

Legalization of Same-Sex Marriage- A Distant Dream of LGBTQs in India

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Abstract

Since ancient times, the LGBTQ community has been treated differently and hence, they never came forward to speak of who they are and that society should accept them. With advancing time society has started to accept them and recognize their rights but they still face many problems as the acceptance as well as the rights are limited. There is hope, but also a long way to go, to take them to a level equal to other males and females. The author in this essay focuses on the marriage rights of the LGBTQs. How they are discriminated when it comes to be legally recognized as married couples? How being not recognized by law affects the couple and Why they cannot adopt children or buy a joint house? The author has analysed the different personal laws in India, including the Special Marriage Act, 1954 and Uniform Civil Code and how they do not allow same-sex marriage. Further, the essay also provides with some solutions as to how can these laws be amended to legalize the marriage of homosexual couples and what role can judiciary play in ensuring such rights.

Keywords: LGBTQ community, Same-sex Marriage, Homosexual Couples, Married Couples, Equal Rights.

It is difficult to right a wrong by history. But we can set the course for the future. This case involves much more than decriminalizing homosexuality. It is about people wanting to live with dignity. ---Justice D.Y Chandrachud in Navtej Singh Johar v. Union of India.

INTRODUCTION

The decision given in Navtej Singh Johar case is a historic judgement not only for the LGBTQ community but for India as a whole. The judgement decriminalised Section 377 of IPC stating that it violates the Article 14,15 and 21 of the constitution. The judgement gave hope to the alienated community of the society which was never treated equal to a normal male or female. People belonging to the LGBTQ community before this judgement could not make love like other couples and were questioned about their identity but with this celebrated judgement, they could now have a private life. Though this judgement was welcomed with great hope, a change that was expected has not yet arrived and these people still have to suffer due to lack of legal rights.

The people belonging to LGBTQ (Lesbian, Gay, Bisexual, Transgender and Queer/Questioning) community have always been treated differently and hence they hesitate to reveal their identity. Even recently a 9 yr. old has asked Pres. Candidate Buttigieg (first major openly gay candidate) at a rally in Denver Colorado to help him to tell the world that he is also a gay. These people are usually associated with psychiatric disorders, sexual abuse, violent behaviour and discrimination. Transgenders have been forced to undergo surgery and adopt a particular gender. Gays, Lesbians and Transgenders find it difficult to get a job. There have been instances where homosexual couples have been burned alive. These people belonging to the third category have been fighting for their rights since a long time.

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RECOGNIZING LGBTQ's RIGHTS

The initiation of recognition of the rights of the third gender dates back to 1994 when Hijras (a name given to the third gender) were given voting rights. In 2014 SC in its judgement in *NALSA v. UOI* recognized this community's constitutional rights of Article 14, 15, 16, 19 and 21 (right to equality, right against prohibition based on sex, right to equal employment opportunity, right to speech and protection of dignity of human life respectively) and gave them the status of 'Third Gender'. Earlier they had to compulsorily write either male or female, but from 15 April 2014, after the judgement of SC, they were categorized as belonging to Third Gender. They were recognized as a backward class entitled to reservations.

The landmark judgement of *Navtej Singh Johar v. UOI* further brought hope to the lives of these people by decriminalising the British enacted Article 377. The SC said it infringed on the fundamental rights of autonomy of personal choice, intimacy, dignity, and individualness of homosexuals. This decision overturned the earlier verdict given by the Supreme court in *Naz Foundation v. Government of NCT Delhi* and ors. and overruled the earlier decision of Delhi Court of criminalising section 377.

The Rights of Transgenders Person Bill, 2014 introduced by DMK MP Tiruchi Siva was passed unanimously by the Rajya Sabha. This bill guaranteed to reserve educational and job seats for third gender, grant them legal aid, pensions and allowances if unemployed but the bill kept long pending in the Lok Sabha and came to no conclusion. Finally, in 2019 The Transgender Persons (Protection of Rights) Bill was passed by the parliament which guaranteed non-discrimination in educational institutes, employment and healthcare services and gave them right of residence with their parents and families. It further advised the formation of National Council for Transgender Persons to keep check on discrimination against the third gender and to provide measures for their development.

