

Legalising Same Sex Unions – Need for Reform

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Abstract

This paper argues for the decriminalisation of homosexuality in India. The perspective taken in this paper as regards LGBT rights is the rights-based perspective. The LGBT community internationally and especially in India is a victimised and harassed minority. In jurisdictions like UK and USA same sex unions have been recognised and this paper argues for a similar move in India. The argument stems from the fact that (according to information given to the Supreme Court) there are about 4.5 million homosexual persons in India and their rights need to be protected. The first step towards this end is the decriminalization of homosexuality and the repeal of Section 377 of the Indian Penal Code, 1860. This section based on the Judeo-Christian concept of sexuality and influenced by Victorian morality finds no place in the rights-based paradigm that is internationally emerging with respect to LGBT rights. The second step is the recognition and granting of legitimacy to same sex unions. The author proposes that a separate law be enacted to legitimacy and recognition of same sex unions and the conferment of rights that come along with legal recognition of a same sex tie.

The foremost advantage of this approach is that decriminalisation would directly bring down the spread of HIV-AIDS and since MSM would become a legitimate group, AIDS Awareness and other campaigns to contain this epidemic would continue without hurdles that they have hitherto faced. The second advantage is that this is in keeping with the movement towards the rights based paradigm as regards LGBT rights. Exploitation, extortion and police harassment would come to an automatic end and the human rights of this extremely vulnerable group would be better protected.

KEYWORDS: Homosexuality, Unnatural Offences, HIV, LGBT.

Introduction

India and the West, have an ocean of differences both in history, culture and living. Hence exporting any western concept and accepting it, is a herculean task for the Indian society. Homosexuality, for many Indians is a foreign phenomenon, the norm that sex solely is for procreation and must always be heterosexual; in the Indian context, is a myth. If we study the history of India we find abundant references of homosexuality; it has been dealt in a detailed fashion in the essay subsequently. In the present India, it is true that we have a long way to go in order to recognise and accept the concept of homosexuality. In India like everything marriage is also intrinsically tied to religion, both in the public psyche and in the eyes of the law.

Marriage is a fundamental liberty right of individuals, it involves an equality element and facet of dignity. The dispute in hand is that India restricts one faction of society

to enjoy such liberty. The restriction is on the basis of sexual orientation, the individuals are not allowed to express themselves sexually which is natural to them, therefore, future of the same-sex relationship is out of question. The existing law in India confers all adults, the right to choose whom to marry, this right is fundamental for due process of law. Thus, even though a faction of society is against inter-religion marriages, the law allows it and also protects the couple. No group of people may be fenced out of this right without an exceedingly strong state justification. However, homosexuality and same-sex marriage is considered as a threat to the Indian society and therefore prohibited. The recent High Court decision to decriminalize homosexuality thereby repealing of Section 377 of Indian Penal Code gave the momentum that the movement for the rights of LGBT community needed. Thereafter, the Supreme Court of India reversed the High Court decision, this acted as fuel to the fire and members of LGBT community and their allies came down to the streets to protest against the decision.

“We, the people of India having solemnly resolved to constitute India into a [SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the [unity and integrity of the Nation];

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.”

The preamble guarantees its citizens the four pillars of the constitution, namely Justice, Liberty, Equality and Fraternity. It is for all the citizens and it does not discriminate on the basis of sexual orientation. The members of LGBT community are deprived of their basic rights guaranteed by the constitution. The out dated law, Section 377 of Indian Penal Code should be repealed. The foremost advantage of this approach is that decriminalisation would directly bring down the spread of HIV-AIDS and since MSM would become a legitimate group, AIDS Awareness and other campaigns to contain this epidemic would continue without hurdles that they have hitherto faced. The second advantage is that this is in keeping with the movement towards the rights based paradigm as regards LGBT rights. Exploitation, extortion and police harassment would come to an automatic end and the human rights of this extremely vulnerable group would be better protected. The final step to include this vulnerable faction of society is to legalize their marriage. There is no reason why homosexual couples should be treated any different from heterosexual ones. The constitution guarantees equal rights for all; and *all* includes homosexuals too. The main barrier to mainstream adoption of same sex marriages in India is cultural acceptance rather than legalization which will take a long time but legalization is a good start. A historic move such as this will also herald India as a modern and progressive nation as other countries that have made same-sex marriage a federal right.

