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Prayer for recognition of Same-Sex Marriage in India.

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ABSTRACT:

“LGBTQIA+ stands for lesbian, gay, bisexual, transgender, queer, intersex and asexual”. This LGBTQIA+ community is demanding only those rights which are available to homosexual couples or individual males and females in society. The LGBTQIA+ community have deprived of their rights for a long time due to the traditional and persisting opinions coming from the past. Marriage is the ultimate bond that gives recognition in society as well as benefits under the law. Heterosexual marriage gained tremendous importance in society from time immemorial but society is dynamic there will be continuous evolution in society at the same time new dimensions will come into the picture. Now it is the time to recognize homosexual marriage so that even they will derive the benefits under the law. Morality vs constitutional morality has always been a question when matters related to the socio-legal aspects, morality changes from individual to individual what is right for one person may not be the right for another person. Thus, homophobic opinions shouldn't be taken into consideration and constitutional morality should prevail. The courts and parliament must push the positive impact on the notion of same-sex marriage into society because even interreligious and live-in relationships were never the moral principles in our land. “Vikriti Evam Prakriti” means what generally looks unnatural is natural. So, the people of the country should understand that it is time to come out of those patriarchal and ancient opinions to consider the evolution taking place in society. This paper traces the notion of same-sex marriage, fundamental rights regarding same-sex marriage, the Special marriage act, adoption and children born out of same-sex marriage, and the vast legislation framework.

Keywords: LGBTQIA+, same-sex marriage, homosexual, homophobic, morality, constitutional morality, fundamental rights.

INTRODUCTION:

India encompasses numerous traditions, cultures, religions, castes, etc. People from different backgrounds have distinct practices, beliefs, and opinions about marriage. In the simple sense marriage between couples via love, arrange or love-come arrange gives social recognition and legal status. Marriage is a commitment towards each other for the rest of the life. Married couples owe duties and obligations towards each other these duties and obligations vary from culture to culture or religion to religion. Manu says that “I hold your hand for saubhagya that you may grow old with your husband, you are given to me by the just, the creator, the wise,

and by the learned people”¹. According to Hindu law, before 1955 marriage is a sacramental union and the wife is the better half of the husband but thereafter it is not a contract completely nor a sacramental union. A man is complete if he only marries any woman. Islam's approach towards marriage is completely different “A marriage is a contract for the legalizing the sexual intercourse, and procreation of children”. Prophet says that only those who marry will be considered as my followers. ² Even in Islam marriage is not a complete contract in the strict sense. From the Christianity point of view, “Lord made a woman from the bone of the man while he was sleeping and brought her to him”. That is why husband and wife become one flesh by leaving the parents aside³. Marriage is an act for the rest of life that is oriented towards God, it is the relationship between man and woman that involves sexual activity and birth to children. As we see above marriage and its image is defined differently but the one thing which is similar in all the above three religions is that marriage takes place between a woman and a man. Indeed, everything on this earth evolved in some or in another way similarly the notion of marriage is also evolved as time passes. Same-Sex Marriage came into the picture, where individual belonging to the same sex marries each other (Homosexual). Unlike traditional marriages between opposite sex which gained significant importance in society along with the legal rights. But same-sex marriage is legalized in some countries but countries like India and others have not yet recognized the concept of same-sex marriage. Each thing in this world has its pros and cons similarly recognition of same-sex marriage does have its pros and cons. Pros of recognition of same-sex marriage are legal protection and benefits under the law like inheritance, tax benefits, social security benefits, etc., the emotional and psychological well-being of the couples, Family recognition helps them to adopt the children or take the children into custody, recognition promotes the security and stability of the couples in the society, recognition of same-sex marriage leads to the social progress and there won't be any sort of discrimination in the society. The cons of same-sex marriage are it is completely against religious and cultural beliefs, the traditional family structure will not accept same-sex marriage, adopted or children born out with the help of technology will have to face multiple challenges in the future, to recognize same-sex marriage many acts which are in force should be amended, recognition may lead to the controversies between the political and legal. Initially, even same-sex intercourse was also considered to be an unnatural offense and those who involve in such intercourse would be punishable but later on, the supreme court held that same-sex consensual intercourse would not amount to be culpable, and to that extent, section 377 would be decriminalized it is because choosing the sex preferences and sexual autonomy is a fundamental right, and expressing their emotions willingness to involve in sexual intercourse is also a fundamental right and discrimination cannot be done because under art 15(1) the word sex means not only the gender but also sexual orientation and at last constitutional morality prevailed rather than morality⁴.

