriage at all.legalizing same-sex marriage goes against their religious, custom, and the sanctity of marriage.

Traditional Values:

Some people emphasize the traditional understanding of marriage as a union between only a man and a woman, rooted in cultural and societal norms that have existed for centuries. They believe that making a changes in the foundation of marriage ruien the tradition of marriage.

Parenting and Child Rearing:

criticizer of same sex marriage believe that child must be raised by the male and female that was the reason supreme court in its recent judgement deny the LGBTQ community to adopt a child, it state that child raised by the male and female is most beneficial for the child. They raise concerns about the impact of same-sex parenting on children's upbringing, believing that children need both male and female role models for proper development.

Social Stability:

Opponents of same-sex marriage believe that making changes in the defination of the marrige will impact on the social stability and it could have unforeseen consequences on family structures and society as a whole.

Preservation of Culture:

many criticizer of same sex marriage give a argument hat adopting a same sex marriage will violate the traditional understanding of marriage which is essential for maintaining cultural values and societal norms that have been a part of a community's heritage for generations.

It's important to note that these arguments against same-sex marriage often stem from deeply held beliefs, cultural norms, and personal convictions. However, these viewpoints have been challenged by those advocating for equality, human rights, and the recognition of diverse relationships in modern societies.

LEGALISING SAME SEX MARRIAGE IN INDIA PROCESS AND METHOD

In India, the legal recognition of same-sex marriage is currently not Provided for under personal laws. Marriage laws in India are governed by various personal laws based on religion and custom, such as Hindu, Muslim, Christian, and others, each having there own way to perform and regulate marriage.

As per the last update in January 2022, India has not enacted specific legislation allowing same-sex marriage. The existing marriage laws are gender-specific and define marriage as it only perform between a man and a woman.

To legalize same-sex marriage in India, it may require either amending existing personal laws to remove gender-specific language in the all personal law or enacting new legislation that give recognition to the same-sex unions.

In legalising a same sex marriage in india it would involve a complex legal proceeding including potential amendments to existing personal laws, and religious sentiments, and addressing constitutional aspects related to equality and non-discrimination between the diverse form of government.

Therefore, the way to legalizing same-sex marriage in India may involve a combination of legislative changes, judicial decisions, and evolving societal acceptance toward LGBTQ+ community because even if it will legalise by the parliament but not accepted by the society so it just become a right in paper not in reality.

CONCLUSION-

same sex marriage is not a new concept in this 21st century its exist in india from the vedic and Mahabharata time, the sculpture in the tample was a evidence of acceptance of diverse form of relationship in the india and just because of change in the norms and punative major taken by the society these LGBTQ community left with a minority population. from very long time there rights were suppresed just because they have a different sexual orientation and now this is a time to provide them equal rights and status similar to the heterosexual couple.

In legalising a same sex marriage is a significant step in providing a equality to the heterosexual couple, in india there is need to go through a complex legal frameworks, societal attitudes, and cultural considerations. There is need to amend the defination of marriage in personal law and make it gender neutral. The enactment of new legislation is important to give recognition to same-sex marriage.

Ultimately, the path to legalizing same-sex marriage involves a collective journey toward a more inclusive and equitable society, reflecting the principles of fairness, dignity, and respect for all.