Objectives

The objective of this research paper is to argue for the legalization of same sex unions in India. The paper sets out to argue that the very concept of homosexuality and its consequent criminalization were based on the Judeo-Christian notions of morality. The paper has as its objective to analyse this historical facet of the debate as to whether same-sex unions should be allowed. The paper also has as its aim to state clearly the Constitutional framework, the framework of personal and statutory law that govern the field of matrimony and its hindrances to homosexual unions. A historical perspective is given as to argue how Section 377 of the Indian Penal Code, 1860 and the concept of "unnatural offences" were supplanted into India by the British lawmakers. Another clear aim of this paper, in the course of the argument for legalization of same-sex unions, is to present a comparative analysis of the legal framework of jurisdictions where these kinds of unions are allowed as legal marital ties. Last but not the least, one another aim is to kindle curiosity by suggesting ways and means by which legalization of same-sex unions can be made possible in India.

A Note on Methodology

In light of the above objectives, the author has adopted a doctrinal method and has attempted to set forth the law with regard to same sex unions. The author has used the historical perspective to bring out the legal framework and has attempted to analyse holistically the black letter law dealing with homosexuality, the crime and same sex unions, the desired reality. A comparative and critical analysis of laws in various jurisdictions, a study of the relevant judicial pronouncements and a re look from the historical perspective to the contemporary societal needs and demands are attempted. Statutes and judgments form primary sources for the analysis. The Constitution, the Indian Penal Code, 1860 (Section 377), Matrimonial Laws of India and laws of different jurisdictions where homosexual and lesbian unions are permitted form the basis of the study which is a critical and comparative research work.

India and Homosexuality

India as a country has flourished in resources, knowledge and power, it continues to be one the most multi-religious, multi—cultural, multi-regional country. India being the golden bird has been a victim of many invasions and with each invasion one new layer of fabric has covered the magnanimous land. Invasion of Aryans into the ancient India has gifted us the curse of caste system which still has its strong foot hold in our country's soil and also many boons like Buddhism, Jainism, Arthashastra, and Sanskrit. Muslim invaders left India with pardah system, slavery but also Urdu, Calligraphy, and exquisite architectures like Taj Mahal. In the same way the British invaders as well had a role to play which altered the course of history of India. It is fair to say that like every invader, the British too hammered and moulded the collective idea of 'good and bad' for the people of India, as per their desired shape. The countless cataclysms ensued countless subjugation of the values naturally attached to the people and it gradually altered the moral conscience of India as a whole.

The concept of homosexuality can be traced back to the ancient India as it is depicted in Vedas and many sculptures across India. Excerpts from 'Kamasutra' also depicts

acts of homosexuality, acts of sodomy were inscribed as part of ‘tantric rituals’¹, arts in many forms show homosexuality in the temples, it is a matter of record that harems of Nawabs also included men and boys. In Hindu mythology there are many stories on homosexuality and in many they portray as heroic characters. There is sufficient evidence regarding homosexuality present in our society since ancient India. It is important to study the history of homosexuality in order to understand the root and relevance of the debate on homosexuality that has come forth in modern India. With the advent of British rule in India, Christianity that considered homosexuality as an unnatural, more accurately, an act of evil, indoctrinated the ruled to consider it sinful². Thereby the Indians under the British influence started interpreting the idea of sexuality pathologically; anything not adhering to the reproductive assumption of sexuality was considered immoral. Ancient India that considered any sexual act as a natural expression of desire and an individual choice, now, was on its way to renounce ‘homosexuality’ which was an accepted part of Indian culture. It throws light on the systematic shift of Indian psyche.

