

**“Homosexuality and Same Sex Marriages - Need for Legislation”**

*Deepali. M. Babar*  
*Assistant Professor,*  
*B C Thakur College of Law,*  
*New Panvel.*

**ABSTRACT****Homosexuality and Same sex Marriages- Need for a legislation**

Homosexuality according to Oxford Dictionary means the quality of being sexually attracted solely to people of one's own sex. Homosexuality was considered to be mental disorder. The practice of homosexuality existed in the world from the ancient period. However this group were discriminated, abused and their act was considered to be immoral, crime and a sin.

In India the act of homosexuality was criminalized by Sec.377 of the Indian Penal Code, 1860. However there was awareness of the fact proved through various clinical research that 'Homosexuality' is normal form of human sexual behaviour. Thereafter homosexual community as well as organisations fighting for the cause of homosexuals started campaigning for legalizing such sexual relationships. Many countries legalized homosexuality as well as same sex marriages. In India Supreme court's verdict in the case of Navtej Singh Johar v. Union of India (2018) has decriminalized Sec.377 partly, legalising homosexuality between two consenting adults. However in India the law is silent on the point that whether same sex marriages are legal or illegal and there is no law governing such marriages, adoption or inheritance, etc.

Keywords- homosexuals, same sex marriages, legalize, criminalized, sexual behaviour.

**INTRODUCTION:**

The Term 'homosexuality' was coined in the late 19<sup>th</sup> century by a German Psychologist, Karoly Maria Benkert.

The term 'homosexuality' according to Oxford Dictionary means, "The quality or characteristics of being sexually attracted solely to people of one's own sex."

According to Webster, "Homosexuals is the sexual attraction or the tendency to direct sexual desire towards another of the same sex."

Till 1970's, homosexuality was considered to be mental disorder. However through various clinical research it has been found out that homosexuality is a normal form of human sexuality.

The Research paper deals with the concept of homosexuality and same sex marriages. The object of the research paper is to analyse and understand the Socio legal aspect of

homosexuality and to find out whether there is need for special legislation governing the same sex marriages.

The research methodology employed in this study is doctrinal and includes review of literature available from Law Books, Law Journals and Internet.

#### HISTORY OF HOMOSEXUALITY IN INDIA-

The fact that homosexuality did exist in India since time immemorial is evident from its reference in various texts and sculptures on caves or temples. For e.g.

1. The Kamasutra uses the term 'tritiya-prakriti' to define men with homosexual desires and describe their practices in great detail. It describes Lesbian, bisexuals, transgender and inter sex people.
2. The Sushrita Samhita and Charaka Samhita also mentions 'homosexuality'
3. Mahabharata and Ramayana
4. Arthasashtra and Manusmriti
5. The Khajuraho temple, in Chhatarpur district, Madhya Pradesh, India consists of various scriptures which shows carvings of homosexual activity

However in our Indian Society such practice was considered to be immoral or illegal. During Mughal period also it was a penal offence. During British period in India, it was made a criminal offence U/S 377 of The Indian Penal Code, 1860.

S.377 of The Indian Penal Code,1860 states, “ 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 for fine.”

Explanation- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

This section was incorporated to make the act of sodomy, bestiality punishable. Such acts were considered crime or sin and against the fabric and ethos of our society. Thus homosexuals faced tremendous humiliation and discrimination by the society without there being any fault on their part.

In many marriages the parties conceal their sexual orientation which causes frustration, dissatisfaction and self hatred.

With the advent of medical research in this field it was found out that homosexuality is a common natural character in a person where in he will be sexually attracted to the person of same gender. It is not a sin or a crime. With the awareness of human rights and modern thinking, the LGBTQI community got the knowledge that satisfactory personal life, privacy, dignity are their basic right. They therefore started campaigning for their rights. Some persons and organizations such as Naz Foundation, The National Aids Control Organization,

Law Commission of India, Navjit Singh Johar, Menaka Guruswamy, Ritu Dalmia, etc. have helped LGBTQI community for seeking equal rights.

