

Legality of Same-Sex Marriage in India

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ABSTRACT

In India homosexual relation was a crime till 2018 but marriage between homosexual couple is still not legally recognized by the Indian law. Homosexual couples can have a physical relationship and live together although they cannot marry each other. In India marriage is a religious tradition rules by different customs of different religions. And religions only consider a heterosexual marriage performed between a man and a woman. In a country where marriage is a sacrament practice, it is not possible to recognize same-sex marriage under personal laws. It can only be legalized under the Special Marriage Act which recognizes marriages that are not acceptable under personal laws.

The people of the LGBT community should get the right to marry their partner and all the right that are available to the partners after marriage. This is guaranteed to them by the Constitution of India. Legal recognition of homosexual marriage is not a big issue when their relationship is considered legal.

One argument given by the opponents of same-sex marriage is that marriage is performed to have a family although the homosexual couples cannot have a family. However, if their marriage got legal recognition, they could have a family because after that they can adopt a child.

Keywords- Same-sex, homosexual, legalized, marriage, community

Introduction-

Same-sex relation or homosexual relation was an offence before 2018 under Section 377 of the Indian Penal Code, 1860. The issue was first raised by the Naz Foundation in 2001.

In 2017 the Apex Court reviewed the case of Navtej Singh Johar v. Union of India and Akkai Padmashli v. Union of India. A constitution bench upheld section 377 of the IPC.

However, still, marriage between homosexual couples or same-sex marriage is not legal in India. Only in few countries out of 195 countries the same-sex marriage has been legalized which includes Australia, United Kingdom, Switzerland, Germany, Taiwan, Netherland, Scotland, Norway, Mexico, Uruguay, Andorra, France, Spain, Austria, Belgium, Brazil, Canada, Colombia, Costa Rica, Denmark, Ecuador, Finland, Cuba, Greenland, Chile, Ireland, Luxembourg, Malta, Argentina, New Zealand, Portugal, Iceland, Slovenia, South Africa, Sweden, and United States of America. Recently, in 2024, Greece and Estonia also legalized same-sex marriage. Some have been legalized by legislation and others by court order.

In India, equality before the law or equal protection of the laws is provided to every individual by Article 14 of the Constitution of India. When heterosexual couples have a right to get their partner, then why do homosexual couples not have the same right?

Article 15 of the Constitution of India discourages the discrimination, but the illegality of same-sex marriage discriminates against the member of that section of society who wants to marry their homosexual partner.

Article 21 of the Constitution of India provides "the right to life and personal liberty". According to this, every person has a right to choose and marry their partner.

Same-sex marriage and personal laws-

According to the religions, marriage is a sacrament relation, which is performed between a man and a woman according to the culture, tradition, and ritual of that religion. Religions and their laws only consider the heterosexual marriages.

If a homosexual marriage is recognized by the personal laws as they consider heterosexual marriage, it might hurt the religious sentiments of the people of that community. In Indian society, religion has a special place, which is why, after 76 years of independence Uniform Civil

Code has not been implemented. People connect everything with their religion and marriage is a part of religious custom.

Legal recognition of the homosexual community is only possible if LGBT community is first considered as an individual community apart from their religion and then their marriage is recognized by the Special Marriage Act, 1954. Because the long title of the Special Marriage Act says that "*An Act to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorce*". It is quite clear that the purpose of this is to legally recognize those marriages which do not get recognition under any personal law.

Research Methodology-

In this article, the qualitative and descriptive methodology has been used to analyze the issue of same-sex marriage in India and the legality of marriage between homosexual partners. The data has been collected from the judgements and articles.

Review of Literature-

"Analysis: same-sex marriage in India" is an article by Ishank Bangarwa. In this article, the author has highlighted all the points related to same-sex marriage from the early modern era to till present. He says that ancient manuscripts such as the Rig Vedas recognized the same-sex relations. Also brought examples from Hindu aristocrats and Muslim nawabs who did the same. These activities became inconsequential with the emergence of Brahmans and later on British colonization. Because at that time, the patriarchal system rose its dominance in society.

South Africa was the first country which grant recognition to the homosexual community, followed by many countries, and in 2018, India became one of those nations. Worldwide, many countries recognize same-sex marriage and have repealed such laws that used to ban such marriage. Even countries are coming up with rules and regulations to protect the homosexual community. Even some countries celebrate this in the form of Midsumma in Sydney, Greece's Women's Holiday Week, Johannesburg's Gays, Lesbian Pride, and Brisbane's Mardi Gras, The Lisbon Homosexuelle Lesbian Festival. It is still a heinous offence in some countries like

Afghanistan, Bhutan, Yemen, Burma, Georgia, Indonesia, Pakistan, Iran, Maldives, Mauritania, Saudi Arabia, Singapore, Nigeria, Sudan, and United Arab Emirates. In England homosexual marriage is legal if performed in public.

The opponent of same-sex marriage said that marriage between a man and a woman is based on culture, and the matter is religious. Their marriage is not valid because they cannot have babies. On the other hand, the supporters argued that homosexual marriage does not affect the other person. The societies where same-sex marriage is legally recognized have no harm to their culture and tradition.

In India, marriage has a special role in culture. Personal laws need to be amended to legalize the same-sex marriage and need to be gender neutral, such as the Hindu Marriage Act, 1955.

There should be a culture for the homosexual community so they can have their own customs and traditions. Arya Samaj sets its own customs and practices and amends the act by adding section 7-A to accept self-respect marriage in Tamil Nadu.

