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"Special Marriage Act and the Rights of LGBTQI Community"

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When section 4 of the Special Marriage Act is interpreted literally it says that it does not enable the solemnization of same-sex marriage, as the Special Marriage Act has been introduced by the legislative intent of solemnization of marriage of a male and a female. The courts are enjoined to take the words as used by the legislature and to give them the meaning which naturally implies. Mere decriminalizing the sexual relationship of homosexual does not create them a right to get married. The legislature is entitled to make reasonable classification for purposes of legislation and treat all in one class on an equal footing. Article 15 (2) prohibits the state from discriminating on the grounds of religion, race, caste, sex or place of birth. However, the article is not infringed by the impugned section as the right to marry a person of same biological gender has not been legally or otherwise recognized under the Act neither does it restrict it in any manner. This paper substantiate the reasons why it is important to make changes in the Special Marriage Act for the actual recognition of people from LGBTQ community.

Section 4 of the Special Marriage Act must be interpreted literally in a manner that does not enable the solemnization of same-sex marriage as the Special Marriage Act has been introduced by the legislative intent of solemnization of marriage of a male and a female. The courts are enjoined to take the words as used by the legislature and to give them the meaning which naturally implies. It is a settled principle of interpretation that the court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. If the result of the interpretation of a statute by this rule is not what the legislature intended, it is for the legislature to amend the statute, rather than for the courts to attempt the necessary amendment by investing plain meaning with some other than its natural meaning to produce a result which it is thought the legislature must have intended.[1]Therefore every time when the Court will have to determine the validity of the marriage it will read the plain section of the Act and the intent behind its enactment and thus non-inclusion of people of same sex would lead to failure of their actual recognition.

The court in **Keshavanand Bharti v. State of Kerala**[2] has observed that a word gets it 'colour' in the context which it used. In **Bengal Immunity Co. v. State of Bihar**[3] it has observed that it is well settled that in interpreting an enactment the Court should take into consideration the antecedent history of the legislation, its purpose and the mischief it seeks to suppress. Therefore at the juncture of passing of the Special Marriage Act in the year 1954, the legislative intent was to provide for a special form of law that bypassed personal family laws to allow inter-caste and inter-religious marriages among members of opposite gender, provided they fulfilled other conditions as required by Section 4 of the Act. But after the

[1] State of Haryana and Ors. V. Ch. Bhajan Lal and Ors., 1992, CriLJ 527.
[2] Keshavanand Bharti v. State of Kerala, (1973) 4 SCC 225.
[3] Bengal Immunity Co. v. State of Bihar, 1955 (2) SCC 674

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decriminalisation of same sex relationship it is important that this section of special marriage act must be subjected to amendment and must recognise their marriage as well.

It is further imperative to note that in the year 1954, Homosexuality was considered to be an unnatural criminal offence under Section 377 of the Indian Penal Code and therefore, it is reasonable to presume that the legislative intent was not to allow or legalize marriage among them. Relevance maybe placed on the Law Commission of India's 42nd Report (1971) [4] that observed that Indian Society by and large disapproved of homosexuality, and the disapproval was strong enough to justify it being not covered by the institution of marriage even under the realm of Special Marriage Act, 1954.

Section 4(c) of the act specifically requires the fulfilment of the following condition:

"*The male has completed the age of twenty-one years and the female the age of eighteen years"*

This provision clearly restricts marriage among people belonging to the same biological gender as the expression 'and' mandates both the requirements as to age must be fulfilled. It mandates that there has to be a male who has completed the age of twenty-one years and a female who has completed the age of eighteen years, and not otherwise.

In **Kanai Lal v. Paramnidh,**[5]this court has held that the primary rule of interpretation is that the intention of the legislature must be found in the words used by the legislature. Relevance maybe further placed on **S.A. Venkatraman v. The State**[6]in which it held that in construing the provisions of a statute it is essential for a court to give effect to the natural meaning of the word as intended by the legislature. In addition to this, it has been observed in **B. Premanand&Ors v. Mohan Koikal & Ors**[7] that any other interpretation may only be given when the plain words of a statute lead to no intelligible results or if read literally would nullify the very object of the statute. In **Patangrao Kaddam v. Prithviraj Sajirao Yadav Deshmugh**[8]**, and Ramesh Mehta v. Sanwal Chand Singhvi & Ors.**[9] it held that the court should read the statute as it is, without distorting or twisting its language.

The object of the statute is to solemnize marriage among consenting individuals of opposite genders, and therefore its provisions must be interpreted in the same context.