#### ROLE OF JUDICIARY-

The Indian Judiciary has also played a vital role in recognizing the rights of homosexuals and partly decriminalized Sec. 377 of The Indian penal Code, 1860.

1. National Legal Service Authority V. Union of India. (2014)5 SCC 438 is a landmark decisions of the Supreme Court of India, which declared transgender people to be a 'third gender' and thus gave them the right of identification of their gender. This Judgement is a major step towards gender equality.

2. Naz Foundation V. Government of NCT of Delhi, 2010 CrLJ 94

The Naz Foundation India, a non-governmental organization committed to HIV/AIDS intervention and prevention, filed a public interest litigation in the Delhi High Court challenging the constitutionality of Section 377 of the India Penal Code, which makes it illegal to engage in any "unnatural" sexual act, defined as sex other than heterosexual intercourse. The Delhi High Court dismissed the original writ petition in 2004 for lack of a cause of action. However, on civil appeal the Supreme Court of India set aside the dismissal and ordered the Delhi High Court to hear the petition on the merits.

The Delhi High Court Judgement declared Sec.377 of Indian penal Code as unconstitutional in so far, it criminalizes consensual sexual act of adults in private and thus violates Art.14, Art.15 and 21 of the Constitution.

But the Supreme Court overruled the Delhi high court Judgement holding that those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitutes different classing and the people in the later category cannot claim that Sec.377 suffers vice of arbitrariness and irrational classification. What Sec.377 does is merely to define a particular offence and prescribe the punishment for the same which can be awarded if the trial is conducted in accordance with the provision of Crpc. Thus Sec.377 does not suffer from any constitutional infirmity. Notwithstanding this Judgement, the competent legislature shall be free to consider the desirability and propriety of deleting Sec.377 of Indian Penal Code from the statute book or amend the same.

The LGBTQI community suffered a significant blow when the Supreme Court overturned the Delhi High Court Judgement.

3. In K.S.Putaswammy and Anr v. Union of India. (2017) 10 SCC 1, A nine Judge Supreme Court bench hearing petition against biometric programme Aadhar card unanimously ruled that privacy is a fundamental right.

In light of this recent Judgement, there stems a ray of hope for those fighting to legalize homosexuality in India by declaring Section 377 of the Indian Penal Code as 'unconstitutional'. What happens between two individuals of the same sex inside their own

private sphere must be protected from invasion by the government and its officials. The right to privacy judgement is one step towards attaining the above goal.

4. Navtej Singh Johar v. Union of India (2018), a petition was filed by dancer Navtej Singh Johar challenging Sec.377 of Indian Penal Code on the ground that it violated the constitutional right to privacy, freedom of expression, equality, human dignity and protection from discrimination. The court stated that criminalizing consensual sex between adults in private was violative of right to privacy. The Sexual orientation forms an inherent form of self identity and denying the same would be violative of the right to life. Thus Sec.377 of Indian Penal Code was partly decriminalized and thus allowing consensual sex between two adults irrespective of gender.

#### SAME SEX MARRIAGES-

The recent verdict of Supreme Court on Sec.377 of Indian Penal Code has given a way or removed the hurdle for same sex couples to legally enter in to consenting sexual relation. But if these couples want to enter in the tie of marriage, the law is silent. In the present Context same sex marriage per se is not illegal or legal in India. No penalties or fine is mentioned against it under any statute in India. So the Government should take an initiative to legalize such marriages.

Same Sex marriages are legalized by many countries such as Taiwan which was the first country in Asia.

In America on June 26, 2015 the United States Supreme Court issued a landmark ruling that granted same sex couples a constitutional “right to marry” ( Obergefell v. Hodges)

In Europe, same sex marriages are legalized in Netherlands, Belgium, Spain, Norway, Sweden, Portuguese, Iceland, Denmark, France, United Kingdom, Ireland, Finland, Germany, Austria.

Italy is the largest Western European Countries where same sex marriage is not legal, however its parliament approved civil unions for same couples in 2016.

In 2005, Canada became the first country in the western hemisphere to legalize same sex marriage. It was followed by Argentina, Brazil, Mexico, etc.