In present day India, there is no law that explicitly refers ‘homosexuality’. In fact, that is a true reflection of the society we live in, where homosexuality is still not a comfortable topic to discuss. As per the Indian law it is not an offence to be or claim to be a homosexual or transgender. Lord Macaulay introduced Indian Penal Code in 1860 which came along with Section 377. The provision under section 377 indirectly demonized the homosexual community through punishing the “carnal intercourse against the order of nature”. It had direct implication on the Indian psyche which has in the past acknowledged homosexuality and hemophilia as an integral part of the society, where the populace with different sexual orientation coexisted with harmony and dignity. This facet of the Indian culture was time and again perturbed; however, penalizing the homosexual act under section 377 was an undeviating and biting blow to the Indian outlook towards homosexuality. Indian culture that openly accepted the natural gender expression of the people without carving up good/bad, natural/un-natural amongst them, now was slowly limiting its compass of acceptability. This change in the society may be attributed to the law prevalent in the land. Thereupon homosexuals were ostracized and regarded as deviants from the norms of the community. Thus, *de jure* the law seems to be criminalizing the act of homosexuality that is sodomy alone, while *de facto* it also criminalizes homosexuality. Prior to arguing the right and wrong of homosexuality it is pertinent to analyze the legitimacy of the law regarding homosexuality in our country.

Section 377 of Indian Penal Code, 1860 & its Implication

Section 377 reads: “Unnatural offences. —Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation. —Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

The legal provision is to punish the individual/individuals engaged in “*carnal intercourse against the order of nature*”. It is a non-bailable and a cognizable offence in India.

The vague language and terms used in this section purposefully opens many doors of interpretation. This is in itself a dangerous scenario which can be instrumental in creating confusion and chaos amongst the masses, most importantly having scope of being manipulated. A law in order to be effective, most necessarily requires being exact and air tight. The term “against the order of nature” is unclear, no where the “order of nature” is defined to extract the exact intended meaning of the law maker. The section as a result of lacking accurate definition has undergone numerous interpretations. The term “carnal intercourse” in the earlier days just included anal sex and only in the later cases included oral sex and other artificial orifices. Principally the unlawful act that is punishable under section 377 is itself not defined precisely and is a major source of worry for the effective applicability of the law. Apart from the vague language, the section does not make a distinction between a consensual and non-consensual intercourse. The law does not take notice of age or consent or the sexual preference of the individuals and declares all homosexual acts as a criminal offence. Many intellects argue that the criminalization of the sexual act that is considered ‘against the order of nature’ irrespective of any criteria is tantamount to impose biblical beliefs on the citizens of India.

Several dispute the constitutionality of section 377, the section is phrased as outmoded and arbitrary which violates many guaranteed rights of the citizens namely right to equality, right against discrimination, right to live with dignity and right to privacy .

It is eminent that the spirit of the section is arguably, to absolutely restrict any and all non-vaginal penile penetration between two individuals. It must be noted section 377 does not make any distinction with regards to the sexual orientation as well; both heterosexual and homosexual indulging in the ostensible unnatural sexual act can be prosecuted. The only criterion under the section is to have or have not committed the “intercourse against the order of nature” which is not defined and is unanimously alleged to be classified on the basis of the pro-creative nature of the act. Ministry of Health and Family Welfare, Department of AIDS Control it has been averred that estimated HIV prevalence among FSW (female sex workers) is 4.60% to 4.94%, among MSM (men who have sex with men) is 6.54% to 7.23% and IDU (injecting drug users) is 9.42% to 10.30%. The total population of MSM as in 2006 was estimated to be 25, 00,000 and 10% of them are at risk of HIV.³ The viewpoint of health has been a major concern which is interrelated to the position of homosexuals in the society, which consequentially connects to Section 377. The cohorts of Section 377 substantiate the British era law to be necessary, as the unnatural sexual act is associated with the rise of HIV and other health diseases. In 2015, 36.7 million [34.0 million–39.8 million] people globally were living with HIV. 2.1 million [1.8 million–2.4 million] people became newly infected with HIV and 1.1 million [940 000–1.3 million] people died from AIDS-related illnesses⁴. In India, there are 2.1 million people living with HIV. There are 68,000 AIDS related deaths in the country due to AIDS-related illnesses and there is a 0.3% HIV prevalence among adults in India⁵. Unprotected sexual activity is one of the primary reasons for the epidemic. There are specific high risk groups that are prone to contracting HIV. The problem is not about numbers alone but about the people. The specific high risk groups face several problems primarily because they belong to an exploited minority and secondly because HIV-AIDS itself is accompanied by social stigma. The epidemic has human rights implications and is perhaps the greatest challenge we face today. A faction of the society is of the opinion that because “the sexual act” is punishable, individuals in

fear of prosecution engage in the act in a hidden manner which consequently hinders prevention/treatment from such aforementioned diseases. It frustrates the social workers for not being able to provide information regarding treatment, monitoring and counselling to the homosexuals.

