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SAME SEX MARRIAGE: FROM A SOCIO- LEGAL PERSPECTIVE

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ABSTRACT

The concept of same-sex relationships has been facing major challenges and numerous dissenting opinions in India, while voices are being raised for its legalisation there are dissenting voices as well. However, upon critically examining the various ancient Indian texts and scriptures, that have consistently proved to carry on their relevance even at present modern times, reveal a more progressive approach which is much broader and equitable than the one created during and post-colonial India. The introduction of criminal punishment for same-sex relationships was owing to the British who drafted the Indian Penal Code. Section 377 criminalised such relationships with imprisonment and fine, thereby creating a hostile environment for such people. Various movements against the discrimination took place globally and our nation also faced a similar uprising. The law of India after independence has undergone numerous transformations as per the need of the society and of course due to the work of legislature and judiciary respectively. However, the topics of queerness, same sex marriage and allied rights were not paid attention to and it was finally with the landmark decision by the Hon'ble Supreme Court in the Navtej Johar case that the same-sex relationships were no longer considered to be unnatural and were decriminalised and also with the privacy judgement, a significant and a strong foundation was laid down for the community in order to advance towards their rights and identity in the nation as an equal. However, it was not sufficient for the community as they were fighting for something much bigger and beyond. Finally in 2023, one of the most awaited judgement was passed by the Supreme Court regarding same sex marriage, the concept of queerness and all matters connected therewith. In this article, we are going to look through the entire journey of this movement, the transformation of its legal status from the past till present including all the relevant judgements, steps taken by the legislature and a significant light will be thrown upon the opinions of both the

sides in this regard.

Keywords: Queer, Same-sex marriage, Transgender, Human rights, LGBTQ+ community, Homosexuality.

INTRODUCTION

Marriages that take place between two persons of same gender or same sex is referred to as same-sex marriages, which currently do not occupy a legal position in the domain of Indian legal jurisprudence. However, this legal position has evolved significantly over time with the development of law and also owing to the constant efforts being made in this direction by various human rights activists and the LGBTQ+ community as well. One of the major developments in this regard was the decriminalisation of consensual intercourse between two persons of same sex which was earlier considered to be "unnatural" and punishable by law. This posed a major hurdle for any discussion about same-sex marriage. Such a historic ruling was given by the hon'ble Supreme Court in the case *Navej Singh Johar v. Union of India*¹ which marked a turning point in the nation's perspective towards LGBTQ+ rights as it has recognised the intrinsic character of the sexual orientation of an individual which is in line with the Constitutional principles and mandates, that is, equality before the law, protection of fundamental rights and dignity of the people which equally involves the rights and dignity of LGBTQ+ community as well. It is undoubtedly a progressive step in a positive direction but numbers of issues continue to exist and hence the legal recognition of same-sex marriage remains a topic of debate and discussion in India.

However, this has turned out to be mere progressive but not a sufficient step to answer the cause for the same sex couples and LGBTQ+ community. It is for this reason that people, mainly LGBTQ+ rights activists, are still fighting for equal rights and advocating for marriage equality through active campaigning for legal recognition of same sex marriages, highlighting relevance and importance of love, affection and commitment to one another irrespective of gender they possess.

A number of petitions have been filed for the Constitutional recognition of right to marriage for same sex couples. It is not something against or contrary to the Constitution rather it is something

¹ *Navej Singh Johar v. Union of India*, A.I.R 2018 SC 4321

which is implicit in the constitution per se. Hence these cases and petitions aim to push for the protection of equal rights and ensuring the guarantee of equal treatment by recognising same sex marriages and also to make provisions for the purpose of adoption, inheritance or any other matter incidental or connected thereto.

Moreover, the society is starting to accept the same sex marriage as a valid, legal and rightful marriage, which evidently shows a changing attitude of the society towards homosexuality. Although, a significant segment of society is not accepting it and hence it creates a hurdle in legalising the same. But the change has started to begin and it has fostered hope for the progression of rights of the said community.

CURRENT LEGAL STATUS OF SAME-SEX MARRIAGE

Section 377 of IPC² talks about unnatural offences and as we know it was the work of the British government during the pre-independence era and it was in the year 2018 that the sexual intercourse between the two persons of same sex was put out of the scope and ambit of 'unnatural' under Section 377.

Let us go through the social and legal development in relation to queer couples and LGBTQ+ community by discussing some landmark judgement and their impact on the society:

Naz Foundation Govt. v. NCT of Delhi³

In this case, an NGO, Naz foundation, along with lawyers collectively had filed a petition before the Delhi High Court challenging the Constitutional validity of Section 377 of the Indian Penal Code, 1860. They argued that Section 377 is violative of Fundamental Rights provided under the constitution such as right to life and liberty, right to privacy and dignity, right to health, right to equality and freedom of expression.