New Zealand and Australia also has legalized the same sex marriage.

In South and Central Asia, same sex relations are illegal in the countries such as Bangladesh, Pakistan, Iran, Saudi Arabia, Yemen.

South Africa has Legalised the same sex marriages.

The time has been changed from traditional heterogeneous marriages to a new modern families where in homosexual relations and marriages are recognized by many countries. ‘Marriage’ is considered as eternal union between the spouses who shares each others pain and pleasure. It is the institution which gives recognition to the sexual relation between the

couple with the blessings of god and elders. The marriage establishes legal rights and obligations between the parties. As the Supreme Court has taken an initiative legalizing consensual same sex relationship. The government should legalize same sex marriages by framing laws governing homosexual marriages, adoption, inheritance, etc.

As far as India is concerned the marriages are governed by the personal laws. Personal laws are applied depending upon the religion to which the parties belong.

1. Hindus- The Hindu Marriage Act, 1955
2. Muslims- The Muslim Personal Law(Shariat) Application Act, 1937
3. Christians- The Indian Christian Marriage Act, 1872
4. Parsi- The Parsi Marriage and divorce Act, 1936

The wordings in the act clearly shows that it governs only heterogeneous marriages. The provisions are made taking in to consideration gender wise character of a male and female. The present personal law therefore cannot govern homosexual marriages. Also the same sex couples is not given a right to adopt a child. They also cannot go for surrogacy in the current legal framework. So a change in law is needed in order to give LGBTQ community their matrimonial and adoption rights.

The various International Conventions like UDHR, ICCPR, ICESCR and Regional Conventions like American Convention, European Convention has given right to a person to marry and found family without any discrimination even based on gender. These Conventions requires the member states to repeal the laws criminalizing homosexuality and for enacting anti-discriminatory laws to prohibit discrimination on the ground of sexual orientation and gender equality.

A positive step with respect to matrimonial rights of LGBTQI community has already taken by the Madras High Court in Arunkumar v. The Inspector General of Registration - on 22<sup>nd</sup> April, 2019 the Madras High Court upheld the right of a transwoman and a man to register their marriage under the Hindu Marriage Act, 1955 considering the marriage to be legal.

Under Hindu Marriage Act, 1955 the term 'bride' would also means a transwoman and not just refer to someone born as a woman. The 'bride' in the Hindu Marriage Act could not have static meaning.

#### CONCLUSION-

Homosexuality is inborn and is immutable in nature. It is a normal behaviour of sexuality. The disturbing factor prevailing in the society is the discriminatory practices and acts of violence against homosexuals. It is the duty of the state to enact antidiscriminatory law prohibiting discrimination on the grounds of sexual orientation and gender identity.

Besides legal reforms of domestic laws in India, the education of LGBTQI rights and of sexual orientation must be spread through awareness.

As far as homosexual marriages are concerned, the Supreme Court has already legalised the Consensual homosexual acts of adults. It has opened the door or paved for the way for same sex marriage. Sexual life is a part of marriage. Every person has right to choose his own partner in life without any discrimination based on even gender. Many countries have legalised same sex marriages. As society changes law also needs to change. Law has to cope with society. In India law is silent on the fact that whether same sex marriages are legal or illegal. It has not dicriminized same sex marriages by imposing punishment under any statutory law. It is the time that the government should legalize same sex marriages and enact law governing their marriages, adoption, inheritances, maintenance, etc.

## REFERENCES-

### Bibliography-

- 1.The Law of Marriage – K.Padmaja
2. The Indian Penal Code- Ratanlal and Dhirajlal

### Webliography-

- 1.<https://www.jstor.org>
- 2.<https://edition.in.cnn.com>
- 3.<https://www.pewresearch.org>
- 4.<http://indiancanoon.org>
5. <https://plato.stanford.edu>
- 6.<https://www.indiatoday. In>
7. [www.legalserviceindia.com](http://www.legalserviceindia.com)
8. [www.nbi.gov](http://www.nbi.gov)
9. <https://www.Britanica.com>
10. <https://timesof india.com>
11. <https://www.lactopus.com>