It is a well known fact that the people with different sexual orientation have been a target of medical negligence, harassment, extortion, rape and several other wrongdoings. The social abhorrence and blatant intolerance has led many individuals with different sexual orientations towards drugs, suicide and other crimes. Psychiatrist Dr. Shreyas Magia states that a major reason behind suicides and drug addiction of the LGBT is that their relationships do not have a point of conclusion; this lack of security is the basis of their emotional affliction⁶. In point of fact, the end of a relationship between homosexual couple is harder as the probability of getting love again is negligible as compared to a straight person. "Suicides among the LGBT community have been increasing and this alarming trend is visible ever since the 2013 Supreme Court verdict on Section 377 of the Indian Penal Code (IPC) which has criminalized same gender sex," says Vikranth Prasanna, founder of Chennai Dost, a closely-knit collective of LGBT members.⁷ In the recent times, the most prominent tests of India's intolerance of homosexuality was evident when a gay professor at one of India's most prestigious universities was found dead two months after vigilantes barged into his house with a video camera and caught him in a naked tryst with a bicycle rickshaw driver, soon after it was known that it was a suicide.⁸ In another tragic case a woman who was a doctor from AIIMS, committed suicide because of her gay husband and unsuccessful marriage; this incident throws light on the impact of societal pressure and appalling perspective for the LGBT group⁹. Numerous cases similar to above mentioned cases can be cited to further expose the atrocities and misery of the LGBT group. The growing number of cases is proof enough that something is wrong with our existing communal norm of the country.

Quiet a number of legal experts state the relevance and necessity of section 377, citing circumstances and miscellaneous cases that can currently only fall under the purview of Section 377. The gap otherwise may be segmented as the 'exceptions' under the rape law and a means to check child abuse. Further, regulating the sexual conduct of citizens in their privacy, on the basis of the legal lapses in other legal provisions, is unacceptable and against the interest of equity and justice. Hence, the archaic and arbitrary provision of law under Section 377 is necessary to be repealed. A distinct law specifically penalizing crimes against child must come in place of section 377 of the Indian Penal Code. The time is changing; it is abundantly visible with the way the High court judgment¹⁰, decriminalizing consented homosexuality has been received by the intelligentsia of the country. The protest and heated debates around Supreme Court reversing the High Court's decision also reflects the changing mindset of the Indian society. The Supreme Court in its judgment has clearly stated that "*Nonetheless in light of the plain meaning and legislative history of the section, we hold that Section 377 IPC would apply irrespective of age and consent. It is relevant to mention here that the Section 377 IPC does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.*"¹¹ The Supreme Court explains that section 377 does not target only LGBT community as the act committed by heterosexual beings is equally punishable, the reasoning is flawed and cleverly ignores the fact that the "act of sodomy" is the sexual act engaged chiefly by the homosexuals. Moreover, the logic

behind not discriminating between non-consensual and consensual sexual act with regards to section 377 is not justified. It is a disappointment to witness pseudo-Liberalism in the highest judicial forum, on one hand it exhibits that the law is not against homosexual community while on the other hand; the sexual act of the homosexuals is an offence. The law has to change with the times, especially in the light of the rights & dignity of the LGBT community and the HIV-AIDS epidemic. Needless to say, the first thing that has to be done is to decriminalise homosexuality. The second step is to recognise the rights and protect the transgender population and the final step would be the legal recognition of same-sex unions. In this paper we shall focus on the probable of legally recognizing the same sex unions and its implications on the society.

