
CRITICAL ANALYSIS OF LEGALIZATION OF SAME-SEX MARRIAGES IN INDIA

ABSTRACT

Same Sex Marriage is considered a social taboo in India, and homosexuals in India are given a very niche status. It is now that a change has to be brought and one way to do that is legalizing same sex marriages. This research paper has analyzed the legal position of same sex marriage in India. This research paper deals with a critical analysis of the reasoning behind non recognition of same sex marriages in India and indicates flaws in the reasoning. 2 pieces of existing literature have been read and analyzed by the author in order to arrive at a conclusive opinion. The aim of this paper is to analyse the legal state of same sex marriage. As a result of the research, the author has opined that same sex marriages needs to be legalized in India and that the conventional concept of marriage needs to change. The opinion of the author is based on the philosophy given by various Analytical School of Thought philosophers and has criticized natural law philosophers. The author has backed up his claims with these philosophies.

Keywords: Same Sex Marriage, Analytical School of Thought, Philosophy, Legalization

Introduction

Same sex marriage has long been seen as a taboo in India owing to certain religious and societal norms, which are based on the natural law theory which is severely flawed. The theory given by Thomas Aquinas specifically says that the purpose of marriage is to procreate however it is not true. The purpose of marriage is not just to procreate or have an offspring, but it is to live with the person of your liking, to get into a committed, legal relationship with that particular person. To deny a person of their right to marry clearly violates their Fundamental right of Equality and equal protection of law guaranteed under Article 14¹ of the Constitution of India. This will not only create a social gap between the homosexuals and the heterosexuals, but also will discriminate them, which is a clear violation of Article 15² of the Constitution of India.. The Indian legislature had recently decriminalized section 377³ of Indian Penal Code, 1860, and by not allowing homosexual marriages, the very crux behind the decriminalization is being defeated. Aristotle in his Theory of Justice, stressed upon equality of beings and stated that justice requires giving equal things to equal persons, and that it forms the basis of any legal system. By not legalizing same sex marriages, the Indian legal system is in contrast with itself. This not only violates article 14 of the citizens, but also Article 21⁴, which is the right to life and personal liberty. Furthermore, criminalizing homosexual marriages is outright arbitrary in itself. The main body of the paper will elaborate on these topics and give the readers a wider understanding of why the claims is being made.

Position in India

The Indian legislature has been silent about the recognition of Same Sex Marriages and even though drastic steps have been taken in order to improve the status of the LGBTQ+ community, it is a long way from treating them as equal persons.

By violating Article 14 and 15 of the Constitution of India, the Indian Legal System has failed to understand what the rights given under these articles actually mean. The legal system has failed to recognize the rights of homosexuals and severely discriminates them from heterosexuals in terms of marriage rights.

¹ India Const. Art. 14

² India Const. Art. 15

³ Indian Penal Code, 1860, No. 45, Acts of Parliaments 1860, India

⁴ India Const. Art. 21

This is also a violation of Article 21 which gives the citizens the right to liberty. This article also covers the right to privacy under it after the Justice K S Puttaswamy⁵ case, which stated that Right to Privacy is a part of Right guaranteed under Article 21. This right prevents the state from interfering with private activities of a person. And the legal system is violating this particular aspect by involving itself with the personal choice of a person to marry another person of their liking. Further, the right to privacy also includes a person's choice of whom to sexual orientation and the choice of whom to marry.

The natural law theorist Thomas Aquinas believes that the purpose of marriage is to procreate and to reproduce heirs. If this was the case then the heterosexual couples who are infertile or impotent or are simply unable to bear a child shall also be not allowed to marry. However, the Indian legislature is silent about these scenarios. In contrast to this theory, the famous natural law theorist Aristotle has also described the concept of equality. Without equality, the whole concept of Justice becomes flawed. And if his theory was to be applied in this particular scenario, then homosexual couples shall be allowed to marry and a legal recognition shall be given to them.

