

## Legal Recognition: The First Step to Acceptance

Simran Sanjay Rane<sup>1,\*</sup>

### Abstract

*The proper functioning of any society is based on the rules and regulations that govern its member and the activities that are being carried out in it. Thus law can be said to be the strong base on which a society is built. Law that is being followed today has undergone numerous changes owing to the changes in the society. Today we have many laws, but all on them will continue to have enforceability so far it is in consonance with the supreme law of the country, i.e. The Constitution of India. The Constitution of India provides some basic right to every human being. There is no discrimination as to who can avail these rights; it is available to each and every human being. Thus the members of the LGBTQ community even though form only a miniscule fraction of the entire population is entitled to the fundamental rights as they are available to other individuals. These fundamental rights also include the right to marry, divorce, maintenance etc.... Thus this research paper focuses on understanding homosexuals and homosexuality and also understanding how current laws fail to provide for rights of the LGBTQ+ community. Where there is a problem there ought to be a solution, the papers also aims to provide probable solution to the lacunae in existing laws.*

**Keywords:** LGBTQ, marriage, Hindu Marriage Act 1955, Special Marriage Act 1954, Uniform Civil Code, divorce, maintenance

### INTRODUCTION

Greek Philosopher Aristotle once said that “man is a social animal,” it means that a person cannot live in isolation from some community and must participate in and share the life of the society [1]. Thus, a person will have to stand by certain norms and principles in order to be able continue to live in the society. Does this mean that societal norms and principle are more important than individual interest and well-being. For many years, society has been discriminating against anything that does not meet the preconceived set of standards. Over the past years, we have overcome wide range of discrimination on the basis of color, gender, caste, and so on.

Sexual orientation and preferences have emerged as new grounds for discrimination. People with different sexual orientations and preferences are referred to as homosexuals. In the past few years, there has been a rise in cases of discrimination on the basis of homosexuality. To understand why such decimation is happening, we first need to understand the concept of homosexuality, who is regarded as homosexual, and whether homosexuality and homosexual have always been existed or if it is something that has emerged recently.

#### \*Author for Correspondence

Simran Sanjay Rane  
E-mail: [simranrane2912@gmail.com](mailto:simranrane2912@gmail.com)

<sup>1</sup>Assistant Professor, Faculty of Law, Children Welfare Centre's College of Law, Malad, Mumbai, Maharashtra, India

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Homosexuality refers to same sex relationship, homosexuals refer to those who are romantically attracted and indulge in sexual relationship with members of the same gender. Today, homosexuals

have been classified as Lesbians, Gays, Bisexuals, Transgender and Queer, together they are referred to as the members of the LGBTQ community.

Now the question to be addressed is, whether homosexuals have always existed. The answer to the question would be yes, from the ancient Indian text, paintings, carvings on temple wall, and so on. All indicate that homosexual relationships have existed since the ancient Vedic period.

Ramayana and Mahabharata are some of the most well-known and widely accepted text. In both these text, at some place or the other, there are reference as to the existence of homosexual relationship. In Valmiki's Ramayana, there is an instance where Hanuman reports to lord Rama of seeing rakshasa women embracing and kissing each other. In Mahabharata also there are several instances that indicate the existence of Homosexuality. One of the most famous transgender characters in Hindu epics is Shikhandi also known as Shikhandini. Shikhandini was born as women but was brought up as a man and was also married off to a woman. Shikhandini's was bestowed manhood only at night and thus was referred to as neither a woman nor a man. Despite of being a transgender, Shikhandi was given an opportunity by Lord Krishna himself to fight as warrior besides Pandavas against the Kauravas in the great war of Mahabharata.

Thus, there are several references in ancient Indian text, which indicate existence of homosexuality, but nowhere are they regarded to be invalid or for that matter neither are they said to be valid. When the same question was asked to renowned author Mr. Devdutt Pattanaik, he said "The idea of judgment, control or commandment is alien to Hindu thought. So, LGBT being seen as positive or negative springs from our desire to judge, which is not Hindu [2]."

Thus, ancient Hindu text cannot be referred either in support or against homosexuality. But the fact that it existed during such ancient time as well can be used to conclude that there is nothing unnatural about it.

The ancient text, Vedas, shrutis, smritis, and so forth, was meant to provide a guideline to an individual in different stages of his life. These texts are of not much relevance today and thus while deciding whether something is valid or invalid should be decided on the basis of our modern-day guide; that is, the Constitution of India.