STATUS OF SAME-SEX MARRIAGES IN CURRENT INDIAN SOCIETY

Though steps have been taken and the judgements have been delivered in favour of the third gender but still there are many important chapters where they lack equality as compared to a normal born male or female. People belonging to this category can neither join military nor legally marry. This problem of not being able to marry legally sometimes defeat the purpose of Sec. 377. There is no law that ensures the right to marry and other matrimonial rights of these homosexual couples. They can show no proof of their marriage as they are not conferred with the legal rights or legal registration of marriage.

Same Sex Couples if want to openly admit their love and marry they are not easily accepted by the society. The pandits, maulvis or other religious heads or gurus refuse to perform their marriage rites and if they marry somehow according to religious ceremonies, then are not accepted by the society and cannot register their marriage in any government institution.

There have been some same-sex marriages in India amongst which some are even accepted by family and society and some which are not but none of them gets officially recognized. A lesbian couple first moved to Gurgaon Court for recognition of their marriage. Since then a lot of petitions are filed by homosexual couples challenging the personal laws and Marriage Acts and asking for their Civil rights and recognition of their marriage but no result.

There are rare stances where a same-sex couple wants to marry only to bring radical change in society but most of the times it is simply because marriage is a part of our culture (of every religion, sect and tribe) and it is a social institution that validates a couple and also transcends the sexual relationship. Every person has a right to choose one's partner with whom they attach themselves and want to share the rest of

their lives with. Denying the homosexual couples this right only because the other person must be of opposite sex is against their dignity and free will. And hence, recently a gay couple has filed a petition in Kerala High Court that some provisions of Special Marriage Act 1954, bare them from being officially recognized as a married couple and hence the Court should strike it down. They argued that it violates their fundamental right to equality and equal protection before law (article 14), right to life and dignity (article 21).

RIGHT TO MARRY AND OTHER MATRIMONIAL RIGHTS

Besides being a sacred religious practice, marriage is also a fundamental right. All the human beings are free to marry to their loved ones and are protected by law if someone goes against them. Hence, the LGBTQs too cannot be deprived of their basic right only because of their different sexual orientation. If two lesbians, gays, bisexuals or transgenders want to marry their third gender sex cannot be an impediment. The court in its Navtej Singh Johar judgement has protected their right to make love and similarly they have the right to make their relationship sacred by getting married and registering it like other couples and become legal and official couples and so they can also avail the opportunities and benefits available to other registered couples.

Homosexual couples cannot be denied this right based on the reason that they cannot produce children. Even there are many heterosexual couples which due to some genetic problem cannot give birth to younger ones. Moreover, the couples marrying at the age of 60-70 too cannot give birth to a child but these couples marry because they love each other and same is with homosexual couples. After being married the spouse acts as support to another be it as physical helper in old age or emotional comforter and the same-sex couples cannot be devoid of this. They need legal recognition so they also can help their other half in buying a house or acting as a nominee in each other's medical forms or will of the property.

All the rights of LGBTQ's are extensions of human rights, right to equality, right to express, right to life and right against discrimination based on sex. And all these rights are granted by the Indian Constitution to its citizens and they cannot be taken away by the society and hence some laws are necessary to ensure LGBTQ community their rights.

As the homosexual couples cannot register themselves in the court of law there are many other rights and benefits that these couples are devoid of that other couples enjoy. They can neither adopt a child, nor write the name of their same sex partner in medical emergency forms. They cannot get Spouse Visa and thus in the cases of cross-country marriages in India, these couples have to face a lot more problems than the usual couples.

These couples have trouble while insuring their lives as they cannot nominate each other (due to lack of legal documents to prove their marriage). Moreover, they cannot make wills in name of each other and in case if they do, chances of it being challenged are high. A homosexual couple can neither open a Joint Bank Account nor take Joint Loans. They cannot even adopt a child and the females are not allowed to be surrogate mothers. The legal rights of pension, maintenance and succession are available to all married couples but same-sex couples. The monetary benefits under Employment Provident Fund Schemes, Workmen's Compensation Act, Migrant Labour Act, etc are given only to those who are either related by blood or legally by marriage and thus once again the same-sex couples remain astray from these benefits.