The court held that the section 377 of IPC imposed unreasonable restriction over the two adults who are having consensual intercourse in private and hence it is violative of basic fundamental rights provided under Article 14, 15, 19 and 21 of the Indian Constitution.

² Indian Penal Code, 1860

³ Naz Foundation Govt. v. NCT of Delhi, (2009), WP(C) No. 7455/2001.

Suresh Kumar Koushal v. Naz Foundation⁴

After the judgement passed by the Delhi High Court, people went to the Supreme court to reconsider the constitutionality of Section 377 as they rejected the idea of decriminalizing homosexual relationships.

The court held that LGBT+ persons constituted a 'minuscule minority' and therefore they didn't deserve constitutional protection and hence the Supreme Court re-criminalised homosexuality.

This judgement of the Supreme Court faced immense criticism as a result of which the public discourse about LGBT rights witnessed an upsurge in India.

National Legal Services Authority v. Union of India⁵

As we know transgender community has never been considered as a part of society and has always been subjected to exploitation, humiliation and violence either by society or by the authorities in power. The constant rejection and not having access to resources, these people often resort to beggary or prostitution, making them more vulnerable to discrimination, STDs and crimes such as human trafficking. But the 2014 Judgement of the Supreme Court brought in a new ray of hope for transgender people as for the first time in history they were recognised as the third gender.

In this case, the issue before the honourable Supreme Court was whether there was a need to recognise the hijra and transgender community as a third gender for the purposes of employment, education, public health, reservation and other welfare schemes.

The Supreme Court in this case created the 'third gender' status for the hijras and transgenders. Now they could proudly identify themselves as transgender because earlier they were forced to describe themselves as either male or female.

The court further stated that non- recognition of identities of these people was a violation of fundamental rights under Article 14, 15, 16 and 21 of the constitution.

The Supreme Court further directed the govt. to put the members of 'third gender' under the

⁴ Suresh Kumar Koushal v. Naz Foundation Civil Appeal no. 10972 of 2013.

⁵ National Legal Services Authority v. Union of India (2014), writ petition (civil) No. 400 of 2012.

category of "economically and socially backward class". Moreover the court also pointed out that the conflict between birth gender and identity of an individual cannot essentially be termed as a pathological condition and therefore the focus should be upon "resolving distress over a mismatch" and not "treatment of abnormality".

Following this judgment, transgender individuals now have the right to legally change their gender without needing to undergo surgery. They also have the constitutional right to identify and register themselves as a third gender. Apart from this, various state governments took small steps to benefit the transgender population by making policies of health and housing.

Justice K.S. Puttaswamy v. Union of India (2017)⁶

This judgement is popularly known as Aadhar judgement and it also dealt with the concept of Right to Privacy as it was observed by Justice DY Chandrachud that the sexual orientation of an individual falls within the wide ambit of right to privacy implicit under Article 21 of the Constitution. This ruling upon the right to privacy being an inherent fundamental right and the fact that the court has considered sexual orientation of an individual within the same, has given rise to essence of hope and achievement amongst the queer community as it was the progressive step towards recognition of their rights, privacy and it was also believed that sexual intercourse between same sex couple will come out of the ambit of Section 377.

Navtej Singh Johar V. Union of India⁷

This judgement was delivered on 6th September 2018, and it was a unanimous decision wherein section 377 was held to be unconstitutional as far as consensual intercourse between the same-sex is concerned. It was observed that it infringes the intimacy, autonomy, identity, dignity and privacy of an individual. The court also opined that this provision does not create a well established intelligible differentia as to what is natural and what is unnatural, thereby labelling it to be a vague provision as it also curbs the freedom of expressing an individual sexual identity which is protected under Article 19. The court also held that sexual orientation being an inherent part of self identity and privacy is also protected under Article 21 that is right to life whereby excluding consensual intercourse between two homosexual individuals from the ambit of Section 377. The court also criticised the Koushal judgement as it was arbitrary, unreasonable and

⁶ Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC1

⁷ Navtej Singh Johar V. Union of India, 2018, writ petition (criminal) No. 76 of 2016

unconstitutional and denying the right to such community on the basis of them being a minuscule section of population is not justified.

