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Right to Marry – As understood by Indian People and the Constitution

Introduction:

In Indian Jurisprudence, we have observed over the years that we go by the phrase ‘Society changes the law’. Yet, it is important that we now understand that it is high time to incorporate the other existing belief systems too. As we have some deep-rooted prejudices and stereotypes inter woven in our social structure and moral codes. Hence it is time that we start observing the message given by the other phrase instead, ‘Law has changed, so should the society’.

Volatile Dynamics of Marital Bonds:

Marriage is an institution that has existed in our culture and society since ancient times. But since time immemorial, marriage has been perceived, as more of an institution bringing together two families rather than a union affecting and concerning, mainly two individuals. Hence, this institution of marriage is an important part of the society and so has long been governed and determined by the morals and code of conduct, predetermined and controlled by the society.

This is one of the main reasons because of which a large population of the society, still is not accepting marital bonds between homosexuals and other members of the LGBTQ community. Especially, people belonging to older age groups, whose viewpoints and attitudes are particularly difficult to alter. There were certain major faults with the concept of marriage a few years back. Historically, marriage was an important institution in the society, since it was essential for property rights and the birth of the successors (sons). Therefore, it was a general practice where the elders of the house fixed alliances without the intervention of the couple as

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love, compatibility and emotional bonds were not considered, necessary or the sufficient reasons to get married.¹

However modern times, have witnessed sparring changes in our thinking and attitudes and has undeniably helped us, in being more accepting and less judgemental which consequently helped in changing the dynamics of families and marriage by altering essential concepts of consent and choice. The wave of feminism inspired women to become freer, assertive and independent. This helped them in not only professional spheres but also in their personal life.² They started making choices about important situations and relations in life and ventured out to find their own partners, with whom they had physical and emotional compatibility.

This accelerated changes in the rationale and form and content of marriage. People have now become accepting, and view marriage as a union between two individuals, irrespective of their gender. The widespread movements about the rights of the people from the LGBTQ community have certainly been able to create a certain amount of impression on the minds of the people. Most people were groomed from childhood to be homophobic or rather unaccepting of the ideas of being a 'queer', however these movements have been able to impart accurate knowledge and understanding about the varied dynamics of gender and sexuality. These movements have created awareness about issues we initially considered 'taboo' or 'abnormal' or even sometimes 'perverted' or 'corrupt'.³

Laws and Views pertinent to Right to Marry

Following the conservative judgement of Supreme Court in Suresh Kumar Koushal v. Naz Foundation⁴, majority of arguments and advances were made to initiate movements and find methods to get the decision overturned. However, at the same time these debates prompted movements and support for seeking legal recognition for not only companionship (sexual

¹ HOMOSEXUALITY IN INDIA, https://shodhganga.inflibnet.ac.in/bitstream/10603/191572/18/18_chapter%206.pdf

² Kajoli Anand, ARYA SAMAJ MARRIAGE: EVERYTHING YOU NEED TO KNOW & HOW IT IS DIFFERENT & UNIQUE WEDDING (2019), <https://www.weddingwire.in/wedding-tips/arya-samaj-marriage--c4401>.

³ Steve Sanders, THE CONSTITUTIONAL RIGHT TO (KEEP YOUR) SAME-SEX MARRIAGE, Michigan Law Review, June 2012, Vol. 110, No. 8 (June 2012), pp. 1421-1481.

⁴ Civil Appeal No. 10972 OF 2013.

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relations) of homosexuals but also legally recognising marital bonds between two consenting individuals irrespective of their gender.

Discrimination on mere basis of sexual orientation for the purpose of granting legal recognition for marriage is objectionable. The Constitution of India guarantees us the Right to Liberty, yet the citizens are restricted to marry the person they love and want to spend their life with. This denial of Right to Choose is in direct conflict with the liberal rights enshrined in the Constitution. Moreover, the right to equality bars any discrimination on basis of gender and sex yet the present marriage laws openly restrict and deprive same sex couples, state benefits as well as legal and social recognition.⁵

Countries across the world have increasingly recognised consensual sexual acts of homosexuals either through amending or introducing newer legislations. They have also recognised same sex marriages. Similarly, it is time that we also grant recognition to such relationships since personal bonds are a matter of choice, love and compatibility and not a thing for moral policing and societal control.

