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Is India ready for Same-sex marriage?

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The marriage of homosexual couples, i.e., same-sex marriage is a heated argument in our country. There is a century-long timeline of the issue of the LGBT community being deprived of their rights. Right from 1861, we had started following what the other foreign countries were doing and therefore the Section 377 was inserted in our IPC, by the crown. We didn't budge from that stand even when the UK itself got rid of the ridiculous law almost 50 years back. It took approximately 150 years for us, as a collective society, to realize what was wrong with our methods and finally, after such a long time, a judgement from the highest authority of our country changed the way we look at the condition forever. Although even this journey wasn't so simple as the highest court itself has turned down an earlier HC judgement. But a deeper analysis the second time round came as a blessing for many.

This article deals with the timeline of major LGBT related incidents and judgements that have taken place over years. It is followed by recent petitions and detailed arguments in the Delhi High Court regarding the legal recognition and validation of same-sex marriages in India. The article includes the views and analysis of the author on the arguments. The article deeply looks into the view of society on this matter followed by a conclusion.

Keywords: marriage, LGBT, homosexual.

INTRODUCTION

Section 377 of the IPC¹ states that “Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

Homosexuality is one of the three types of sexual orientation, in which people have romantic and sexual attraction towards the same sex. It has been regarded as “against the order of nature” for a long time now. It wasn’t until recently that Countries around the world started legalizing homosexuality. As of January 2021, there are only 29 countries in the world where same-sex marriage is allowed.² Still, in many countries, homosexuality is penalized with life imprisonment or even death.

September 6th, 2018 is marked as one of the significant days of history. The long-fought battle of the LGBT community finally brought out some fruitful results. The Hon’ble Supreme Court in *Navtej Singh Johar v. Union of India*,³ passed a landmark judgment declaring Section 377 to be unconstitutional to the extent that homosexuality was legalized but the Section will remain in action to the extent it relates to acts of sex where no consensus has been taken, sexual acts with minors and bestiality.⁴

¹ Indian Penal Code 1860, s 377

² Rosie Perper, ‘The 25 countries around the world where same-sex marriage is legal’ (*Business Insider*, 19 November 2017) <<https://www.businessinsider.in/politics/the-25-countries-around-the-world-where-same-sex-marriage-is-legal/articleshow/61707572.cms>> accessed 01 May 2021

³ *Navtej Singh Johar v Union of India* AIR 2018 SC 4321

⁴ Pratik Dixit, ‘Navtej Singh Johar v Union of India: decriminalising India’s sodomy law’ (*Taylor & Francis Online*, 15 November 2019) <<https://www.tandfonline.com/doi/abs/10.1080/13642987.2019.1690465?journalCode=fjhr20>> accessed 01 May 2021

THE TIMELINE

There is a century-long timeline of the issue of the LGBT community being deprived of their rights⁵:

- 1861: Section 377 was introduced by British Raj in Indian Penal Code, 1860. It was based on the Buggery Act of Parliament of England.⁶ The literal meaning of the term Buggery is “against nature”. Over the decades, innumerable activists supporting LGBT challenged section 377 in various ways.
- 2001: An NGO, Naz Foundation filed a case in Delhi HC where an unconstitutional tag on the present provision was sought.⁷
- 2003: Delhi HC dismissed the petition filed by Naz Foundation.⁸
- 2006: Naz Foundation appealed against 2003 petition dismissal in SC The hon’ble SC directed the HC to reexamine the matter.⁹
- 2009: Delhi High Court held that criminalization of homosexuality was in violation of Article(s) 14, 15, and 21, & hence decriminalizing homosexuality among consenting adults.¹⁰
- 2009: An astrologer from Delhi filed before the hon’ble SC to get another order on the verdict of the High Court.
- 2012: Supreme Court finally started hearing for the case and later did away with the HC’s ruling.¹¹

⁵ Anuradha Parasar, ‘Homosexuality In India – The Invisible Conflict’ (*Delhi High Court*) <http://www.delhihighcourt.nic.in/library/articles/legal_education/Homosexuality_in_India_-_The_invisible_conflict.pdf> accessed 01 May 2021