Moreover, the homosexual couples who get married on foreign lands (where same-sex marriage is legalised) could not register themselves in India. Their marriage certificates are not accepted whereas the heterosexual couples are allowed to re-register themselves once they prove their marriage in other country.

SAME-SEX MARRIAGE OR CIVIL UNION

Many countries have made laws for same-sex marriage whereas some other recognize it as civil unions. Steps have been taken to recognize same-sex couples, as people have started to accept them for who they are. The first step towards the legalization of same-sex marriage is sometimes believed to be a Civil Union or Civil Partnership i.e a couple living together as partners having some legal benefits. This status of Civil Union is usually recognized by states (as per their wish) and thus these couples can get benefit under state laws but not federal (unless centre passes a legislation). The model of Civil Union and not homosexual marriage stands safe against religious oppositions but the status is lower than marriage and hence its acceptance is not completely validated. In 1989 Denmark granted the status of Civil Union to these couples and allowed them to have some benefits as other married Couples had. Then in 1999 France passed a law governing such relationships and then by many other countries including England and Wales in 2004 recognized the civil unions. But later all these countries legalized the same-sex marriages and gave same status to the homosexual couples as the heterosexual couples because the status of Civil Union seemed to be more of a commercial relationship than a loving bond.

The first country to legalise same-sex marriage (right to marry, divorce and adopt children) was Netherlands. In 2003 Belgium, in 2005 Canada and Spain legalised the same. Many other countries including South Africa, Sweden, Netherlands, Ireland, Finland, England Wales, Luxembourg, Scotland recognize the rights of LGBTQs and have legalised the Same-sex Marriages. U.S.A Supreme Court gave the verdict in 2011 that same-sex couples can marry nationwide. There are now about 30 nations worldwide that have legalised the same-sex marriage.

Adopting the Civil Union model in India will not be feasible as it would not only require new legislations for recognizing these relationships but also amendments in other acts to grant succession rights, pension rights, etc to these couples. Moreover, recognizing Civil Unions as partnerships will pave a way for live-in relationships which is again against the Indian religious practices which considers marriage as sacred act and hence there will arise many controversies.

SAME-SEX MARRIAGE AND PERSONAL LAWS

India does not officially recognize Same-sex marriages and has no special act or provisions for rights of LGBTQs. There are different legal and valid Marriage Acts (Indian Christian Marriage Act, 1872; Special Marriage Act, 1954; Hindu Marriage Act 1955; Parsi Marriage and Divorce Act, 1936; Anand Marriage Act, 1909 and Muslim Personal (Shariat) Application Act, 1937) according to which a couple can marry and get registered in India. Though none of these explicitly forbids same-sex marriage, but certain provisions of the acts can be interpreted as being for heterosexual pairs only.

Section 51 of the Indian Christian Marriage Act talks about the Solemnisation of marriage which uses the terms--husband and wife. Section 5 clause (c) of Hindu Marriage Act again uses the words bridegroom and bride. Section 3 (c) of Parsi Marriage and Divorce Act, 1936 makes use of the terms male and female to specify the ages. Though these does not completely deny the homosexual marriage, but are controversial to definition of a bride (bridegroom) and wife (or husband). However, there is nothing as such in Anand Marriage Act and Sikhs believe in Guru Granth Sahib, the supreme, which does not ban the same-sex marriages.

