

THE STIGMA OF THE LGBTQ+ AND THE EFFECT ON THE LEGAL SPECTRUM

- Chhatrapal Singh Shaktawat and Ashutosh Nath

I. INTRODUCTION

“What does love means if we would deny it to other”

-DaShanne Stokes

Now we are living in a modern and civilized world. If you look the Indian history of culture, then you can find that there was a time on which some people leave their family and took sannyasa in their young age before marriage. But in the present world everyone in his/her young age has an interest to get marriage or to be part of it. Due to same religious concept, social norms and public policy some people have been deprived from marriage in some of the countries in the world. Same sex relationship and same sex marriage is one of the main issues in the concept of marriage in this present time. In this paper we will discuss about the issue of same sex relationship and marriage not only on India basis but also, we will compare it with world scenario.

In the year 2018 in the case of **NAVJEJ SINGH JOHAR VS UNION OF INDIA**¹, the Hon'ble Supreme court of India declared a 160 years law as unconstitutional that was **section 377** of Indian Penal Code, 1860. This judgement of supreme court decriminalized the offence of homosexuality in India. After this judgment we can say that the same sex relationship is legalized in India but here the issue is that after this judgement it creates a confusion in the mind some people that same sex marriage is also legalized in India. Some of the people argue that as if same sex marriage is not legalized in India then there is also no law which can prove that the same sex marriage not legalized in India. It is because it is not specifically mentioned anywhere. This paper is based on a detailed analysis of historical back ground of homosexuality in India, the land makes cases on which basis the concept of homosexuality is now legalized, Indian laws and same sex marriage, alternative to same sex marriage, and the negative and positive effect of homosexuality on society.

II. WHAT IS MARRIAGE?

** Chhatrapal Singh Shaktawat and Ashutosh Nath are students of Symbiosis Law School, Hyderabad.*

¹ W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016

The term marriage can be defined in both simple and complex way. Oxford English dictionary define marriage as “**The condition of being a husband or wife; the relation between persons married to each other; matrimony**” But now in the latest edition, the term marriage is defined as a long-term relationship partners of same sex. Marriage has different types of definition, but in most of the definition it is mentioned as a union between a male and female. As marriage is a social institution, most of the time people prefer the social definition. Due to this marriage is affected by social factors like religion, morality, culture and norms. So, these factors create disputes between different people from different communities in the society.

III. RELIGIOUS PROSPECTIVE OF MARRIAGE –

The major religion (Hinduism, Islam, Christianity, Buddhism, and Jainism) in India gives their own definition and conducts of marriage. The concept of same sex marriage is not defined by any of the faith book.

HINDU -According to Hinduism marriage is the joining of two individuals for life. it says the marriage should be formalized between two contradictory sex.

ISLAMIC-According to Islamic law marriage is social contract between 2 individuals. Here both the parties to marriage must give consent for marriage. Islam law strictly prohibited the same sex relationship and marriage. According to this law the persons who supports same sex marriage and relationship they are challenging the natural conception of god.² Therefore, it can be presumed that members of the same sex could never be married, and even if they were married, they could never consummate such a union.

CHRISTIAN-According to Christian law there is no absolute or complete definition of marriage. In bible it is mentioned that marriage is a union of man and women. Christianity does not give legal permission to same sex marriage.³ Christian law says the marriage should be done in a

² Wayne Dynes, *Encyclopaedia of Homosexuality* (New York) (1990)

³ Rory Mc Veigh & Maria-Elena D. Diaz, Voting to Ban Same-Sex Marriage: Interests, Values, and Communities, 74 AM. SOCIOLOG. REV. 891–915 (2009).

traditional way⁴. Some far-right groups even believe that homosexuals should be stoned to death due to a passage in the Old Testament⁵

IV. HISTORICAL BACKGROUND

There were some past stories in which you can see the concept of homosexuality was also present in the past also. In the Valmiki Ramayana, it is mentioned that the Rakshasa women who were kissed by Raavan, were kissing to each other which was seen by Hanuman. In accordance with the female tradition of the Devadasis, a woman dedicated rest of her life to a temple.⁶ In some parts of state of Karnataka, these devadasis were married off to Goddess Yellamma. They considered goddess Yellamma as their husband.⁷