Transgender Persons (Protection of Rights) Act, 2019

On July 2019 a bill was introduced in the House of the people that is lower house of the parliament by the former minister of social justice and empowerment Mr. Thawar Chand Gehlot. The motive was the recognition, defining the identity and protection of rights of transgender persons including their healthcare benefits and social welfare. The bill also dealt with prohibition of discrimination against transgender persons especially related to education, employment, unfair treatment, etc. It was on August 5, 2019 that the bill was passed by the house of the people and thereafter passed by the Council of minister that is upper house of the parliament on November 26, 2019. The bill got its presidential assent on December 5th, 2019 and as per Section 1(3) the implementation of the bill was to be done by the Central govt. via the notification in the official gazette. The Act came into force January 10, 2020, vide notification no. S.O.135 (E). The Transgender Persons (Protection of Rights) Act, 2019 consists of 9 chapters incorporating 23 sections which deal extensively with the provisions related to prohibition against discrimination, recognition of their identity, obligation of establishment and appropriate government, formulation of national council, penalising the offender who acts against the principles of this Act, special provisions for education, social security, health and all matters connected therewith and incidental thereto.

The Act of 2019 is a just and equitable step towards the rights of transgender as it furthers the fundamental principles of the Constitution as laid down Article 14, 15, 16 and 21.

The latest Legal development in this aspect can be traced to the Judgement of the honorable Supreme Court in the case of **Supriya Chakraborty & Anr. v. Union of India 2023**⁸ through a 5 judge bench. The 2 gay couples had filed the petition in the Supreme Court seeking the recognition of same-sex marriage and other connected rights of queer couples. It is a very elaborate judgement which deals with power of the court, the ambit of Article 32, judicial review and separation of powers, the role of courts in a democratic process, about the depth of the concept of queerness, understanding the institution of marriage and the rights of queer persons to marry, right of transgender persons to marry, their right to adoption, maintenance and to form a union, etc.

⁸ **Supriya Chakraborty & Anr. vs. Union of India, 2023, writ petition(civil) No. 1011 of 2022**

The court has held that the natural phenomena of the queerness are known to India since ancient times and it cannot be said to be an urban concept. The Supreme Court also realised that the laws related to recognition and regulation of queer marriages lie within the domain of legislature, be it the parliament or state legislature under Article 245 and 246 read with entry 5 lists 3 of 7th schedule of the Constitution. It was also observed that the unmarried couples including queer couples can jointly adopt the child and the regulation of 5(3) of adoption regulations has been held to be ultra vires the JJ Act and Article 14 and 15 of the constitution. The Supreme court also recognised the right to prohibition of discrimination against the freedom of queer couples and their right to enter into union with benefits under law. The Supreme Court also directed the union government to constitute a committee for the purpose of defining, regulating and elucidating the scope of the entitlements of queer persons or queer couple who have entered into unions. The Supreme has also passed certain recommendations that are to be followed by the committee.

SAME-SEX MARRIAGE AND AN INDIAN PERSPECTIVE

In India, homosexuality has always been considered as a taboo and people tend to overlook this matter. Some people are hesitant to even discuss about this subject matter while some have their disagreements with the same. The relationship between two persons of same sex or gender is considered dysfunctional and unnatural, and also, prior to 2018, it was considered as an offence even if it was consensual. However the judicial viewpoint has been changed after the historic judgement of *Navtej Singh Johar v. Union of India*⁹. But still there is a lot to work upon in order to meet the ends of justice. Mere recognition of consensual sex between two partners of same sex cannot be said to be answering the cause for their fight to demand equal treatment and equal protection.

Due to customs, usages and also due to the colonial rules and laws, the thinking with respect to homosexuality had been quite narrow and arbitrary. But with the passage of time, it is, however slowly, but surely changing and transforming into a much broader and progress approach. It is very disheartening to see that parents also tend to alter their views upon homosexuality and same sex marriage when it comes to their own child, resorting to manipulation and mistreatment because people still somewhat consider homosexuality as a sin and against their beliefs and against the very nature of human existence.

⁹ *Navtej Singh Johar V. Union of India*, 2018, writ petition (criminal) No. 76 of 2016

Our ancient texts and scriptures are proving to be of high relevance in almost every significant aspect of human life and day to day dealings. All the newly discovered things nowadays find their relevance and source from such ancient texts, even western ideas drive their motivations with the help of these ancient Indian texts and religious scriptures. They have proved to be of a very significant value. The same is true for the present topic as well, for instance, the Rigveda in Hinduism, the oldest written text traced in the history of mankind, states “Vikriti Evam Prakriti”, that is, what seems to be unnatural is also natural¹⁰. It clearly suggests a very wide and progressive approach because there are no limitations to the human imagination and progression. We should be welcoming of every positive idea which we encounter and eliminate the evil or negative thoughts from the society. Our constitution also talks about equality and prohibits the discrimination on the basis of gender, sex, etc.