There can be different approaches to include homosexual pairs under these personal laws. Since all of the acts are otherwise gender neutral but the terms bride-groom and husband-wife and so the first approach can be to categorise one of the two as a bride (or wife) and other as the bridegroom (or husband) to

come under the ambit of a couple but this would challenge the traditional duties of a couple as a husband or a wife. The other method can be to recognize the standard form of marriage commonly decided by the LGBTQ community as personal law under these already existing laws. Similar is done in the case of Arya Smajis where there forms of marriage are recognized under Hindu Marriage Act. But unlike Aryas people belonging to the LGBTQ community are not derived by single principles but their own customs and cultures and hence this approach is not very practical. Third approach could be to declare these laws discriminatory on the basis of sex and violative of Article 14, 15 and 21. But this is again not possible as it was decided in the case of *State of Bombay v. Narasu Appa Mali* that, “personal laws are outside the ambit of judicial scrutiny and hence cannot be tested against fundamental rights”. Hence it is not very easy to follow any of such approaches to alter the personal laws as it will give rise to many retrospective actions. Thus, the only alternative that seems best now can be to seek amendment in these laws or inclusion of some specific provisions without obstructing the current laws.

SAME-SEX MARRIAGE AND SPECIAL MARRIAGE ACT AND UNIFORM CIVIL CODE

Special Marriage Act, 1954 was passed so that two persons to marry outside the realm religious laws. Two persons from same or different religions can now marry and register themselves under this act and they are not limited by their personal laws. But SMA, 1954 has a provision which says that the two individuals must be of opposite sex (as it endorses the words male and female) and hence homosexual couples could even not be benefited by this act.

To rectify this, an amendment can be sought in the Section 4 of the act which says that the minimum age of the male should be 21 years and that of female 18 years. This amendment will not affect any religious laws and hence there are less chances of revolt by common people. Amending the Special Marriage Act by judicial decision is a good option as it can be declared unconstitutional. The Supreme Courts in U.S.A held in *Goodridge v. Dept. of Public Health*, and *Varnum v. Brien* cases that, “Marriage laws which does not allow same-sex marriage are unconstitutional as marriage is an individual’s right and he cannot be devoid of it until and unless there is a strong justification and being of same-sex is not such a hinderance.” The Canadian Court also held in *Halpern v. AG of Canada* that, “current definition of marriage is violative of rights of same-sex couples and so changed the definition to voluntary union of two persons.” The Constitutional Court of South Africa also held in the case of *Minister of Home Affairs v. Fourie* that, “Marriage laws which do not allow same sex-marriage are discriminatory on the basis of sex.”

Besides, Special Marriage Act, we also have the provision of Uniform Civil Code but only the state of Goa follows this common family law. All the people of Goa irrespective of their religion marry according to these set rules of law. Article 44 of the Constitution provides for UCC in India but this is still a controversial matter as to should it be applied to whole of India or not. But even this UCC does not allows the same-sex marriage as it explicitly defines marriage between two persons of different sex.

In present a new Uniform Civil Code was drafted and sent to the Law Commission of India that would legalise the same-sex marriage in India and will also provide the adoption schemes for the homosexuals. It defined marriage as “the legal union of a man with a woman, a man with another man, a woman with another woman, a transgender with another transgender or a transgender with a man or a woman.” It allowed all types of marriages and gave equal status to both homosexual or heterosexual marriages. Moreover, the draft allowed adoption to every married couple but the bill has not been passed till now. This could have been a great solution to the problem subjected to passing of the bill which is not easy due to political interests.

CONCLUSION

Same-sex Marriages cannot be denied only because of the reason that they were forbidden in history according to our ancient scriptures or because homosexual couples cannot produce children. These statements no longer justify the ideas and beliefs of today's generation who wants to accept the people as they are. With the changing time we have to change our mindsets and should accept these homosexuals couples with open hands without questioning their identities. Hence, there needs some laws to protect the rights of these individuals.

Though it is not easy to make changes but the judiciary has to interfere to make things right. Specific legislations need to be enacted by the parliament for these couples. Their marriage rights can either be ensured by amending the already existing marriage acts to include same-sex marriages or adding certain provisions in Special Marriage Act, 1954. Otherwise the government may pass some other bills to grant equal rights of the LGBTQ Community or pass the new 2017 Uniform Civil Code that would redefine marriage, from a union between two persons of opposite sex to voluntary union between any two persons. So, these people can openly accept their love and sacredly tie their marriage knots, have acceptance in society and avail the benefits that other married couples have.