In the **Manu smriti**, it is mentioned that if a kanya (virgin) got intimate with another kanya, then were punishing in the form of fine that is 200 panas (currency of the time). So here we can see that man smriti does not allow the same sex relationship. In that period if a stir had some sexual intercourse with other women then some brutal punishment was given to that women. For example, her 2 fingers were cut and she had to do a donkey ride throughout the village.⁸ There are no kind words for a male homosexual either. "Causing an injury to a priest, smelling wine or things that are not to be smelled, crookedness, and sexual union with a man are traditionally said to cause loss of caste."

In Arthashastra also minimal punishment is prescribed for homosexual activity. Basically, it shows that homosexual interactions were not acceptable even then.

V. LAND MARK CASES RELATED TO SAME SEX MARRIAGE IN INDIA

In the year 1994, **section 377** of Indian penal code, 1860 was challenged By **AIDS BHED BHAV VIRODHI ANDOLAN**. It was challenges because there east a refusal for the distribution of condoms in the Tihar jail. In that time the main argument was distribution of condoms in the jail

⁴ 6 Ibid

⁵ The Associated Press, Ex-Bob Jones President Apologizes for 1980 Anti-Gay Remarks, THE NEW YORK TIMES, March 23, 2015, <http://www.nytimes.com/aponline/2015/03/23/us/ap-us-rel-bob-jones-gays.html> (last visited August 29th, 2015); 18:22, Leviticus, KING JAMES BIBLE

⁶ OGAN, S. Devadasi Cult: A Sociological Analysis, Ashish Publications, 1990, New Delhi: Page 101-02.

⁷ SEETALAKSHMI, S. 'Devadasis Substitute One Evil For Another', Times of India (Bangalore), 25th January 1998.

⁸ NARRAIN, A. 'Queer. Despised Sexuality, Law and Social Change', published by 'BOOKS for CHANGE', 1st edition 2004, page 36.

spread homosexuality. After that in the year 2000, the 172th-law commission published its report in which the commission recommends to declare the section 377 of Indian penal code unconstitutional.

2001 to 2009 was the time period when an NGO named **NAZ FOUNDATION** took a case to the Delhi High court to decriminalizing homosexuality. In the year the Delhi high court gave its judgement that the **section 377 of Indian penal code is unconstitutional** as it violates **article 14, 15, 19 and 21** of a person who is from the LGBT community. The Delhi high court was on the opinion that Without dignity and privacy no one can enjoy right to life. Section 377 is violating section 14 of Indian constitution as it creates a class for the homosexual. According to article 15 of Indian constitution one should not be discriminated on the basis of sex. Here the sex not only means its biological sex. It also includes sexual orientation.

But in the year 2013, in the case of **Suresh Kumar Koushal Vs Naz Foundation**⁹ the supreme court went against the judgement of the Delhi high court. In this case the supreme court held that homosexuality is a criminal offence. Only parliament can decriminalize this. The court has no function in this. If the parliament want then it can pass a law on it. Secondly it also said that we can extent right to privacy that it creates homosexual act.

In the case of **NATIONAL LEGAL SERVICES AUTHORITY V. UNION OF INDIA**¹⁰ (which is known as NALSA case) the supreme court create some guide line to protect the rights of the transgender community. But it did not overrule the Koushal judgement.

In the case of **NAVTEJ SINGH JOHAR N. UNION OF INDIA**¹¹ which was decided on 6th September 2018, de-criminalized all consensual sex among adults in private, including homosexual sex. It was decided by 5 seniors most judge of the supreme court of India. In this case the supreme court held that the work of 2 consulting adults in private can not be criminalized as it is not an **intangible differentia** and there is not rational nexus. As per article 15 we support the judgement of Delhi High court. Here sex means both biological sex and sexual orientation. Similarly, as per article 19 every person can express its identity openly and article right to life include right to privacy.