⁶ The Buggery Act 1533

⁷ Utkarsh Kumar, ‘The Naz Foundation Case (Section 377) - Interlinking and Hyperlinking’ (*Slideshare*, 7 March 2014) <<https://www.slideshare.net/utkarshk02/the-naz-foundation-case-section-377-interlinking-and-hyperlinking>> accessed 01 May 2021

⁸ *Ibid*

⁹ *Ibid*

¹⁰ Manoj Mitta & Smriti Singh, ‘India decriminalises gay sex’ (*Times of India*, 3 July 2009) <<https://timesofindia.indiatimes.com/india/india-decriminalises-gay-sex/articleshow/4726608.cms>> accessed 01 May 2021

¹¹ J Venkatesan, ‘Supreme Court sets aside Delhi HC verdict decriminalising gay sex’ (*The Hindu*, 11 December 2013) <<https://www.thehindu.com/news/national/supreme-court-sets-aside-delhi-hc-verdict-decriminalising-gay-sex/article5446939.ece>> accessed 01 May 2021

- 2015: Shashi Tharoor made the introduction of a Private Member's bill in LS to decriminalize homosexuality. Members voted against it.¹²
- 2016: Five petitions were filed in Supreme Court. It was argued that Section 377 is against Part-3 of the Indian Constitution *i.e.*, violative of Fundamental Rights.¹³
- 2017: A new and reformed Uniform Civil Code¹⁴ was called for by many citizens and even a draft of the same was created and at the same time, the draft was, for the purpose of legalizing same-sex marriages, forwarded to the Law Commission of India.¹⁵
- 2018: Hearing started to hear the matter related to the unconstitutionality of the said section. Finally, on 6th September 2018, Supreme Court decriminalized homosexuality.¹⁶
- 2020: the Uttarakhand HC gave a similar judgment on the lines of what was held in the hon'ble SC and gave the satisfaction to the public that while same-sex marriage may not be legal, cohabitation and "live-in relationships" come under the country's statutory protections.¹⁷

PETITION FOR SAME-SEX MARRIAGE

The previous year, three petitions were filed before the Supreme Court for giving legal sanctity to same-sex marriage.

¹² Press Trust of India, 'Lok Sabha votes against Shashi Tharoor's bill to decriminalize homosexuality' (*Live Mint*, 12 March 2016) <<https://www.livemint.com/Politics/KxkeRYk64JYWrJmfhRNZdI/Lok-Sabha-votes-against-Shashi-Tharoor-s-bill-to-decriminalize.html>> accessed 01 May 2021

¹³ Web Desk, 'Meet the fantastic five who filed petition against Section 377 in Supreme Court' (*The Week*, 6 September 2018) <<https://www.theweek.in/news/india/2018/09/06/meet-the-fantastic-five-who-filed-petition-against-section-377-i.html>> accessed 05 May 2021

¹⁴ Constitution of India, art 44

¹⁵ Editorial, 'Allow gay marriages, give couples police protection if needed, suggests draft Uniform Civil Code' (*Scroll.in*, 13 October 2017) <<https://scroll.in/latest/853850/allow-gay-marriages-give-couples-police-protection-if-needed-suggests-draft-uniform-civil-code>> accessed 05 May 2021

¹⁶ Navtej (n 3)

¹⁷ HT Correspondent, 'Same sex couples can live together': Uttarakhand HC (*Hindustan Times*, 20 June 2020) <<https://www.hindustantimes.com/india-news/same-sex-couples-can-live-together-uttarakhand-hc/story-WDjvNH3JzJvaGDtpfzZOxL.html>> accessed 05 May 2021

- i. First was a PIL filed by Abhijit Iyer Mitra, Gopi Shankar, Giti Thadani, and G Oorvasi,¹⁸ for recognizing same-sex marriage under HMA.¹⁹
- ii. Many people are familiar with the love story of the couple Kavita Arora and Ankita Khanna. They met at work and fell in love but their relationship was a crime. After the judgement of 2018, they, along with many more homosexual couples, were contented as now they will finally be recognized in the eyes of law. But, their happiness didn't last long as even after the ruling by Supreme Court in 2018, their relationship has no legal status because they have not been conferred the constitutional right of homosexual marriage and hence they cannot enjoy any right that is granted to them as of heterosexual married couples. They cannot take any benefits from laws related to matrimonial rights and relief. In October 2020, the couple moved to Delhi High Court filing the petition for same-sex marriage, and argued that “without official recognition by the Constitution and legal system, they are strangers in law”.²⁰
- iii. The 3rd petition was filed by Vaibhav Jain and Parag Vijay Mehta (OCI).²¹ They sought protection under the Foreign Marriage Act.²² They had even applied in NY's Consulate of India but to no avail.²³

ARGUMENTS FOR AND AGAINST

- The Centre, against these three petitions, opposed any change in the existing marriage-related laws arguing it will create a state of complete chaos and havoc.