Same-sex Marriage

Homosexuality is one of the current divisive political/religious issues thereby; the topic of same-sex marriage is inevitable. Prior to discussing “same-sex marriage”, it is necessary to define the term “marriage”. Since time immemorial, marriage has been an indispensable to preserve the moral and culture in the society. The concept of marriage is imbibed very deeply into the basic senses of the people and is instrumental in conserving the ‘family unit’. As per legal lexicon a marriage is a civil and religious contract whereby,¹² a man is joined and united to a woman, for the purposes of civilized society. The Hindus consider marriage as a religious sacrament, whereas, the Muslims consider marriage as a legal contract between a man and a wife. The concept of ‘marriage’ has evolved through generations and has reached this stage where, it fulfils the requirements of a healthy relationship between two individuals. Marriage provides public acknowledgement, security, mutual responsibility and other benefits for the relationship to grow and last.

In India we have distinct laws to govern citizens of different religions, the major marriage laws are as follows:

- a) The Hindu Marriage Act, 1955
- b) The Muslim Law
- c) The Parsee Marriage & Divorce Act, 1939
- d) The Indian Christian Marriage Act 1889
- e) The Indian Special Marriage Act 1954

Interestingly, Section 5 of the Hindu Marriage Act merely discusses union of two Hindus and does not have any mention of the gender of the parties. Similarly, all other marriage acts solely speak about the union of two individuals with specific religions thereby; same-sex marriage is not illegal in India. The marriage laws in India are not prima facie gender-specific; nevertheless, all the marriage laws are silent on the same sex unions. The Parsee Marriage and Divorce Act, states in Section (1) (a) that “No marriage shall be valid if the contracting parties are related to each other in any of the degrees of consanguinity or affinity set forth in Schedule I”; nowhere in the act it is discussed that a male and a female can only be the parties to the marriage contract. Section 4 of the Indian Christian Marriage Act lays down, that any two people can enter into a marriage regardless of their gender. Islamic Civil Law which is applied to Muslims as a personal law, also does not mention explicitly the gender of the parties in order to enter into the contract of marriage. Section 4 of the Indian Special Marriage Act 1954, lays down the conditions relating to solemnization of special

marriages.—“Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act”; in similar fashion, the special marriage act does not mention the gender of the parties for marriage. The Previously stated that same-sex marriages are not illegal per se yet, in this setting, existence of Section 377, Indian Penal Code which criminalises the very outcome of same-sex union, is paradoxical. Every religion in India has their own distinct perception of marriage however; all of them discuss solely the union of a man and a woman. Therefore, the union of homosexual couple is ultra vires to the Indian marriage laws. It is a myth, as regards why homosexual relationship should be excluded from such rights, benefits of Marriage which is without any discrimination available to heterosexual couples. The law permits individuals with mental or physical disability, individuals who cannot or unwilling to procreate, individuals who have different sexual orientation, however, the law is silent on the union of homosexual couples. The dispute is that the same-sex couples and opposite-sex couples ought to enjoy equal rights as per the rights guaranteed to all the Indian citizens in the Constitution. The debate in the public realm is principally about the expressive aspects of the gay marriage.

Same-sex Marriage around the Globe

Numerous countries with a history of similar resistance to homosexuality as India, have repealed/modified the laws in favor of homosexuals. With an eye on the international conventions to protect human rights, the Indian laws have to undergo the strict scrutiny in order to confirm its validity and righteousness in the contemporary India. Netherlands is the pioneer to legalize same-sex marriage in the world, in 2000, a landmark bill which conferred right to marry, divorce and adopt child to the same sex couples¹³. Thereafter, existing civil marriage statute was altered and the bill was passed to create world history. The general public of Netherlands widely accepted the change as new way of life. Belgium is regarded as one of the forerunners in this field; in 1998 the Belgian government conferred limited rights to same-sex couples where in, the couple could register and officially assume joint responsibility for a household. Subsequent to such path-breaking step, the Belgian government legalized same-sex marriage in 2003¹⁴. The marriage between homosexuals was given the same status as a heterosexual marriage, the homosexual couples enjoyed the same tax and inheritance rights post marriage. In 1999 the homosexual couples gained the legal benefits of the same-sex marriage. The journey towards legalizing and protecting the rights of the homosexual couples in Canada had to face many protests and challenges but eventually succeeded to uphold the right and duty of the same-sex couples. South African chapter is complicated, as here the government wishes to bring change and the general population is too conservative to accept same-sex marriage. The South African government legalized same-sex marriage in 2006, subsequent to one year; the court ruled that the previous law was unconstitutional. The government is enthusiastic to bring acceptability of same-sex marriage, yet the traditional monarch of the Zulu people, which comprises one-fifth of the country's population, is conservative and unwilling to accept homosexuality. Denmark in 2012 legalized same-sex marriage, prior to that in 1989, Denmark was the 1st country to allow same-sex couples to register as domestic partners. Similarly on 17th of April, 2013, New Zealand parliament legalized same-sex marriage, making itself the 13th country in the world to allow homosexuality union. Interestingly, in addition to rights that resulted from the marriage, a right to adopt children was also granted to homosexual couples. Thereafter, England, Scotland, France, Brazil and many other countries followed the