It was after a long journey that homosexual relationship became valid in India. It started with the case filed by Naz foundation [3] in the year 2001 against the government of NCT of Delhi in the Delhi High Court, it was a writ petition filed to decide upon the constitutionality of Section 377 of the Indian Penal Code, 1860. The Delhi High Court after considering the arguments of both the parties held that section 377 of Indian Penal Court is violative of Articles 14, 19, and 21 to the extent it criminalizes consensual sexual intercourse between adults whether they may be homosexuals or heterosexuals.

The decision of Delhi High Court in Naz foundation case was challenged in Suresh Koushal Kumar and anr Vs Naz Foundation [4], in the Supreme Court of India. The appellate argued that Section 377 did not violate any of the articles as it is gender neutral and that the High Court had exceeded its authority in deciding the morality of the section as it is the function of the parliament to do so. The arguments put forward by the appellant were upheld by the two-judge bench of the Supreme Court, stating that decision of the High Court was to a greater extent influenced by foreign judgments and it was futile attempt to protect the right of the LGBTQ community which forms only miniscule fraction of the population.

After this decision in 2016, a group of people from different profession belonging to the LGBTQ community filed a writ petition to the Supreme Court stating that due to the continuance of section 377 they were continuously mistreated and this was causing them psychological distress. The Navtej Singh

Johar and ors VS Union of India [5] case was heard before the five-judge bench of the Supreme Court. The Supreme Court after considering the facts of the case, overruled the decision of the two Judge Bench of the Supreme Court in Suresh Kumar Koushal Case and held that section 377 is in fact violative of Articles 14, 15, 19, and 21 of the Constitution of India and thus the provisions criminalizing consensual sexual intercourse between adults must be abolished, and remaining part of the section protecting the interest of the children and women should remain in force.

The Navtej Singh Johar case was decided by the Supreme Court on 6th September 2018; thus, it took 18 years to provide official recognition to the members of the LGBTQ community. As it is said Rome was not built in a day, the same way the fight for the rights of the members of LGBTQ community is far from over.

One of the most basic rights provided in the Constitution of India is the right to life and liberty. This right is provided under Article 21, while explaining the right to life it is said that it does not mean continuance of a person's animal existence but it means availing fullest opportunity to develop one's personality and potential to the highest level possible in the existing stage of our civilization [6]. Thus, mere recognition of Homosexuals is not enough there are several other rights, which are freely available to heterosexuals but are still not available to them. Let us discuss what are these rights are and how can they be made available to the members of the LGBTQ community.

## **MARRIAGE**

In India Marriage is considered to be a most important ceremony which every male and female are bound to undergo at some point of time. There are two factors which support this compulsion of marriage.

### **Social Factors**

Man has since the beginning of time lived in a society, as it is very well established that man is able to prosper and is able to live a stable life while living in a society. A society is nothing but group of people cordially living together, thus society is created when smaller group of people come together thus forming a society. Family is the smallest unit of a society; a society prospers and increases in size with expansion of its smallest unit. Marriage is referred to as a union not only between two people but also between two existing society, it lays down the foundation to form a new family. Marriage has historical, cultural, and social significance [7]. Strong stable marriages are the best way to ensure that children become responsible members of society. Thus, marriage ultimately contributes to be overall welfare of the society.

### **Religious Factors**

Hindu philosophy provides for four stages of life which every man is expected to go through, these stages are also called as "Ashramas." The four stages are Brahmacharya (student), Grihastha (householder), Vanaprastha (forest Walker/forest dweller) and Sannyasa (renunciate). The Grihastha ashrama is stage of life where a man is expected to get married and form a family and provide for the members accordingly. Marriage is often referred to a sacrosanct, an indissoluble and eternal union. Among Hindus marriage is a necessary sanskar, as a man is incomplete without his wife and it is a wife who completes him [8]. A man cannot perform any of the yagnas (sacrifices) without his wife. Thus, wife is often referred to as "Ardhangini," "Dharmapatni," "Sahadharmini."

The institution of marriage is necessitated both by social and religious factors. Thus, everyone who forms part of the society have the right and duty to get married. Homosexuals are also part of this society; they also work for the upliftment of the society and thus they must also be able to get married and form their own family. Today, marriage of a person is governed by several personal laws like Hindu marriage act, Muslim Marriage act, Special Marriage act 1954, and so forth. From the language used in these acts, it is quite evident that they govern marriage between heterosexuals, homosexual marriages are not explicitly excluded but neither are they included and thus their validity can be easily challenged. Thus, there is an urgent need for these acts to be amended to for a new law to be enacted.