¹⁸ Soibam Rocky Singh, 'Delhi High Court issues notice to Centre on plea to recognise same-sex marriages under law' (*The Hindu*, 19 November 2020) <<https://www.thehindu.com/news/national/hc-asks-centre-to-respond-to-plea-to-recognise-same-sex-marriages-under-law/article33130651.ece>> accessed 05 May 2021

¹⁹ Hindu Marriage Act 1955

²⁰ Press Trust of India, 'Court extends Centre last chance to reply to pleas seeking recognition for same-sex marriage' (*The Hindu*, 8 January 2021) <<https://www.thehindu.com/news/cities/Delhi/court-extends-centre-last-chance-to-reply-to-pleas-seeking-recognition-for-same-sex-marriage/article33530122.ece>> accessed 05 May 2021

²¹ Ketaki Desai, 'Two couples lead fight to legalise gay marriage' (*Times of India*, 23 October 2020) <<https://timesofindia.indiatimes.com/city/delhi/two-couples-lead-fight-to-legalise-gay-marriage/articleshow/78819208.cms>> accessed 05 May 2021

²² Foreign Marriage Act 1969

²³ *Ibid*

- Centre said whether same-sex marriage should be legalized must be decided by the Legislature and not the Judiciary since issues concerning personal relationships fall under the ambit of Legislature's wisdom.²⁴

So, accordingly, the Centre on 25th February 2021, opposed same-sex marriage, dismissing the petitions related to homosexual marriage in Delhi High Court.²⁵

- The centre told the Delhi HC – This act of legalizing would never be realized in the minds of the Countrymen and this action will be against this deep-seated concept of an Indian Family Unit.²⁶
- Arguing against this, petitioners said that this argument is ridiculous because it is based on the assumption that marriage is not a marriage if couples can't produce biological off-springs.
- Centre said that the 2018 Supreme Court judgment neither intended to nor did, legitimize same-sex marriage. Centre, citing the Supreme Court Ruling of Navtej Singh Johar case,²⁷ pointed out that same-sex couple was given the freedom to lead a dignified private or personal life about Article 21 of the Indian Constitution²⁸ but that, by no means, grants the homosexual couples public rights related to marriage and legitimacy of their particular human conduct.
- The Centre also mentioned that there is no acceptance of the same gender marriage in either personal or codified laws. It is said that western ideologies cannot be inculcated in the Indian context since marriage is a matter in India that depends on old age customs, rituals, ethics, societal values, etc.

²⁴ Samanwaya Rautray, 'Same sex marriages cannot be given legal sanction: Government' (*Economic Times*, 25 February 2021) <<https://economictimes.indiatimes.com/news/politics-and-nation/same-sex-partners-not-comparable-with-indian-concept-government/articleshow/81209328.cms?from=mdr>> accessed 06 May 2021

²⁵ Sofi Ahsan, 'Centre opposes same-sex marriage in Delhi HC, says not comparable with 'Indian family unit concept' (*Indian Express*, 26 February 2021) <<https://indianexpress.com/article/india/same-sex-marriages-legal-recognition-centre-7204303/>> accessed 06 May 2021

²⁶ *Foreign Marriage* (n 23)

²⁷ *Navtej* (n 3)

