

Constitutional validity of same sex marriage: A dynamic analysis

Same sex marriage is an emerging topic in Indian jurisprudence. It is concerned with LGBTQ+ community. It can be elaborated as Lesbian, Gay, Bi-sexual, Transgender, Queer , The "plus" represents other sexual identities. The first four letters of the acronym have been used since the 1990s, but in recent years there has been an increased awareness of the need to be inclusive of other sexual identities to offer better representation.. The dispute is regarding their matrimonial rights, for marrying people with same sexual identity or recognition. This concern came out recently when, homosexual relationship or homosexuality was decriminalized.¹ This productive move , raised questions whether these relationships can be matrimonial or not?. Homosexuality was recognized as a ‘third gender’,² but matrimonial rights was in question. Provided that oppression or discrimination LGBTQ+ community is going through made them isolated in the society. Cyber bullying and other kinds of ill treatment in happening with them.³ As the said communities are not being accepted, in order, to marry they will need to unwillingly alter or change their sexual preference, which is violative to their several fundamental rights.⁴ As a developing nation, there should be equal protection of rights without discrimination on any grounds such as sexual preference, it would create a sense of predicament in society. Matrimonial matters shall be under privity of an individual. In India, right to privacy is now a fundamental right⁵.

Why in news ? –

¹ Indian Penal Code,1860,Sec 377, Act of Parliament,(abrogation), 2018.

² National Legal Services Authority vs. Union of India (UOI) and Ors. (15.04.2014 - SC) : MANU/SC/0309/2014.

³ Navya Kharbanda, 16-year-old queer child Pranshu dies by suicide due to bullying; Did we fail as a society? Mental health expert opines (Nov 28, 2023, 05:38 PM IST), <https://www.hindustantimes.com/htcity/cinema/16yearold-queer-child-pranshu-dies-by-suicide-due-to-bullying-did-we-fail-as-a-society-mental-health-expert-opines-101701172202794.html>

⁴ Navtej Singh Johar and Ors. vs. Union of India (UOI) and Ors. (06.09.2018 - SC) : MANU/SC/0947/2018

⁵ Justice K.S. Puttaswamy and Ors. vs. Union of India (UOI) and Ors. (24.08.2017 - SC) : MANU/SC/1044/2017

Recently, a petition related to same sex marriage was filed in Supreme court of India.⁶ In this matter SC five judge constitutional bench rejected the petition. The case started, when a same-sex couple filled writ petition before the court of law, seeking matrimonial rights.

Legal aspects-

Union of India, being a party in this case argued about constitutional validity of writ filled under article 32 of Indian Constitution (constitutional remedies), provided that Supreme court has no authority over enactment of statutes or amending the constitution, which is entirely within the domain of legislation.⁷ As of now, there is no law in existence regarding the same-sex marriage. Allowing such kind of marriages will require amendment in current matrimonial laws. As the constitution of India, not very expressively recognize ‘ Right to marry’, it is not a ‘fundamental right’ was said in above case. The matrimonial right was claimed under SPECIAL MARRIAGE ACT, 1954, the mentioned statute does not apply regarding same-sex marriages as it states ‘ the parties are not within the degrees of prohibited relationship: Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship’⁸. Hence, by given statute reference its not possible to allow matrimonial right to same-sex marriages under the said statute without amending it. Reasoning behind the usage of word ‘ customs’ in above statute is to clarify that marriages in India is backed by certain customs for being conducted⁹, regardless of caste, religion etc. Due to this special situation, some customs cannot be fulfilled which is an essential of marriages in any matrimonial laws enacted in the nation. For example, in Hindu laws, ‘saptapadi’ being a essential element for any matrimonial recognition, if there is same-sex marriage these rituals will not be fulfilled as per it was followed throughout the times.

Couples belonging to LGBTQ+ communities can willingly stay together in live-in relationships as this concept of forming a relationship of choice is recognized by constitutional principles with respect to reasonable restriction.¹⁰ There are complexities regarding adoption

⁶ Supriyo and Ors. vs. Union of India (UOI) (17.10.2023 - SC) : MANU/SC/1155/2023

⁷ INDIA CONST. art. 368, cl. 1.

⁸ Special Marriage Act, 1954, Sec.4. cl 3(d), Act of Parliament, 1954 (India).