same precedent. In the recent times USA, Ireland, Greenland, Columbia have followed the movement. More recently, Iowa and Vermont have legalized same-sex marriage, the former through judicial interpretation of the state constitution, the latter through legislation. Analyzing the modus operandi of this long list of countries, which has legalized the same-sex marriage, will help us understand what is happening in our country, and where we might go from here. Each of the above countries have undergone the protests of the conservative mindset, this phase has eventually elapsed with the help of government and awareness spread by the homosexual and their allies.

Studies show that all the countries legalized same-sex marriage has witnessed visible and drastic positive impact on the homosexuals as well as the society. None of the countries retreated from their stand of homosexual unions, since the law to legalizing the same-sex marriage has been formally implemented in their respective governments. Rothblum studied 216 lesbians and 123 gay men who had civil unions in Vermont compared with 166 lesbians and 72 gay men who had not had civil unions. Gays in civil unions had significantly greater contact with and social and emotional support from their families and friends.¹⁵ They were more likely to remain in their long-term committed relationship if it was a legally recognized relationship.¹⁶ In so doing, they had better access to health insurance and quality health care as well as more consistent family support, which is vital to one's emotional health.¹⁷ In United States, Klausner analyzed data obtained from a survey of 2881 gay men in four major metropolitan areas of the United States and concluded that "same-sex male civil unions are associated with lower-risk behavior for HIV infection and other STDs ... suggesting that societal and legal recognition have an impact on the maintenance of safer sex behaviors."¹⁸

Thus, the health benefits bestowed by legalized marriage are noteworthy, regardless of the sexual orientation of the individuals. The practical aspects of legalized marriage provide important financial security and stability. The social aspects of publicly formalizing one's commitment to another creates a community of support that provides benefits far exceeding those available to couples who only cohabit. The improved psychological well-being conferred by such support clearly has a protective effect on the health of those individuals. Not only is marriage associated with positive health outcomes for all individuals, regardless of sexual orientation; in addition, same-sex marriage has not been demonstrated to adversely affect the institution of heterosexual marriage¹⁹.

Suggestions

The homosexual community asks for equal dignity before the eyes of law, it is a just claim as it is guaranteed to all its citizens irrespective of, caste, creed or gender. The law should not keep same-sex couples from uniting and must recognize their relationship. The criminalization of homosexuality, by out casting an entire class of people is against the principles of justice. Such fractured social support mechanism is not only unhealthy for the members of LGBT community but also for the entire society. The social outcasts are compelled to live their lives in the shadow of harassment, exploitation, humiliation, and cruel and degrading treatment at the hands of the law enforcement machinery; further it denies them moral full citizenship. The vulnerable state of the minority is prone to harassment and exploitation. The recent Supreme Court decision criminalizing homosexuality is a huge blow to every citizen's belief and understanding of the constitution. It is submitted that Section 377 is

violative of “right to equality” guaranteed to all its citizens under Article 14 of the constitution. The unwarranted restriction on a person’s choices to express himself sexually in the privacy of his home is unacceptable and directly affects one’s “right to life and personal liberty” guaranteed under Article 21 of the constitution. NACO has specifically stated that enforcement of Section 377 IPC adversely contributes to pushing the infliction underground; make risky sexual practices go unnoticed and unaddressed. Section 377 IPC thus hampers HIV/AIDS prevention efforts²⁰. Section 377 is not in alignment of the principles of the constitution, therefore must be repealed at the earliest. A strict and hermetic law pertaining specifically to child abuse must come into force; this law shall fulfill the void with regards to child protection in India.