²⁸ *Constitution* (n 14), art 21

- Opposing this, the petitioners contended that Hindu Historical texts identify 60- odd genders and there is no factual basis to prove that marriage between those 60-odd genders was prohibited. Hindu texts of Rigveda says “Vikriti Evam Prakriti” which when translated means “what seems unnatural is also natural” and Kamasutra by Vatsyayana dedicates a whole chapter to homosexual behavior and homosexuality continued to exist legally in India until it was outlawed and penalized during British Colonial Rule in the 18th century.
- The government argued that the institution of marriage is a social one and hence it cannot be limited to concerns about the privacy of an individual. It said that Art. 21 is subjected to procedural laws of our Country and the fundamental right of same-sex marriage cannot be included in it.
- The government argued that in a same-sex marriage, it is impossible to term one as husband and the other as a wife, and thus many statutory schemes related to marriage will serve no purpose.
- Arguing the above point, the advocate of the petitioner said the HMA²⁹ doesn’t make any note on the biological “sex” or “gender”, it simply states marriage between “two Hindus”.
- Petitioners urged the court to declare that the Special Marriage Act, 1954³⁰ applies to any two persons who wish to marry, regardless of their sex, by striking down any sexual-based restrictions mentioned in the act.
- Petitioners said that the union of marriage should be limited to heterosexual couples is an Abrahamic concept and it has almost nothing to do with Hinduism. And for Hinduism to flourish in the 21st century, it must not be restricted by Abrahamic beliefs.

ANALYSIS OF ARGUMENTS

The arguments from both sides are logical in one way or another.

²⁹ *Hindu Marriage (n 19)*

³⁰ *Special Marriage Act 1954*

The centre is right in arguing that it is not easy or reasonable to include the concept of same-sex marriage in the long-rooted family unit custom of husband, wife, and children and that marriage is a social institution and cannot be narrowed down to the private lives of two individuals. Centre mentioned that incorporation of such marriages in personal laws will create havoc. It is true because if the choice is offered, it will distort the entire system formed over the centuries of rigid beliefs regarding marriage.

At the same time, petitioners were not wrong when they argued that procreating a biological child is neither the reason nor the utmost goal of marriage so it must not be restricted to heterosexual couples. And the fact that old Hindu texts rife with the references of same-sex couples and their conjugal and rights. And if something has been a part of old age customs, then it should be accepted even now. Sexuality, whether homo or hetero, is not an option or choice but something that people are born with and how something that is inborn can be unnatural.

Arguments from the sides are in no way preposterous. But there is a third side to this issue, i.e. the point of view of society. Is society ready to inculcate the idea of same-sex marriage in their firmly settled mentality of heterosexual couples?

While LGBT rights have received significant awareness in Urban India and acceptance by youth more than ever due to various initiatives, campaigns, and their liberal ideologies, it only poses a small picture of a real-life scenario. While LGBT voices are being heard through various online and offline platforms, these only reveal a small portion of struggles and manifold opposition and challenges that this community faces.

Even many educated urban families do not accept their Children's homosexuality and thus disown them leading many of them to commit suicide. Rural families have their own way of dealing with LGBT individuals by covertly killing them. The transgender community faces rampant violence. Lesbian women are put through non-consensual sex which is many a time approved and even committed by their own family members.

In a survey, around 62% of respondents claimed that they are against homosexuality, let alone endorsing same-sex marriage. Even if laws are enacted to permit same-sex marriage, it does not guarantee homosexual couples freedom from oppression by society.³¹

All these facts clearly indicate that Indian society is not yet ready for homosexuality. But can we really blame society? Should the centre be really condemned for disapproving the same-sex marriage? It has been over two centuries since homosexuality was criminalized. It does not matter what was the scenario before the 18th century. What matters is what has happened after that and how people and society have changed in terms of its ideologies, values, and principles accordingly. We cannot expect society to accept at once what it has been frowning upon for centuries now.

CONCLUSION

From all the above-mentioned arguments and keeping in mind the view of society on this issue, it is obvious that it will take some time for society to accept this and adapt to the new big change. Undoubtedly, this does not give society the right to oppress this community, but we can also not force this new ideology upon it. Society will accept homosexuality but it is not going to happen overnight. Society does have a history to get evolved and get adapted to new situations, beliefs, laws, and regulations; an example would be acceptance by societies of laws banning many old cruel practices that were considered sacred such as child marriage, sati, and the ritual killing of animals. The same will happen in the matter of homosexuality over time. Let us first give society some time to accept homosexuality, and then we can put forward the idea of same-sex marriage.

³¹ S Rukmini, 'Homosexuality in India: What Data Shows' (*Live Mint*, 14 September 2018) <<https://www.livemint.com/Politics/nLQIPpl5UICajLDXETU3EO/Homosexuality-in-India-What-data-shows.html>> accessed 08 May 2021