An existing act cannot be amended unless it is in any way violative of fundamental rights of a citizen. In Navtej Singh Johar case the Supreme Court held that Article 14, equality before law implies that all laws are equally applicable to all, following this principle a portion of Section 377 of Indian penal Code was abolished. Civil law is not an exception to this principle and thus any of the personal laws or special marriage act can be proposed to be amended on the ground of it being violative of article 14. Thus, the provision concerning Homosexual marriages can be provided under either the personal laws or the Special marriage act by making necessary amendments.

### **HINDU MARRIAGE ACT, 1955**

There are different personal laws for every religion. Hindu Marriage Act provides for solemnization of marriage between a Hindu male and Female. The act contains provisions which provide for the ceremonies of marriage, registration of marriage, void and voidable marriage, and grounds of divorce. An attempt can be made to amend Hindu marriage act so as to provide for Hindu Homosexual marriage. The act is to a greater extent gender neutral but there are certain provisions where words like “husband and wife,” “bride and bridegroom” indicate that it is applicable to heterosexual couples only. Thus, by amending the terms used in the act, which expressly indicate that the act is intended to be applicable to heterosexuals the ambit of the act can be extended to cover Homosexuals as well. But amending personal laws is not that simple as the authority to amend it not only lies with the parliament but to several religious sects as well. These sects have strong religious belief and making such major amendments in their personal laws would be met by a strong opposition which would ultimately affect the peace in the society. Another impediment that could be faced is that if both the parties are not belonging to the same religion then they cannot marry under any of the personal unless anyone of them converts to the religion of the other. Thus, amendment of any of the personal laws would not be enough, the Special Marriage Act which provides for intercaste marriage will also have to be amended.

### **SPECIAL MARRIAGE ACT, 1954**

The object of the act is to provide for special forms of marriage; that is, the marriage not covered under the personal laws. Up until now the marriage not covered by personal laws referred only to inter – caste heterosexual marriages, this intension is also expressed from the use of word like “husband and wife,” “bride,” and bridegroom.” The act is more suitable to provide for Homosexual marriage as the object itself states that it is to provide for special form of marriages, and in the current scenario marriage between same sex individuals can be included within the meaning of special form of marriage. By making minor changes the object can be achieved. At the same time, it won’t be faced by any opposition from various religious sects as the act is civil law and parliament has complete authority to amend it.

### **CIVIL UNION**

Another option available to provide for homosexual marriage is through a concept called as civil union. This concept has been actively adopted by several countries like the United States of America, France, Australia, and so forth. To provide for civil union a separate act would have to be enacted, which will provide for appropriate procedure and consequences. Since this has nothing to do with religion the question of opposition would not arise and thus it would be a much simpler and convenient approach. The only precondition for the success of such union would be that all the rights such as succession, survival benefits, and so on, that flow to a heterosexual couple as a result of marriage should be made available to homosexual couples as well. If such rights are not made available, then, it would be nothing but a mere formality and would itself amount to discrimination and the civil union would have a lower status than marriage. Another point to be taken into consideration is that if such rights are made available to the homosexual couples as a result of the civil union, then appropriate amendments will also have to be made to the concerned acts enforcing such rights.

### **UNIFORM CIVIL CODE**

Part IV of the Constitution of India Provide for Directive Principles of State Policies (DPSP). The Directive Principles were promises made by the Constitution of India to its people. The object of the

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promises was to provide for a welfare state. The aim of Welfare State is the attainment of substantial degree of social, economic, and political equalities; to provide the means whereby all its members can reach minimum standard of economic security, civilized living, capacity to secure social status and culture to keep good health. One such promise is to provide for a Uniform Civil Code (UCC). This promise is provided under Article 44, it states that "The state shall endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India." Thus, Uniform Civil Code would be an epitome of equality, as it means that there would be single legislation applicable to all irrespective of their race, caste, color, gender, sexual preference, or orientation. Even though this appears to be the most feasible option but at the same time it is the most difficult to achieve, as even after 73 years of independence no steps could be taken towards.

## **DIVORCE**

Since ancient times divorce is considered to be a sin, as the institution of marriage was considered to be so pure and sacred that any act with the aim to break it was considered to be morally wrong. In Hinduism, marriage was referred to as a Sacrosanct and an indissoluble union but despite of such strong belief the concept of divorce was introduced in Hindu marriage act. Over the period of time, the society evolved, and this sacred or indissoluble union can be dissolved in certain circumstances. But by including divorce under current laws does not mean that it is in anyway favored as it is granted only for grave reasons. In Naveen Kolhi VS. Neelu Kohli [9], the Supreme Court Stated that "By refusing to sever that tie the law in such cases do not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties."