¹25, Dr. Paras Diwan, Modern Hindu Law, 63, Allahabad Law Agency, 2021.

²27, Prof. Iqbal Ali Khan, 107, Mohammedan Law, Central Law Agency, 2021.

³Bible Gateway, <https://www.biblegateway.com/passage/?search=Genesis%202&version=NIV>, (last visited May 18, 2023).

⁴ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

Review of Literature:

Nivedita Baraily in her paper opined that to achieve the goals of human rights same-sex marriage should be legalized and it should be done sooner because “justice delayed is justice denied”⁵. Akshat Agarwal in his paper opined that instead of trying to amend the special marriage act to provide marriage equality personal laws should be reformed. He also suggested that in the meantime legalizing same-sex marriage parliament should issue guidelines regarding same-sex marriage⁶. Authors opined that same-sex marriage should be legalized so that they can enjoy legal rights and because of not recognizing the marriage same-sex couples are facing several abuses and crimes⁷. Devarupa Bhattacharya opined that homosexuality is not an offense and same-sex marriage is the two individuals with their joy, cheerfulness attaining sexual pleasure and lifetime commitment towards each other through wedlock⁸. Awisurya Sudhansubala opined that the rights of people cannot be denied on the ground that the majority of other people are opposed to their rights, and courts should protect all individual’s rights equally⁹.

Fundamental rights concerning same-sex marriage:

Constitutional law does not expressly provide that the right to marriage is a fundamental right but various landmark judgments state that Marriage is a fundamental right. Article 14 declares that all persons are to be treated equally before the law¹⁰. The word “persons” in Article 14 also includes “third gender”¹¹. It is impossible to treat everyone equally before the law which is why reasonable classification can be done to achieve equality among the like people. Every classification should satisfy the following two conditions to consider as a reasonable classification, the first condition is intelligible differentia which means people of like should be treated alike and the second condition is nexus should be there between the object sought and differentia¹². If we see the objective of the Hindu marriage act, 1955 is to make the law in regards to marriage among the Hindus, Similarly, even if we look at the objective of the Special marriage act, 1954 is to provide a special form of marriage in special cases for example inter-religious marriages, further the Indian Christian marriage act, 1872 objective is to consolidate and amend the laws dealing with Christian marriages, furthermore the Foreign marriage act,

⁵ Nivedita Baraily, The Need for Legalising Same-Sex Marriage in India: A Future Possibility or a Possible Apprehension, 4, Indian Journal of Law and Legal Research, 1, 1-32, 2022.

⁶ Akshat Agarwal, Marriage Equality in India: Thinking Beyond Judicial Challenges to Secular Marriage Law, Indian Law Review, 170, 170-188, 2022.

⁷ Mishka Paswan and Jivitesh Sisodia, Same Sex Marriage: A Taboo in Indian Society, 5, International Journal of Law Management and Humanities, 349, 349-362, 2022.

⁸ Devarupa Bhattacharya, Legitimizing Same Sex Marriages in India – An Urge for Advancement, 4, International Journal of Law Management and Humanities, 1831, 1831-1837, 2021.

⁹ Awisurya Sudhansubala, Legal Recognition of Same Sex Relationship: A Comparative Study of India and U.S.A, 4, International Journal of Law Management and Humanities, 1992, 1992-2000, 2021.

¹⁰ Indian Constitution, art 14.

¹¹ National Legal Services Authority v. Union of India, AIR 2014 SC 1863.

¹² K. Thimmappa v. Chairman, Central Board of Directors, SBI, AIR 2001 SC 467.

1969 objective is to make provisions dealing with marriages of citizens of India outside the country, here the classification between the homosexual and heterosexual has no nexus with objective of the acts. Constitution guarantees the freedom of speech and expression to every citizen¹³. Love can be communicated from one person to another in the form of speech and expression. Marriage is an expression of love and commitment towards each other. Two adults choosing their life partner is exercising the fundamental rights vested under articles 19 and 21¹⁴. Decency and morality cannot stand as a restriction to recognition of same-sex marriage it is because same-sex marriage is not an obscene act or indecency behavior it is not corrupting the minds of the people who get influenced and come to the point of morality indeed same-sex marriage was never the concept in ancient times and such acts considered to be immoral but it is impossible to stick to the same moral principles forever. Society is dynamic, opinions change, and practices change as time passes therefore same-sex marriage should not be considered an immoral act. Once upon a time, even live-in relationships were against moral principles but now it is legalized. When discrepancies arise between morality and constitutional morality then constitutional morality shall prevail. Constitution guarantees the right to life¹⁵. Any person who attained the age of majority has the right to choose a life partner¹⁶. Thus, not recognizing same-sex marriage violates the fundamental rights of the LGBTQIA+ community.