⁹ (2014) 1 SCC 1

¹⁰ 8 (2014) 5 SCC 438.

¹¹ W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016

VI. MEANING OF THE TERM HOMOSEXUALITY

HOMOSEXUALITY



In the term of homosexuality, the term homo means same and sexuality means a person's sexual orientation. When a person is oriented towards the same sex then it is called homosexuality. It is the psychological, emotional and physical attraction towards same sex. The above definition is one general definition. The definition of homosexuality is not defined anywhere. So, some people argue that can we considered the relationship between the family members as homosexuality (FATHER -SON, BROTHER- BROTHER RELATIONSHIP)

VII. SAME SEX RELATIONSHIP AND MARRIAGE IN THE WORLD SCENARIO A COMPARATIVE STUDY

In the world scenario you can see that some of the countries are legalizing same sex marriage. (like-US).Some countries give permission to same sex relationship, but there are no laws related to marriage. So, here you can see that their countries are in the middle position. (LIKE INDIA). In the present time, there are some countries who opposes same sex marriage. you can see different concept of same sex marriage in different countries. (LIKE-IRAN)

In the following picture you can see the concept of homosexuality in different countries in the world. There are indicated by different colours.

VIII. IMPORTAN VERDICT ON HOMOSEXUALITY BY FOREIGN COURTS

In the case of **MINISTER OF HOME AFFAIRS V. FOURIE**,¹² the constitutional court of south Africa held that the laws related to marriage , which do not permit the marriage of same sex couple, violates the section9(3) of the constitution, which basically says that there should be no discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Somehow, we can relate this concept with the Indian laws.

¹²(2006) 1 SA 524 (CC).

In the case of **HALPERN V. AG OF CANADA**,¹³ the Canadian court held that not giving permission to the same sex couple for marriage is the violation of section 5(1) of the constitution. On other hand in the case of **WILKINSON V. KITZINGER**¹⁴ the High Court in England held that not giving permission to the same sex couple does not violate the European Convention on Human Rights.

IX. CONCEPT OF HOMOSEXUALITY IN DIFFERENT REGION

1) UNITED STATES

ON 26 THE JUNE 2015 theus supreme court granted same sex marriage in 13 states where it was banned. On this judgement of the supreme court there was bid debated on the concept of religious believes and equality. Case of cake

2) MIDDLE EAST AND NORTH AMERICA-

In the country like Iran, Saudi Arabia and Yamen same sex relationship is illegal the punishment of death penalty will be given for these activities. Israel recognizes same-sex marriages performed in other countries, and same-sex couples enjoy civil benefits, including residency permits for the partners of Israeli citizens.

3) SUB-SAHARAN AFRICA

Among the sub- Saharan countries south Africa is the only country which support the same sex marriage. in the other countries of Africa same sex marriage and relationships are criminal offence.

4) PACIFIC RIM-

In Australia and New Zealand, the same sex marriage is legal. Australia's parliament voted in December 2017 to change the law on marriage after nearly eight million Australians backed the move in a national referendum that fall. Same-sex marriage became legal in Taiwan in May 2019, as the legislature implemented a ruling the top court issued two years earlier. Voters had voiced their opposition to the ruling in a 2018 advisory referendum. A district in Tokyo began recognizing same-sex unions in 2015; ILGA found a year later that only 33 percent of Japanese supported same-

¹³(2003) 169 OAC 172

¹⁴, 2006 EWHC 2022 (Fam).

sex marriage. Lawmakers in Thailand and Vietnam have considered bills to legalize same-sex marriage or civil partnerships.

14 percent in the country of Indonesia and 31 percent in China and 30 percent in Malaysia support that same sex marriage should be legal. Today also there are some countries like Indonesia, Malaysia, Myanmar, and Singapore, in which death sentence is given for same sex marriage. Many protections were done by the people as there should be no discrimination on the basis of sexual orientation. So, the government recommended a penal for legalize same sex marriage.