Major arguments against legalising it heavily relies on the lack of support from the society due to the prevalent unacceptance by people belonging to certain faith and age groups. Also, Government of India relies on the weak argument that such a marriage, between two consensual adults of the same sex, falls foul of various existing civil and criminal laws. However, this could not be a basis for legally denying marriage equality right of choosing a life partner, since it equates to restricting equal opportunity to people belonging to same sex and is an evident discrimination against citizens of India on the basis of sexual preferences. Sexual orientation is a used to control the right to marry, which is essentially a personal choice in which the government should not interfere, since laws are for the betterment of society and should not in any scenario serve as a restriction or forced morals and conduct.⁶

Reading down of Section 377 was historic advancement by the Indian Judiciary, however, this was just a scratch on the surface since the LGBTQ+ community struggles with various social and legal discriminations.⁷ Equality is a Fundamental Right promised to the community and marriage, adoption, inheritance is also an integral part of the Fundamental Rights. Therefore,

⁵ Tebbe, Nelson, Widiss, Deborah A., and Gilreath, Shannon, "The Argument for Same-Sex Marriage," 159 University of Pennsylvania Law Review.

⁶ <https://www.pewforum.org/fact-sheet/gay-marriage-around-the-world/>

⁷ A Right to Marry? Same-sex Marriage and Constitutional Law, <https://www.dissentmagazine.org/article/a-right-to-marry-same-sex-marriage-and-constitutional-law>.

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is it constitutional to deny such basic rights to the people from LGBTQ community only because the society is conservative and unwilling and the religious notions of certain are against the Right to free will and choice of those belonging to this community.

Article 16 of the Human Rights United Nations- ‘Universal Declaration of Human Rights’ grants right to marry to every human and Article 21 of our Constitution does not expressly grant this right but it is interpreted under it. In the case *Lata Singh v. State of Uttar Pradesh*, the Apex Court opined that ‘the right to marry is a component of right to life under Article 21 of Indian Constitution’.⁸

Thus, exerting control and forceful denial of essential right by legal means is unconstitutional and should immediately be amended.

ISSUES AND CONSIDERATIONS OF SAME SEX MARRIAGES

It was believed in western countries, primarily European that the widespread outburst of HIV/AIDS (a deadly disease) was due to the increasing number of gay men engaging in sexual relations.⁹ This led to increased false allegations and cases of brutality and harassment towards the gay community which led to harsher legal punishments and widespread social exclusion, against the people belonging to LGBTQ community.¹⁰

Similarly, even after de-criminalization of Section 377, our society still is reluctant to acknowledge rights of the LGBTQ community since expression of Homosexuality and Bisexuality is perceived as abandonment of traditions and society by certain communities. They are considered a threat therefore for preserving the sanctity of marriage and in the interests of the society it is believed that marriage stays intact only when a man and woman marry each other. This social stigma is the driving force for all arguments against same sex marriage.¹¹

⁸ *Lata Singh v. State of Uttar Pradesh*, (2006) 5 S.C.C 475.

⁹ Homophobia and HIV, AVERT (2019), <https://www.avert.org/professionals/hiv-social-issues/homophobia>

¹⁰ Linda Silberman, Same-Sex Marriage: Refining the Conflict of Laws Analysis, *University of Pennsylvania Law Review*, Jun., 2005, Vol. 153, No. 6, Symposium: Current Debates in the Conflict of Laws (Jun., 2005), pp. 2195-2214.

¹¹ Debra Umberson, Mieke Beth Thomeer, Rhiannon A. Kroeger, Amy Caroline Lodge, and Minle Xu, Challenges and Opportunities for Research on Same-Sex Relationships, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4294225/>.

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IS LEGAL RECOGNITION OF SAME SEX MARRIAGES THE NEED OF THE HOUR?

Indian Law has a set of laws for governing family related matters- adoption, marriage, divorce and custody. Thus, is it being evident that for any marriage to be valid it has to be a part of these laws. Moreover, a state issued marriage certificate is an essential proof of a valid marriage. Legal benefits like adoption, succession and maintenance rights will only be possible after legal inclusion of marriages between homosexual couple. Moreover, many schemes by central and state governments allow benefits¹² that are only available to relatives by blood or by institution of marriage, in such cases couples in LGBTQ community are not included. Same sex couples are not allowed right to adopt as per Central Adoption Resource Authority (CARA) guidelines¹³.

Moreover, all same sex couples are not seeking all these rights, as some are only seeking acceptance in the society. Many of them only want to exercise their Fundamental Right as a citizen of India and live with dignity and look for a respectable life where their relationship is legally recognised.¹⁴

Right to Marry is important, because selection of a partner is an integral part of one's privacy and no interference or control by state is ideal. Consensual sexual relations are allowed but consensual companionship and nuptial bonds are denied on pretext of morality and unwilling society.

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¹² Pension Schemes, Employment Provident Fund scheme, 1952 and Workmen's Compensation act, 1923

¹³ Central Adoption Resource Authority Ministry of Women & Child Development Government of India, CARA, http://cara.nic.in/Parents/eg_ri.html

¹⁴ Who are Considered Dependents in Case of Workers' Compensation Insurance? SECURENOW (2017), <https://securenow.in/insuropedia/who-are-considered-dependents-case-w-c-insurance/>.