⁹Wikipedia, Weddings in India. https://en.wikipedia.org/wiki/Weddings_in_India

¹⁰ INDIA CONST. art. 21.

of child, as same-sex couples cannot reproduce with respect to their unique situation. In order to adopt a child as a couple, stable matrimonial relationship of at least for 2 years.¹¹ Denial of matrimonial rights, will deprive same-sex couples from adoption of child. It can be further explained as, for the welfare of concerned child, as in modern times a lot of disputes between parents causes plenty of mental trauma to children. Assurance of a healthy relationship between couples and a legally recognized marriage is expected from couples, in order to adopt a child having sole purpose of welfare of the concerned child.

As discussed above, legal aspects of same-sex marriages are contradicting with the ideas of same-sex matrimonial relationship. This concept is very new in the limelight in India, since ideas of same-sex marriages are relatively new in the country, there is no enacted laws that allow such marriages.

Global recognition of same-sex marriages

Recognition of same-sex marriages are on its peak around the globe. Approximately, 34 countries recognize same-sex marriages in the world. Estonia is the latest country to recognize these marriages, which will be in effect from January, 2024. 23 countries have legalized same-sex marriage nationally through legislation. Among these, Australia, Ireland and Switzerland legalized same-sex marriage through legislation only after nation-wide votes. 10 countries have legalized same-sex marriage nationally through court decisions — Austria, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Slovenia (followed by national legislation), South Africa, Taiwan and the United States of America. 2 countries, South Africa and Taiwan, enacted legislation legalizing same-sex marriage after courts mandated them to do so.¹² There are countries that are going through recent developments in same-sex marriages, countries such as -

- India
- Japan
- Philippines
- Thailand

¹¹ GUIDELINES GOVERNING ADOPTION OF CHILDREN, 2015, sec 5 (f), Act of Parliament, 2015 (India).

¹² HRC Foundation, Marriage Equality Around the World, <https://www.hrc.org/resources/marriage-equality-around-the-world>

Since, the global recognition is there around the globe, accepting same-sex marriages sounds very progressive as a society. But just like any other things, same-sex marriages have their own merits and demerits in the society. Some people consider this as a sign of progressive society, while some other opinions are different and consider this as 'Destruction of Indian family system'. In a democratic country like India, freedom of speech and expression being a fundamental right under article 19(1) of Indian constitution, different opinions and its impact does create reason for govt to amend or enact laws through legislation. Even in modern India, transgenders are not even recognized in society, even after legislation authorization. In countries like India, which has dense population, it is not easy to make people aware of these situations. In India, many people consider it as a relatively new concept, not having any historical background. As far, its constitutional validity is concerned, it is entirely dependent on Hon'ble Supreme court's judgement which clearly rejects the petition, but there are other aspects rather than constitutional validity, which cannot be ignored. 'Liberty' being one of the principle from Indian constitutional preamble, the state cannot ignore the liberty of other genders residing in India. On the other hand, other than legal technicalities, a sense of social recognition is also crucial for any community to survive and get their rights in a particular country.

Historical background of same-sex marriages-

The people often argue about historical references of such marriages, there is a rich history about homosexuality and same-sex marriages. In North America, among the Native Americans societies, homosexuality existed and some have asserted that same-sex unions have taken place with persons known as Two-Spirit types, but no documentation or evidence of same-sex marriage exists. "In many tribes, individuals who entered into same-sex relationships were considered holy and treated with utmost respect and acceptance," according to anthropologist Brian Gilley.¹³ In this reference, 'two-spirit' means people used to believe or identify having two souls in their body with different genders. The concept of same-sex relationships, whether matrimonial or non matrimonial, had historical relevance and not a relatively new concept as argued by some. The Boxer Codex, dated 1590 or earlier, records the

¹³Walker, Dalton (17 July 2007). "Going Far From Home to Feel at Home". The New York Times.

normality and acceptance of same-sex marriage in the native cultures of the Philippines prior to Spanish colonization.¹⁴ In world history, these relationships have sufficient historical references to consider this concept to be proven by history.