It shall be noted that India does not recognize the Union of a same sex couple and the Court has recently reiterated its position. In the case of *Abhijit Iyer Mitra v. Union of India*⁶, The center had argued that marriage is only permissible between a biological man and a biological woman, which shows that the center still believes in the traditional concept of marriage, and that the purpose is to procreate. The center also argued that same sex marriages shall not be allowed as it goes against the societal mores and values. The society does not take into account the plight faced by the homosexual couples and thus basing an argument on the societal norms is very vague.

The Need To Recognize Same-Sex Marriage

We often say that the only thing that is constant is change, and we know that the world, its ideologies, and its understanding of society is very dynamic in nature, but the legislature is ignorant about this change of ideology. Over the years, the concept of marriage has changed and thus the laws regulating marriage also need to change. Homosexual marriages need to be legalized and shall be given appropriate status.

⁵ K. S. Puttaswamy and Anr. v. Union of India 2017 10 SCC 1

⁶ *Abhijit Iyer Mitra v. Union of India* 2021

Although, this makes us wonder why is there even a need to recognize same sex civil unions?

The answer is that Male-to-male intercourse is frequent, according to a recent United Nations Population Fund (UNFPA) survey on sexual habits in rural India. In actuality, a higher proportion of men in the research admitted to having sex with other guys rather than sex with sex workers. Both married and single men could agree on this. 3 percent of married males and almost 10% of single men reported having sex with another man in the previous year. With comments on sexual practices from around 3,000 respondents and in-depth interviews on personal habits from 250 people, the poll encompassed 50 villages in five districts of five states. Data points to a reality that the government is either unable or unwilling to address. Love is love⁷. The dangerously high divorce rate is the actual danger to marriage. Marriage is another form of two people coming together legally. Non-religious people prefer to get married in a registrar rather than a church. Marriage demonstrates your strongest devotion to one another. Lesbians and gay men share the same basic needs and aspirations as heterosexual people. I'm unable to see how this relates to God. In this case, marriage is a legal union rather than a religious union. The best way to demonstrate your love and dedication to your partner is to be married, thus there is no reason why gay people should be denied this privilege. Who are we to sit and make judgments? Same-sex unions need to be permitted. It is up to individuals to abstain if gay relationships conflict with their religious beliefs. People who do not share their religious beliefs ought to have the freedom to decide for themselves on this and other matters. Lesbians and gay men share the same basic needs and aspirations as heterosexual people. It is absurd to claim that same-sex unions should not be permitted because they "do not produce children." Should older heterosexual couples who are unable to have children be prohibited from getting married? It is a wonderful thing to celebrate when two people share a deep love for one another and desire to bring their fates together. It doesn't matter if it's referred to as a "marriage" or a "life pact." A person's support or opposition to same-sex unions is a question of personal belief and morality; the government has no business interfering in such matters. Same-sex unions do no harm to anyone. Because human rights are universal, it is forbidden to use prevalent cultural and social norms to go around or restrict fundamental or constitutional rights. Many of my country's progressive laws would not have been passed if we accepted the government's arguments in the Delhi High Court case. For instance, many men still believe that they have the right to abuse their spouses according to custom or that they should receive

⁷ Ruth Vanita, *Love's Rite: Same-Sex Marriage in India and the West*, Pg 49, 2005.

a sizable dowry just because they were born with a penis. If we give in to these cultural beliefs, then there is nothing to turn round the legislations that we have made to stop violence against women or dowry and dowry related deaths.

Conclusion

From the above content, it can be concluded that it has been a long time that the union of same sex couples has not been recognized and that it shall be given a legal status now. The philosophy behind the traditional concept of marriage has changed over the years and to keep up with this change, the laws need to be changed too. I am of the opinion that homosexuality is not an offence but more of a personal choice to be happy. Marriage is not just a legal status given to couples, but it is more of a commitment and a basic right of every person which needs to be guaranteed to them. We are in an era where we never question heterosexual marriages but we criticize homosexual couples. It is time that this changes and that India becomes the 31st nation in the world to allow same sex unions to get married.