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# Homosexual Marriages: India and The World

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## ABSTRACT

Since the verdict given by the apex court in *Navtej Singh Johar vs. Union of India*, there is an uproar in the country to legalize same sex marriages. In a multi-religious country like ours the term “marriage” means different to people belonging to different sect. Hindus believe it to be a sacrament while Muslims believe it to be a contractual relationship. Similarly Parsi marriage is also known to be a Contract through a religious ceremony called “the Ashirwad” validating it. While analyzing this issue it is also pertinent note the meaning of the term “gender” and “sex”. Many countries including Netherland, Belgium, Canada, Spain, South Africa, Norway, Sweden Argentina Iceland, Denmark etc. have legalized same sex marriages; while many countries have legalized same sex marriages, India still has a long way to go. This article is aimed at critically analyzing what made their law makers to take this step and what challenges a multi-religious country like India faces when it comes to same sex marriages.

**Keywords:** Homosexual marriages, domestic partnership, adoption.

## I. INTRODUCTION

In a multi – religious country like ours marriage and religion is intertwined. When it comes to same sex marriages the meaning of the term gender and sex must also be analyzed. As stated by honorable justice Chandrachud “gender is not only about genitals”. The term “sex” could be implied to mean the physical part of the body further dividing it into male or female, but the term “gender” has to be interpreted in a broad perspective. Several examples all over the world which show rightfully that a person may be born as a male or a female but does not feel the same emotionally, mentally and psychologically. In the case *National Coalition For Gay And Lesbian Equality V. Ministry of Justice*,<sup>2</sup> the South African court held that Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. In yet another case of *Navtej Singh Johar v. UOI*<sup>3</sup> the Apex court declared section 377 of IPC as

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<sup>2</sup> (1998) (6) BCLR 726

<sup>3</sup> AIR 2018 SC 4321

unconstitutional as it violated Art 14, 15, 19 and 21 of the constitution.

Taiwan become the first Asian country to legalize same sex marriage in the year 2019 with some restrictions when it came to transnational marriages. Spain is yet another example which not only legalized same sex marriages but also gave homosexual couples equal right to adoption and assisted reproduction as that of heterosexual couples. Portuguese legalized same sex marriages but excluded right to adoption. In Iceland gay couples register themselves as domestic partners since the late 90's, today gay couples can legally adopt Children in Iceland. In Argentina same sex marriages was legalized in the year 2010 with equal rights and responsibilities to homosexual couples as that which were enjoyed by same sex couples to register as 'Domestic partners'. The term 'domestic partners' can be understood as that partnership which involves enjoying the similar mutual relationship when it comes to sharing a common domestic life and living together as that of a married couple. The use of this term is most commonly done in several countries where a couple wants to share a marital relationship but the laws of that country are such that their marriage is prohibited. In other words in the countries which doesn't allow registration of same sex marriages domestic partnership is used as a means to live together and enjoy the marital ties in spite of not being legally married. That means this arrangement comes to the rescue for gay and lesbian couples in those countries where homosexual marriages are illegal. Similarly New Zealand also legalized same sex marriages along with giving homosexual couples the right to adopt children. Homosexual marriages were also legalized in England and Wales by the 'assent' of Queen Elizabeth –II. Finland and Luxembourg also passed the bill legalizing same sex marriages. The apex court of Costa Rica ruled that it is unconstitutional to ban same sex marriages, thus legalizing homosexual marriages.

As the society develops law also amends according to the general will of the people or either according to some political superiors and learned Judges or legislators. India is now going through this transactional stage but if we don't formulate detailed norms our society will face chaos in near future.

It is pertinent to note that now India has decriminalized unnatural sexual relations, but there are a lot of challenges which India will face while legalizing same sex marriages and going hand in hand with the footing of the world.