In the country like Pakistan 30 percent of the population are in the same sex marriage. and if you look this concept in India, then now same sex relationship is legalized as per Indian law.

COMPAIRING WITH INDIA

From the above data we can see that in some country same sex marriage is legalize. In that situation some country only give permission to same sex relationship not marriage. there is also some country in which there are criminal offence. So, we can see here that India comes in the 2nd category. Before 2018 judgement of the supreme court in *NAVTEJ SINGH JOHAR N. UNION OF INDIA* fell under the 3rd category. so, it was a historical change in the Indian society.

X. INDIAN LAWS AND SAME SEX RELATIONSHIP

1) SAME SEX MARRIAGE AS PER THE PERSONAL LAW

In any of the personal law there is no provisions related to same sex marriage and relationship. All the personal laws are against the concepts of same sex marriage and all of them provide heinous punishment for this concept. We can see it in the above-mentioned paragraph. (RELIGIOUS PRUSPECTIVE OF MARRIGE)

In the country like India marriage is considered as a social institution. The religious rites are an essential part of the marriage.¹⁵ In this milieu, the most satisfactory course would be the recognition of same-sex marriages under Indian personal marriage laws. The laws related to marriage and succession are different in Christians, Muslims and Hindus personal laws.

¹⁵ B.N. Sampath, Hindu Marriage as a Samskara: A resolvable conundrum, 3(3) J. Ind. L. Inst. 319-331 (1991).

The Hindu Marriage Act that governs Hindus, Sikhs, Jains and Buddhists states that a marriage may be solemnised between any two Hindus.¹⁶

According to the Hindu marriage act 1955 the bridegroom should obtain the minimum age of 21 and the bride should obtain the age of 18 at the time of marriage.¹⁷ Similarly, the Christian marriage act says the same concept. According to Christian marriage act the marriage should be performed between a man and women. There is no provision of same sex marriage.¹⁸ Since Muslim marriages are not governed by a statute, there is no statutory definition of 'marriage', but they are normally considered to be a contract for the purpose of procreation.¹⁹

HINDU MARRIAGE ACT AND HOMOSEXUALITY

Under Hindu marriage act, 1955 section-2 defines "**who is a Hindu**". Similarly, section- 5 of Hindu marriage act 1955 defines the definition of marriage. This particular section says the marriage should be solemnized between 2 Hindus. In these 2 provisions it is not mentioned that the marriage should be solemnized between a male and female. So, Vinodha (18) and Rekha (21), 2 Hindu girls wanted to get married. They said that Vinodha is the bride and Rekha is the bright groom. They want to marry on the basis of section 2 and section 5 of the Hindu marriage act. When this case came to court, the judge referred a case **PADMA SUNDARA RAO V. STATE OF TAMIL NADU**²⁰ and held that every act should be read as a whole. Here Section 13 (2) (iv), "that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years. Here the term he, and she defines that the marriage should be solemnized between a male and female.

SPECIAL MARRIAGE ACT AND HOMOSEXUALITY-

Inter religion and inter caste marriage are solemnized under special marriage act, 1954. To avoid religion conflict, it is one of the ways to solemnized marriage. Here it is possible to do a marriage of a same sex couple, but a certain amendment is needed for this. It is because the section 4(c) of

¹⁶ 8 Hindu Marriage Act, 1955, S. 5

¹⁷ Id.

¹⁸ Christian Marriage Act, 1872, S. 60

¹⁹ 1 Siddharth Narrain & Birsha Ohdedar, *supra* note 23.

²⁰ , (2002) 3 SCC 533

the SMA needed ascertain change. It is because it says that the male should be obtained the age of 21 and the female should be obtaining the age of 18 at the time of marriage.²¹

HOMOSEXUALITY AND INDIAN CONSTITUTION(ARTICLE14,15,19,21)

In the **NAVTEJ SINGH JOHAR N. UNION OF INDIA**²²case the Hon'ble supreme court said not legalizing same sex relationship is the violation of article 14,15,19, and 21 of the Indian constitution.