ARGUMENTS FOR SAME-SEX MARRIAGE

There are several arguments in support of same-sex marriage, including

Human rights and Fundamental rights: The right to marry a partner of one’s own choice is a fundamental human right, and denying same-sex couples the very same right to marry a person of their choice would be arbitrary and inequitable as it would lead to discrimination, thereby violating the right to equality and equal treatment. Allowing the same-sex marriage would not only promote the aforementioned fundamental right but also bring a sense of harmony in the society as it will defeat the fear of unequal treatment in the eyes of same sex couples. It is pertinent to note that according to the Indian Constitution, discrimination on the basis of sex is prohibited and therefore marriage equality would ensure that same-sex couples have the same legal rights and protections as opposite-sex couples enjoy.

Legal protections: Marriage is much above and beyond physical intimacy and mere decriminalisation of consensual sex between two persons of identical sex can not be deemed sufficient to answer the actual cause of equal rights of same sex couples. Recognition of same sex marriage would provide better and effective legal protection to such couples, such as the ability to make medical decisions for each other and access to survivor benefits and moreover the benefits that only family members can enjoy because marriage in a sense initiates a family as well. Denying same-sex couples the ability to marry denies them all these legal protections as have been

¹⁰ **Bipasha Chakraborty**, Vikriti Evam Prakriti: What Seems Unnatural, Is Natural, Honi Soit (Nov.6,2023, 5:06 PM), <https://honisoit.com/2021/10/vikriti-evam-prakriti-what-seems-unnatural-is-natural/>

discussed which would be unjust, unfair and consequently defeat the purpose of law.

Social benefits: Marriage, apart from its legal position, serves a social purpose as well, such as stability, companionship, and support which is something that the same-sex couples also deserve to enjoy and experience just like opposite-sex couples. Moreover, the societal perceptions and position will change towards them bringing about a sense of harmony and stability in the society.

Parenting rights: Same-sex couples can not be adjudged incapable of raising children as it would affect their dignity and will send a negative message in the society. They are just as capable as opposite-sex couples. We have numerously seen a single parent raising his/her children properly and effectively, no one questions their authenticity, so what is the point of questioning same sex couples on the same ground? Legalizing same-sex marriage would ensure the equal treatment of these couples with respect to the parenting rights.

Religious freedom: Legalizing same-sex marriage would not infringe the religious freedom, neither of those who want to perform it nor who oppose it. Primarily such marriage are nowhere seen to be going against the morals and ethics of any particular religion, but still if it goes against the beliefs and mandates of any religion then it would not be required to be performed by the religious institutions. Court marriages is always an option, but at least there should be a beginning somewhere,

Consenting adults: Marriage is known to be a sacred union or a contractual union, depending upon the religious belief, between two consenting adults, regardless of gender. If two people love each other and want to commit to spending their lives together, they should have the right to do so regardless of their gender.

Health benefits: Legalizing same-sex marriage can have positive health benefits for same-sex couples. For example, being married can reduce stress and improve mental health, which can lead to better physical health outcomes.

Cultural significance: Marriage plays a culturally significant role in the society which is valued by the society at large. By denying same-sex couples the right to marry, they would miss out on a very significant cultural aspect of life which is marriage and the rights and protections that come

along with it. Society, by denying, sends a message that their relationships are less valued than opposite-sex relationships which again goes against the very foundation of Indian law.

Tradition: There is a constant argument that a marriage has always been a union between a man and a woman but this is actually through the customs and usages which have prevailed over time. But we must not forget that the very concept of marriage per se has evolved throughout the history. We have seen a number of customs and usages of evil nature which had prevailed over a large period of time and ultimately struck down for the purpose of law and civilised society, for instance, sati pratha, widow remarriage, triple talaq, dowry, etc. So same sex marriage cannot be denied merely on the basis of some custom that has prevailed over time. Marriage has been redefined to include interracial couples and divorced individuals, therefore, allowing same-sex couples to marry would simply be another evolution of the institution of marriage.

Support for families: Family support is something which is essential in everyday life for everyone to live happily and with dignity. Legalizing same-sex marriage can provide much-needed support for families. For example, a same-sex spouse would have legal rights to make medical decisions for their partner or be entitled to bereavement leave if their partner dies.

Social progress: It would be a landmark step forward for social progress of the country and for LGBTQ+ rights. It would send a message that all people, regardless of sexual orientation or gender identity, deserve equal rights and opportunities.