To legalize homosexual marriage under the Special Marriage Act, 1954 the only amendment that is needed is to change section 4(c) and add a provision that acknowledges homosexual marriage. Another way is to accept them as a civil union. Countries like the United States of America, Australia, New Zealand, and Europe have introduced the civil union regulation, which has payroll, adoption, and insurance rules and provides such legal benefits that a married couple has. Laws for the civil union have been passed by France, England, and Wales. However, a civil union is not equal to a marriage, whereas marriage is accompanied by legal rights and privileges. Unlike marriage, civil unions should also have such legal acknowledgment.

The legality of same-sex marriage is a religious issue more than a political one. Homosexual relation cannot be recognized as a crime because it is a way to find love, and it does not harm anyone. For Indian society, homosexual relation is nothing new.

"Navtej Singh Johar v. Union of India, 2018" constitutionality of Section 377 was questioned by the Naz Foundation in the Delhi High Court, in which the court gave its ruling in favor of the

petitioner and held that the consensual relationship between two homosexual persons shall not be punishable. This section is violative of Articles 14 and 21 of the Indian Constitution, which guarantee equal protection and the right to privacy, respectively.

The decision of the High Court of Delhi has been challenged by some organizations and individuals in the Apex Court of India. Their arguments were that the commission of an offence cannot be incorporated under the right to privacy and decriminalization of section 377 will destroy the institution of marriage. In 2013, the honorable Supreme Court revoked the judgement of Delhi High Court.

A writ petition was filed by Navtej Singh Johar, Aman Nath, Ritu Dalmia, Ayehsa Kapur, and Sunil Mehra to decriminalize homosexual relations under Section 377. To hear the matter Supreme Court constituted a five-judge bench including – Chief Justice Dipak Mishra, Justice Indu Malhotra, Justice R.F. Nariman, Justice D.Y. Chandrachud, and Justice A. M. Khanwilkar on January 5, 2018. The five-judge bench declared its decision on 6th September 2018, in which they nullified Section 377 IPC and decriminalized homosexual relationships between consenting adults. The judgement allowed the relationship between homosexual couples.

Case laws on the legality of same-sex marriages in India-

Naz Foundation v. Government of NCT Delhi, 2009-

This is the first ever landmark case in the history that declared Section 377 of the Indian Penal Code unconstitutional, which penalized the homosexual relations and violated their fundamental rights.

NALSA v. Union of India, 2014-

This was the very first case that dealt with the legal status of people belonging to the LGBT community and recognized them as the third gender and for the entitlement of fundamental rights. The court stated that the discrimination against these people is an infringement of their basic right guaranteed in Article 15, which prohibits inequality on the grounds of sex.

Navtej Singh Johar v. Union of India, 2018-

Section 377 of the Indian Penal Code has been struck down by the Supreme Court as it intervenes with rights granted by Article 14, 15, 19(1)(a) and 21 of the Indian Constitution. This is a landmark judgment in the journey of legalization of same-sex marriage because this case decriminalized the homosexual relations between adults.

Supriyo v. Union of India, 2023-

In this recent case, a constitutional bench consisting of Chief Justice D.Y. Chandrachud, Justice P.S. Narasimha, Justice S.R. Bhat, Justice Hima Kohli and Justice S.K. Kaul, gave their judgment by 3:2 majority that the same-sex couples did not have the right to marry under Special Marriage Act and to form civil unions and they also could not adopt. It was ruled that the right to marry is not a basic right. And the matter should be dealt with by the legislature.

Recommendation and suggestions-

Same-sex marriage or homosexual marriage should be legalized because as a couple, they have a right to get married to their partner. When homosexual couples can have a legal relationship then their marriage should also get legal recognition, so that they can enjoy the rights which are provided to legal partners by the law of our country.

Section 4 of the Special Marriage Act allows marriage to be solemnized between any two people, which means it is gender neutral law. According to this, there is no need for any new legislation to legalize the marriage of same-sex couples; the only thing that is needed is to recognize their marriage as the marriage of heterosexual marriage.

When a person can live with their homosexual partner and have a relationship with them, why cannot their marriage be legalized?

It will not be the first time when Indian society breaks its stereotypes and accept something which does not adhere to its religious norms. The Supreme Court has legalized the live-in relationship under Article 21 and says that Part III of the Constitution of India guarantees that living together is a right to live. Taking this decision into account, same-sex marriage should also get legal recognition.

Conclusion

In Indian society, marriage is considered a traditional practice that is performed to have a family, while homosexual couples cannot have a family, their marriage should not be recognized by the law. And according to the adoption law of India, a single female can adopt a child of any gender, but a single male cannot adopt a girl child. However, if homosexual couples got recognition as legal couples, they could adopt a child and make a family because a couple can adopt a child.

If the homosexual couple does not get legalization, they have no right of inheritance in the property of their partner and other rights that a person has against their partner.

In Indian society, the concept of same-sex relations is nothing new it is in the culture from ancient times but has been penalized by the British colonials. Till now, many countries in the world have recognized the marriage of the homosexual community and some of them even celebrate this.

In India, Tamil Nadu has amended the Hindu Marriage Act, 1955, and added section 7-A to recognize the self-respect marriage. In other parts of India, these marriages can be legalized only by amending the Special Marriage Act, 1954. The legal recognition of homosexual marriage in India is difficult only because society looks into the matter from the religious point, if it is looked at from a political point it will be very easy to get legal recognition for the homosexual community. However, it does not affect any other person in the society but will be highly beneficial for the same-sex couples.

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