ARTICLE-21

Right to privacy comes under right to life. The state can only interfere in those situations if the work of a person creates some problem to the state. If 2 consulted adults doing something in their bedroom in privacy then they are not disturbing the state. It is their right to privacy the state should not interfere in that. On this particular argument there is also some cross argument which says that it is it is against the order of nature. It is unnatural.

In that judgement **JUSTICEDIPAK MISRA** said that- the natural identity of an individual should be treated to be absolutely essential to his begin. What nature gives is natural. That is called natural within. He also quoted German thinker JOHAN WOLFGANA- who said I am what I am, take me as I am.

ARTICLE-14

As we all know article 14 talks about right to equality. Before this judgement, the LGBT communities were discriminated on the ground of equality.

So, **JUSTICEINDU MALOHOTRA** said-History owes an apology to members of the community for the delay in ensuring their rights. section 377 will, however, continue to govern non-consensual sexual acts, carnal intercourse with minors and acts of bestiality.”

ARTICLE -15

²¹ The Special Marriage Act, 1954, S. 4(c)

²² W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016

Coming to article 15 of the Indian constitution there should be no discrimination on the ground of sex. Here this particular ground also includes sexual orientation.

So, here from all these articles we can see that before the decriminalization of 377 of the Indian penal code it was violating these articles of the Indian constitution. This judgement, somehow protect the right of the LGBT community by granting same sex relationship. But here the question is right to marriage is a fundamental right. If the supreme court grant same sex relationship then why it is not granting same sex marriage. Not giving permission to the same sex couple to marry is also violating the fundamental right of the same sex couple.

SAME SEX MARRIAGE IN INDIA

Now in India same sex relationship is legal, but there are no specific laws related to same sex marriage. There are no specific laws which says that the same sex marriage not legalized. In this present time after the legal recognition of same sex relationship some people are getting marry on this particular basis that there are no specific laws relating to this concept.

Now India is in the middle stage of this concept. So, we are going step by step. We can say that we are in the middle stage. Somehow not giving permission to same sex couple is also a discrimination. As we all know India is a country of different religion. In India most of the religion are against the concept of marriage. here people argue that in Indian constitution we have right to practice religion. Some how same sex marriage violate this right. So, the court and the government are in such a situation where if they protect the right of one community then, on the other side they will violate the right of religion person. People also argues that the same sex marriage cannot fulfil the main purpose of the marriage as they cannot produce children. On this particular issue there is also another argument that the only purpose of marriage is not to produce children. In this present time if the government legally recognized the same sex marriage, they also have to codified the personal laws. If the same sex marriage will be legal in India there is a need to change some act like the Indian Succession Act, 1925, Guardians and Wards Act, 1890, Workmen's Compensation Act, 1923 and a host of other legislations relating to succession, adoption, pensions etc

ALTERNATIVE TO SAME SEX MARRIAGE IN INDIA

In several Latin American and European countries, Australia and New Zealand and in many states of united states of America an alternative to marriage is taken that is civil union or

partnership.²³United states of America accepted one of the concepts that is domiciled partnership. This concept is legalized not only by the city council but also by the private companies.²⁴There are some legal benefits like pension, adoption which is easier by accepting the concept of civil union instead of marriage.

Due to these above problems there are some alternatives which can be taken instated of marriage in India. They are 1) live in relationship 2) common law marriage 3) civil union.

LIVE IN RELATIONSHIP

The concept of live in relationship is legalized in many of the countries including India. This is one of the ways to replace same sex marriage. We can give the status of live-in- relationship to the same sex couple. We know that it cannot fulfil the position of marriage but in this present situation we can say that it can be one of the alterative.

COMMON LAW MARRIAGES

It an informal agreementfor marriage which will not provide a marriage licence. ²⁵ here the couple have to accept that they are in marital relationship. Those couple have to tell the society that they are married. Here in this case if there will be certain codification in the SMA then also it will work like a common law marriage. This concept is also legalized in different jurisdiction.

CIVIL UNION

Civil union is one of the best alternatives for same sex couple. The opposition faced by this model is less than other, at least in religious ground. Because according to the religious ground the marriage should necessarily heterosexual.