Even in the Indian history, homosexuality and same-sex relationships can be found. The LGBTQ community has a long recorded history in Ancient India due to the prevalence of the accepting Hindu spiritual traditions¹⁵ and cultures across the subcontinent, with a turbulent period following Islamic Turkic rule and Christian European colonialism that introduced homophobic and transphobic laws, thus criminalizing homosexuality and transsexuality. In the 21st century following independence, there has been a significant amount of progress made on liberalizing LGBTQ laws and reversing the homophobia and transphobia of the previous colonial era. Ancient Indians, has been liberal towards freedom and liberty of individuals, thus these relationships were also recognized in ancient Indian history. Even, if we consider ancient sacred Hindu texts, homosexuality was not considered as unnatural practices. Rigveda, one of the four canonical sacred texts of Hinduism says Vikriti Evam Prakriti, (meaning what seems unnatural is also natural)¹⁶. Thus, both ancient Indian history and ancient Hindu sacred texts also consider and provide us with evidences of practices of homosexuality.

As, being relevant from history and cultures, same-sex relationships are not unacceptable, since it was practiced in different cultures from earlier ages. There are many references from Indian history as well as world history. It was argued, in the recent case of same-sex marriage in India, that these kind of relationships are urban concept and restricted only to upper class of society. But that is not the case, Even CJI Chandrachud, while addressing to this matter said, “Homosexuality or queerness is not an urban concept or restricted to the upper classes of society. It is not an English-

¹⁴George Bryan Souza. The Boxer Codex: Transcription and Translation of an Illustrated Late Sixteenth-Century Spanish Manuscript, Annotated Edition. Brill; Annotated edition (November 20, 2015).
https://en.wikipedia.org/wiki/Boxer_Codex.

¹⁵ Vātsyāyana (1929). KāmaSutrā, <http://www.virtualvinodh.com/writings/assorted/homosexuality-kamasutra>.

¹⁶ Stephen Hunt; Andrew K. T. Yip ,The Ashgate Research Companion to Contemporary Religion and Sexuality. (1 December 2012).
https://books.google.co.in/books?id=yfvkSILF1Q0C&pg=PT368&redir_esc=y#v=onepage&q&f=false

speaking man with a white-collar man who can claim to be queer but equally a woman working in an agricultural job in a village.”¹⁷.

What are the Possible Problems Faced by LGBTQ+ Communities in India?

As, there is a negative perception about LGBTQ+, many young children are often afraid to tell their parents about their sexual orientation. This causes a lot of trauma and depression in young children. The future of India, that is young minds, cannot be neglected just because of their sexual orientation or preference. In Indian society, it has been frequently observed that many things related to young children's life is often dictated by their parents and guardians, things such as, education, career, marriages etc. The lack of family support, can be a huge blow to children, realizing their sexual preferences. In Indian society, basic things such as, school uniform, toilets, dress codes are gendered. These basic things needed for any children, are categorized into two genders that is male and female. As a developing nation, few things are needed to be understood, that there is a difference between sex and gender, as a biological term, sex is male, female, transgender and others, while gender as a social category may vary. There is a kind of marginalization in our society, about people belonging to LGBTQ+, leaving these people deprived from basic social services such as education, health care etc.

Conclusion

As citizens of India, we have some duties towards our society, such as making society a liberal place, a society in which everyone must be granted their rights without discrimination. Any kind of atrocities can cause collapse in whole social structure of any nation. On the other hand, as a responsible citizens, we must also respect and have faith in our democracy and justice system. There should be enough faith and trust on 'last interpreter of Indian constitution', that is Hon'ble Supreme court of India. Possibly this is the beauty of our democracy, that no authority has absolute power in our nation. As we seen, that judiciary authority also have some limitations, in enactment of laws. As a society, we must be aware and realize these issues as issues of the nation not just one community. Govt of India, have some stands on this

¹⁷ Srishti Ojha, Kanu Sharda, No legal recognition to same-sex marriage, Supreme Court leaves it to Parliament, New Delhi,UPDATED: Oct 17, 2023 18:13 IST. <https://www.indiatoday.in/law/story/supreme-court-rules-against-same-sex-marriage-asks-centre-to-ensure-rights-of-queer-community-2450019-2023-10-17>

issue can also have some possible reasoning. We must acknowledge that and also on the other hand, question our elected govt about these issues. Our first priority should be as citizens, adopting a liberal view and work on making this nation's social issues , with motive of constructive view rather than mere protest. India as a nation, has the most diversity in the world, different religion groups and different kinds of people reside in this country peacefully. Equality of rights without any discrimination should be outmost priority for govt as well as citizens. Collusion of govt and citizens makes a healthy democracy and nation, so the responsibility for change also lies with both the components of society.