ARGUMENTS AGAINST SAME-SEX MARRIAGE

Here are some arguments against same-sex marriage

Tradition and morality: Marriage has been always a tradition institution between men and a women and it has been deemed to be universal and natural that a marriage is supposed to be taking place between a men and women. Any other kind of marriage would defeat the very purpose of the marriage and its scarmental values. It has been looked at in this way for centuries and the people believe it in the manner it has always existed. Changing its nature would create a hindrance and would defeat the tradition purpose and moral values.

Religious beliefs: Some religious segments of the society consider it to be against their religious beliefs and are against the legalisation of the same. They consider it as the destroyer of very

essence of their religious belief, faith and ideas.

Procreation: A common argument that prevails in the society is that naturally procreation occurs only out of the procreation of the opposite genders that is same-sex couples are incapable of giving birth to a child, has procreation is considered to be the main purpose of marriage

Parenting concerns: It is somewhat similar and connected to the point of procreation that the children are raised naturally by a father and a mother and same sex couples are incapable of providing the same to a child which may lead to negative outcomes such as behavioral issues, inadequate experiences, and lack of emotional support. People also argue that the children raised by same sex couples would automatically tend to leave their natural biological interest and will be tilted towards queerness not by choice rather by way of their experiences with same sex parenting.

Slippery slope: It is also another fear in the mind of people that legalising same sex marriage could potentially give rise to other non traditional and unnatural relationship such as marriage between siblings, polygamous marriage and so on

Legal concerns: Some people believe that it will shake the societal conscience and interference in the present existing laws would create legal and administrative complications that will further create more problems rather than providing a solution.

However many of such arguments have been widely debunked as many of these are simply illogical and have no legal relevance, while some arguments are strong enough to restrict the legalisation of the same sex marriages. It is worth noting that no legal steps can be taken in the absence of an enactment as observed by the Supreme Court in **Supriya Chakraborty & Anr. vs. Union of India 2023**¹¹.

¹¹ **Supriya Chakraborty & Anr. vs. Union of India, 2023, writ petition(civil) No. 1011 of 2022**

RECOMMENDATIONS TO IMPROVE SAME-SEX MARRIAGE STATUS

It has been established that it is difficult for the courts to intervene in the present subject matter in the absence of the legislation therefore the prime focus should be upon enactment of a new law by the parliament, as parliament acts for the people. It is the public who choose their representative to act on their behalf for the betterment of the society. When a voice is raised, it is acted upon by the appropriate government to answer the cause for the people. The Supreme Court has also clearly established that it is not possible for them to interfere in absence of legislation and it is within the domain of parliament or the state legislatures only. The court can only help in the interpretation of existing laws ensure that the laws are in line with constitutional values and principles. Hence an effort to bring the change on the ground level of the society should be made which can be done through spreading of knowledge, awareness and adoption of a progressive approach. People must be educated about the concept of queerness and its link with the ancient India. Our history has proved to be much more progressive and purposive than what we tend to think of. After so many invasion and the rules of the foreign powers our thinking has been narrowed and we have, overtime, developed a superstitious notion and have undervalued ourselves. It is only by spreading the awareness on the ground level, our society will change, progress and will respond towards this issue much more positively. A sense of harmony and coherence has to be built within the society as it is only thereafter the government through its citizen will respond to the issue appropriately.

CONCLUSION

Same sex marriage in India is an evolving issue and in recent years, it is progressing significantly as homosexuality is no longer consider to be unnatural and has been decriminalised by the honorable Supreme Court in the year 2018, however, same sex marriage is still not legally recognised, though the honorable Supreme Court has directed the union government to constitute a committee for the purpose of defining, regulating and elucidating the scope of the entitlements of queer persons or queer couple who have entered into unions. The Supreme Court has also passed certain recommendations that are to be followed by the committee.

The Indian government and the society are grappling with various religious perspectives and social cultural surrounding with same sex marriage. Some conservative voices argued against legalising same sex marriage as they consider it grossly immoral and violative of custom and religious

beliefs. However, society is starting to accept the same sex marriage as a valid, legal and rightful marriage which evidently shows a changing attitude of the society towards homosexuality.

It is pertinent to note that mere recognition of the same sex marriage is not sufficient rather the ultimate aim is to ensure the protection of equal rights and inclusivity for the LGBTQ+ community in India as it reflects that fundamental rights are equally guaranteed regardless of the sexual orientation of an individual.

The pursuit of legalizing same-sex marriage in India is likely to involve further legal battles, societal debates and advocacy efforts. It is crucial for the LGBTQ+ community and their allies to continue to raise awareness amongst the people, challenge the discriminatory laws, demand for a new legislation as observed by Supreme Court and further promote understanding and acceptance in the society.