## **II. CHALLENGES INDIA WILL FACE WHILE LEGALIZING HOMOSEXUAL MARRIAGES**

*Firstly* the various personal laws needs to be amended which are in force in India due to its multi-religious facet. *Secondly* as Indian laws recognize only binary gender it has to be decided

who is the husband and the wife in same sex marriages. As all the personal laws in India whether it be Hindu laws, Muslim Laws or Parsi laws, use the term 'husband' and 'wife' for laws relating to marriage, divorce, inheritance, adoption or child's legitimacy. Further as far as the societal setup is concerned a lot of its population will not accept same sex marriage as it goes against their ideal standards set for marriage and also goes against their religious beliefs. The question of adoption or assisted reproduction must also be resolved before hand while recognizing homosexual marriages. Apart from the social stigma which will be faced by homosexual couples there are most likely chances to face discrimination in various facets of life like employment, child's custody, Inheritance which will dwell for a long time in the country if there are lack of determined laws.

Sec 5(iii) of Hindu marriage act provides that, 'the bridegroom has completed the age of 21 [twenty-one years] and the bride, the age of 3 [eighteen years] at the time of the marriage.'<sup>4</sup> This clearly shows that there must be a Hindu male and a hindu female as parties to a valid marriage. The hindu succession act also defines the term 'agnates' and 'cognates' relating it to male and female but it difficult to determine these relations when it comes to homosexual marriages.

### **III. A GENDER NEUTRAL LAW – NEED OF THE HOUR**

Looking at the pace of development India is making not only in innovation and technology but also in its societal ideologies, there is an ardent need that before we legalize homosexual marriages the personal laws in India need to be amended and made gender neutral. Legalizing homosexual marriages would mean amending various personal laws not only in respect of marriage but also when it comes to adoption, maintenance and guardianship. Though our society is in that transitional stage but the ideologies and religious beliefs in the society are still very strong to oppose the validity of homosexual marriages, hence it is in the interest of the society that prior to legalizing homosexual marriages, personal laws must be made gender neutral.

When it comes to inheritance as well, Hindu succession Act now provides equal rights to Hindu daughters as that of a Hindu son, when we speak about Christian laws also provide equal rights to Christian daughter as of the Christian Son, whereas Muslim inheritance laws differs and doesn't grant equal rights to their daughters when it comes to Inheritance. There is an ardent need to for gender neutral laws before we legalize homosexual marriages.

In case of homosexual marriage being legalized, there are possibilities of outbreak of diseases

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<sup>4</sup> Act no. 25 of 1995.

like HIV/AIDS which needs to be considered. Hence legislature must make wise provisions to avoid such outbreaks.

#### **IV. ARGUMENTS THAT FAVOUR LEGALIZING HOMOSEXUALITY**

Right to life and personal liberty guaranteed under Article 21 of the constitution which also includes right to privacy under its ambit which in turn includes right to marry according to one's own likings and state cannot interfere with an individual's own private personal life.

Article 15 of the constitution prohibits discrimination on basis of various grounds which includes discrimination on basis of sex.

Article 17 of International Covenants on Civil and Political Rights also favour protection of privacy of individuals and non-interference by the state which states that 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'<sup>5</sup>

Article 12 of Universal Declaration of Human Rights exclusively provides that 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation'<sup>6</sup>

Though ones culture, traditions and beliefs may not give sanctions to these laws which are intended to be formulated. Furthermore the societal stigma, the family and relatives will have to face inconvenience and in most cases shame for having a homosexual couple in their contact, but laws needs to be amended according to the general will of the people, hence law needs to change with the changing needs of the society and as such there is an ardent need for such progress.

#### **V. CONCLUSION**

Many countries in the world have accepted and formulated laws relating to homosexual marriages not only legalizing them but also giving homosexual couples the right to adoption or assisted reproduction. As the status in our country relating to homosexuality is such that legislature and the judiciary are silent upon these topic but homosexual intercourse has been decriminalized. Hence if proper and determined laws are not formulated it will lead to chaos in the society in the near future.

The laws which will be formulated must determines the role of both of spouses in relationship, the question of adoption or assisted reproduction must also be settled. Laws must also

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<sup>5</sup> United Nations, Treaty Series, vol.999,p. 171c

<sup>6</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A(III)

emphasize on the role of spouses in case of maintenance and guardianship. Determined laws must be formulated for the purpose of inheritance of homosexual couples. All the differences in personal laws must be eliminated so as to formulate better laws and to get rid of gender bias. Formulating gender neutral laws is the need of the hour.

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