XI. NEGATIVE AND POSITIVE IMPACT ACCORDING TO INDIAN SOCIETY

NEGATIVE-

²³ O Nicola Barker, Not the Marrying Kind – A Feminist Critique of Same-Sex Marriage 48 (2012).

²⁴ Id., at 44.

²⁵²⁵Robert Black, Common Law Marriage, 2 UNIV. CINCINNATI LAW REV. 113 (1928).

Here the main argument is it has a bad impact on society. People argue the main this concept cannot satisfy the main purpose of marriage. if same sex marriage will be legalized then, there couple cannot give birth to any children. If they adopt a child then here the question is how far that child accept his/her parents in future. Same sex relation and marriage will also create some HIV virus related disease person has right to religion. According to many of the religion in India it is an anti-religion activity. If violate the fundamental right that is right to religion.

You can compare the cake case in a.s.a.p. in use when a cakeshop owner refused to make a cake for the gay couple for their anniversary. He claimed that Christian law does not support same sex marriage. so, if I will make it then it will be against my religion.

-BIBLIOGRAPHY-

BOOK REFERRED-

(I) BY A SINGLE AUTHOR:

M P JAIN INDIAN CONSTITUTIONAL LAW PAPERBACK – 4 FEB 2018

BY M.P. JAIN (AUTHOR), JUSTICE JASTI CHELAMESWAR (EDITOR),
JUSTICE DAMA SESHADRI NAIDU (EDITOR)

(II) BY TWO AUTHORS:

THE CONSTITUTIONAL LAW OF INDIA (IN ENGLISH) PAPERBACK – 2018

BY DR. J.N. PANDEY, WITH A FOREWORD BY JUSTICE H.C.P. TRIPATHI
(AUTHOR)

JOURNALS, ARTICLES

1) ARTICLE-

- AGE OF CRIMINAL RESPONSIBILITY OF JUVENILE IN INDIA VIS-A-VIS GLOBAL SCENARIO: A CRITICAL REVIEW *MUKESH YADAV, **POOJA RASTOGI (INDIAN ACAD FORENSIC MED. JULY-SEPTEMBER 2013, VOL. 35, NO. 3)

2) JOURNALS

- JUVENILE JUSTICE – A HARD LOOK HAVIRIPETH PRAKASH D.DEPARTMENT OF CRIMINOLOGY AND FORENSIC SCIENCE, KARNATAK

SCIENCE COLLEGE, DHARWAD, KARNATAK, INDIA (INTERNATIONAL
RESEARCH JOURNAL OF SOCIAL SCIENCES VOL. 2(1), 38-40, JANUARY (2013))

3)ONLINE CONTENT-

- JUVENILE DELINQUENCY – THE BABBLE OF OPINIONS & THE ELUSIVE DEFINITION (<https://www.mapsofindia.com/my-india/society/juvenile-delinquency-the-babble-of-opinions-the-elusive-definition#>)
- JUVENILE DELINQUENCY IN INDIA (<https://blog.forumias.com/article/juvenile-delinquency-in-india>)

4)CASE LAWS-

- HIRALAL MALLICK VS STATE OF BIHAR (AIR 1977 SC 2236)
- JAYA MALA V. HOME SECRETARY (AIR 1982 SC 1297)
- BHOOP RAM V. STATE OF UP (AIR 1989 SC 1329)
- UMESH CHANDRA. V. STATE OF RAJASTHAN (1982 SCR (3) 583)
- ARNIT DAS V. STATE OF BIHAR (AIR 2001 SC 3575, 2001)
- PRATAP SINGH V. STATE OF JHARKHAND [3 SCC 551 (2005)].
- RAISUL V. STATE OF UTTAR PRADESH [AIR 1977 (SC) 1822].

5)ACTS-

- THE HINDU MARRIAGE ACT-1955
- THE SPECIAL MARRIAGE ACT-

6)REPORTS-

- 172 LAW COMMISSION REPORT