This exclusion has resulted in grouping it into two classes of people: one class which adheres to the regular societal and religious norms of sexual choice and the second class of those who are inclined otherwise. Although both the classes of people seek to exercise the right to choose their partner but only a class of them are allowed to do so. The act causes discrimination towards people who choose homosexuality. This arrangement prohibits one

[4] 42nd Report, Law Commission of India, 1971.
[5]Kanai Lal v. Paramnidh, 1957 AIR 907, 1958 SCR 360.
[6]S.A. Venkatraman v. The State, 1958 AIR 107, 1958 SCR 1040.
[7]B. Premanand&Ors v. Mohan Koikal&Ors, AIR 2011 SC 489.
[8]PatangraoKaddam v. Prithviraj Sajirao Yadav Deshmugh, AIR 2001 SC 387.
[9]Ramesh Mehta v. Sanwal Chand Singhvi & Ors., AIR 2004 SC 521.

class of people to have their sexual relationship of their choice by excluding them from rest of the society. This ends up oppressive for that class as it separates between the individuals and in this manner frustrates them from enjoying their sexual rights.

It was held in **National Legal Services Authority v. Union of India & Ors.**[10] that, *"each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedo*m". Therefore, it is averred that the classifications are not based on intelligible differentia and thus violate Article 14 of the Constitution, which guarantees the right to equality.

When the plain reading of the section 4 of special marriage act is done, it does give the rights to people from LGBTQ community that they deserve by the virtue of being human beings. As the right to marry a person of same biological gender has not been legally or otherwise recognized under the Act. A statute is will of the sovereign legislature which is representative of the people[11]it is the duty of the executive to act and the judiciary (in course of administration of justice), to apply the law as laid down by the legislative will. Therefore it is important for it to include people of same sex for marriage if the society actually wants to recognize their rights.

While the object of the Act is not clearly stated, the legislative intent behind the Act is easily discernible as it came into force when homosexuality and any intimate acts between same sex couples were deemed outside the order of nature. The Act was enacted in order to facilitate the marriages of those individuals who do not wish to be bound by any personal laws. Thus, it would not be in the right spirit to purposely interpret a law as unconstitutional which was intended for facilitating the will of the people.

The test laid down by this Hon'ble Court in **Bennett Coleman & Co. &Ors v. Union Of India Ors**[12], is whether the direct and immediate impact of the impugned action is on the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. Homosexuals must be accepted with the same dignity and respect as that of their contemporary and must be free to express their orientation in a socially acceptable manner and the impugned section completely bars them.

In the case of **Raj Kapoor And Ors v. State and Others**[13], it was held by this Hon'ble Court that finality and infallibility are beyond Courts which must interpret and administer the law with pragmatic realism, rather than romantic idealism or recluse extremism. And thus the literal/restrictive interpretation of Section 4(c) to disallow the homosexuals from getting married. Which makes the entire judgement of decriminalizing homosexuality as futile.

Sexuality cannot be construed purely as a physiological attribute. In its associational attributes, it links up with the human desire to be intimate with a person of one's choice.

[10] WRIT PETITION (Civ.) No. 494 of 2012.
[11]Gwalior Rayo Silk Co. v. Custodian of Forests, AIR 1990 SC 174
[12]Bennett Coleman & Co. &Ors v. Union Of India Ors, 1973 SCR (2) 757.
[13]Raj Kapoor And Ors v. State and Others, 1980 AIR 258, 1980 SCR (1)1081

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Sharing of physical intimacies is a reflection of choice. In allowing individuals to make those choices in a consensual sphere, the Constitution acknowledges that even in the most private of zones, the individual must have the ability to make essential decisions. Sexuality cannot be dis-associated from the human personality. Privacy, in these matters, is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.

The individual existence cannot be considered free if the state does not provide suitable milieu for the individuals to freely exercise their rights. This means that developing human relations is a value that is to be protected for the purposes of achieving full personhood and privacy means that there shall be no interference with actions which promote such a value. The right to privacy is innate to Article 21 and includes the idea of privacy of choice. The exercise of autonomy enables an individual to attain fulfilment, growing self-esteem and form relationships of his or her choice and fulfil all legitimate goals that he or she may set."[14]

Therefore it is important to make the changes by the legislators, after the judgement has been given in Naz Foundation Case, because reading the plain and literal meaning of section 4(c) of special Marriage Act does not recognize the rights of Homosexuals. When the sexual orientation of one is looked down and is not protected by the law, it grows the sense of insecurity among such people. Actual protection and acceptance would only take place if there is substantial law which recognizes their existence as individual. Having family, kids and home shall be a human choice irrespective of the gender. Therefore it is important that section 4 of the special marriage act is subjected to amendment for the protection of the people from LGBTQ community. It must include people of same sex for the actual recognition they deserve.

[14] Naz Foundation.