Special Marriage Act, 1954:

It is argued that the terms man and woman in the act shall be changed to the term spouse so the notion of same-sex marriage will fall within the ambit of the Special marriage act. Section 4(c) of the act shall be amended where the minimum age of male and female prescribed shall be changed to lesbians 18 years, gays 21 years, and transgenders to the age of 18 or 21 years according to the path they choose¹⁷. Being a secular and uniform law special marriage act with few amendments can be the way toward the legalization of same-sex marriage.

Adoption and Children born out of same-sex marriage:

From a religious perspective and Indian ethos, the ultimate object of marriage is to reproduce children or procreation. Later on, it is decided that the “right to reproductive choice” is a fundamental right guaranteed under Art 21 of the constitution¹⁸. So even same-sex couples have the “right to reproductive choice”. Not all heterosexual couples give birth or will be able to give birth therefore the perspective of procreation after marriage had changed. Same-sex couples can give birth to children with the help of the latest technology and that technology is also quite used by heterosexual married couples. Children who are named bastards (which means they have no surname) are a burden on the government sometimes even the government

¹³ Indian Constitution, art 19(1)(a).

¹⁴ Shakti Vahini v. Union of India, (2018) 7 SCC 192.

¹⁵ Lata Singh v. State of U. P, (2006) 5 SCC 475.

¹⁶ Indian Constitution, art 21.

¹⁷ The Special Marriage Act, 1954, § 4(c), No.43, Acts of Parliament, 1954 (India).

¹⁸ Suchita Srivastava v. Chandigarh Administration, (2009), 9 SCC 1.

cannot look after every child who has left with none here homosexual couples will adopt those children. According to the guidelines released by the CARA, it makes individuals adopt children challenging if same-sex marriage is legalized even gay couples or transgenders couples can adopt the child. On the other hand, the statutory body “National Commission for Protection of Child Rights (NCPR)” argued that same-sex marriage legalization can fluid the notion of gender and adopt the child but the mother and motherhood bond will not be received by the adopted child. The adopted children will have to face difficulties throughout their life and legalizing same-sex marriage and giving them the right to adoption will lead to an experimental process that effect adversely on the growth of the adopted child.

Vast Legislation Frame Work:

Indeed, not recognizing same-sex marriage violates the fundamental rights of the LGBTQ+. Supreme Court is empowered to deal with matters if any fundamental rights have been infringed but unlike the matters related to the recognition of live-in relationships or the constitutionality of section 377 of IPC, the recognition of same-sex marriage is interlinked with the multiple laws around 160 which are in force. So, the center argued that the recognition of same-sex marriage shall vest in the hands of the parliament. Even the basic laws like CPC and CRPC should be amended so that there won't be any discrepancies among the laws which are in force.

Limitations and Future Scope of Study:

The limitations of the study are it is purely based on secondary data. Additionally, the study is focused only on the arguments given before the honorable supreme court and opinions stated in research papers. Further studies can be made with more advanced arguments in favor of the recognition of same-sex marriage. The recognition is lacking due to the lack of political will.

CONCLUSION:

When two heterosexual couples with love and commitment towards each other can marry at the registry office and get all the benefits under the law even though such marriage is not according to religious principles why not the homosexual couples can marry at the same registry office and derive the similar benefit's which are available to the homosexual couples. When a live-in relationship is against moral and religious principles though legalized in India even the presumption of marriage evolves due to long cohabitation why not same-sex marriage be legalized? Every creature in this world has come into existence with the approval of God then why should we oppose the rights of LGBTQ+ on the ground that same-sex marriage is against nature? It is wrong to state that only opposite-sex couples can love, care for each other or seek sexual pleasure, love is a form of expression that is not developed voluntarily but it is a sign of attraction towards another individual. When there is pure love and attraction and individual can seek sexual pleasure then what is the problem in legalizing same-sex marriage? The LGBTQIA+ community has only won the half battle after decriminalizing section 377 of

IPC but the other half battle is to get complete recognition even under the aspects of the marriage. It is a shame on our part to watch the humans who are not able to enjoy their fundamental rights even after almost 77 years of independence, fighting for the recognition who are born out naturally the same as us, not able to have family on their own, derive benefits under the law as we do. In the author's point of view either the supreme court should deliver the judgment as soon as possible or Parliament should instead work on the laws regarding the recognition of same-sex marriage rather than arguing that many laws should be amended. The members of the parliament must amend the laws according to the evolution of society.

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