The divorce provisions in Hindu Marriage act were guided by the three theories of divorce. These theories are:

### **Fault/Guilt Theory of Divorce**

This theory provides that when any one of the spouses has committed a matrimonial offence, then the innocent spouse shall have the right to have the union dissolved. Matrimonial offences include adultery, desertion, cruelty, and so forth.

### **Consent Theory of Divorce**

This theory provides for dissolution of marriage with the mutual consent of both the parties. The underlying rationale is that since two persons can marry by their free will, they should also be allowed to move out of the relationship of their own free will [10] But this theory was opposed by many as it would lead to hasty divorce, but even this problem is countered as many safeguards have been implemented before divorce can be granted by mutual consent.

### **Irretrievable Breakdown of Marriage**

When the spouses are unable to live with each other such that the relation of the spouses has been destroyed to such extent that they cannot be expected to live together cordially; in such case, their healthy relationship is irretrievable and it would be better for both of them for their marriage to be dissolved.

The concept of divorce is supported from social point of view. As discussed, earlier marriage is the starting point of family, which is the smallest unit of the society and it is with the growth of these units that the society flourishes. Since the smallest unit is so important any disturbance in it would have an impact on the society as well. If spouses who do not like each other due to any reasons are forced to live with each other, it would affect their state of mind and thereby affect their functionality in the society which would ultimately affect the society.

Thus, the concept of divorce is supported from a religious as well as a social point of view. The purpose of providing concrete divorce laws is to protect individuals from mental and physical distress arising not only from pre-divorce circumstances but also from certain post-divorce circumstances that

may arise. Post-divorce circumstances refer to the custody of children, maintenance, division of property, and so on. There needs to be a proper codified law for this matter, as in the absence of such laws, the matters could not be decided accurately and may go on for an indefinite period of time.

The question of divorce can arise only after proper marriage laws have been enacted, assuming that appropriate marriage laws are provided for homosexuals. The aforementioned situations can arise even with respect to homosexual couples. Since, after considering the changing societal circumstances, the provision of divorce was included under various personal laws, the same reasons can be relied on provide for divorce between homosexual couples.

### **Maintenance**

The number of working or self-employed earning women in India as compared with working men is quite low. Many married women in India are housewives, either by choice, lack of educational qualification, or for any other reason. Thus, they are dependent on the income of their husband to provide for themselves and their family. Thus, in the event of divorce, the question of how the housewives would be able to provide for their basic means of livelihood would arise. Keeping this in mind, the maintenance provision would be the most apt solution for this problem.

Over the period of time, direct contribution of women towards the smooth functioning and upliftment of society has considerably increased. In certain circumstance it is the wife who provides for the family rather than the husbands, the reason may be that the husband may choose not to work and support his wife or due to some disability is unable to work. Thus a husband who cannot provide for himself can claim maintenance from his wife.

On analysis of the maintenance provisions, it is quite clear that it is gender neutral is available to both males and females. Thus, by applying this provision it can be concluded that there is no reason why the option of maintenance should not be made available to a Homosexual spouse who for any reason is unable to provide for himself or herself.

The family unity is important for many reasons. One such reason is that in every family, there is a head who provides for the basic needs of the family. By doing so, the burden is not on the society but on the head of the family, who provides his labour for the proper functioning of the society and, in return, receives monetary benefits to bear the cost of the means of livelihood for his family. Thus, in the event that the family breaks up and the members are unable to provide for themselves, it is necessary for the head to continue to provide for them; otherwise, the responsibility would be on society and its long list of burdens.

Thus, homosexuals or heterosexuals' maintenance is necessary for the proper functioning of individuals as well as the society.

### **CONCLUSION**

A society without discrimination can never flourish. Discrimination creates a rift among the citizens of the society, which ultimately hampers its progress. Ever since the decriminalization of Section 377 in the Navtej Singh Johar case, no further steps have been taken to provide for the marriage, divorce, maintenance, and so on, of members belonging to the LGBTQ community. The people belonging to this community are humans and contribute to the development of society to the same extent as any other citizen. The task of providing for such provisions is difficult but not impossible since multiple options are available, as discussed above. Such change is the need of the time, as it will further contribute to the upliftment of society.

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