Many countries that faced similar conflicts between liberals and conservatives in order to legalize homosexual unions have cleverly resorted to “cohabitation contracts”, subsequently legalized same-sex marriages. It will give the homosexual partners an option to formalize the status of their partners. The homosexual couples can enter a cohabitation agreement, enlisting the rights and obligations the partners have for each other. The agreement would bestow some amount of social security to the couples and will make split ups easier. This step shall also help the government to keep a record of the homosexual group and spread awareness regarding health. This idea may be the inception of the change of the society’s outlook; it may most certainly be the base of more concrete laws for homosexuals in future.

A separate Act legalizing the same-sex marriage must come in place; homosexual union must be recognized with state sanction. Under the same-sex marriage Act, the conditions of age, consent etc enumerated in our existing marriage laws must be included, in addition the religious places must also be ordered to perform the role of facilitator. The fight for homosexuals in India is centrally a religious fight, therefore it is important to include the religious institutions to participate. Registration of marriage, marriage certificate which form the evidence of marriage must be made compulsory for the same-sex marriage.

India can follow New Zealand bold move of allowing the homosexual couples to adopt children. Although strict qualification must be framed in order to ensure safety of the children. Steps such as tenure of the same-sex marriage, financial status, educational qualification and health history must be considered while the right to adopt a child is decided.

The dissolution of same-sex marriage must be accepted only when the courts decide. The right to maintenance, right to visitation of children should be conferred to the homosexual couples opting for dissolution of same-sex marriage.

In my opinion, the real danger to marriage is the alarmingly high divorce rate. As a lawyer, I can understand how fragile our institution of marriage has become in present day. Marriage as I understand is a legal union of two individuals. Marriage is the biggest commitment made by partner to another. Members of LGBT community are no different, they are just as human. The expectation from life and the needs are same as heterosexuals. Therefore, I insist our members of the society to acknowledge love in all forms without any pre-conception, discrimination or bias.

Conclusion

The prospect of marriage will remain the same, couples will continue to unite, rear children whilst at times, marriages may fail. Marriage has been prevailing in our societies for generations and is deep rooted in the conscience of every Indian; in this light it is absurd to imagine marriage of people in love is a threat to the institution of marriage, only because they belong to the same sex. As per the Constitution of India, no citizen can be restricted to enjoy the civil benefits, essentially live with dignity and be with the person he/she loves. Same-sex marriage is a bold move and it would pave the way for a big change in the world. The movement has already begun; it is a matter of time that same-sex marriages will be as mainstream as heterosexual marriages. The history is spectator to changes that were unacceptable to the world then but later realized as the true mark of evolution. Slavery, Sati, dowry, inter-religion marriage there are numerous examples to illustrate and justify the necessity of this ongoing movement for the LGBT community. Outstanding activism of many and persistent effort of the LGBT community has brought tremendous changes in many countries' societies. This ongoing fight of the minority is not to be over soon, the fights for equality has always been triumphant; it is your decision to choose the side. Neo-global phenomenon is unavoidable and is already making impact in our society, resistance to it is futile.

I may state safely that denial of autonomy and dignity for non-conforming sexuality, gender identity or expression is harmful for every society and questioning any traditional law or government is usual nuances of any democracy. Notwithstanding the above statement it is also vital to critically examine the existing law; revisit its purpose, its effect on the society holistically and mechanize a solution for the larger good of the society. Section 377 has to be evaluated not merely in terms of the actual prosecutions but in terms of its impact in constructing mindsets and giving out the message of the spirit of our community. The balance is indispensable for a country like India.

“Marriage should be between a spouse and a spouse, not a gender and a gender.”
— **Hendrik Hertzberg**

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