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Right to Homosexual Marriage

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Abstract

In this paper the practice of homosexual marriage with reference to it's validity has been established. Firstly the concept of marriage according to Vedas as well as Upanishads has been analyzed and shown of eligibility of homosexual marriage to be the subpart of such marriage. According the relation of homosexual marriage thorough analysis of Article 21 of the Indian constitution i.e. the concept of personal liberty has been analyzed thus validating the same. Follow by the arguments which were made by the Supreme Court for invalidating homosexual marriage has been analyzed and proved to be quite vague in it's stand. Then a list of cases has been presented where having a specified way of marriage having adverse effect upon people thus paving away to choose partners irrespective of opposite sex. Lastly the entire matter has been summarized.

Keywords: *Homo Sexual Marriage, Validation, Right to Personal Liberty, Vedas & Upanishads*

1.0 Introduction

Marriage is the pillar which led to the construction as well as maintenance of the family. And a family is such an entity for which people do actually strive for. But the question what is the need of having such family. Is such family only relates to having reproduction to new generations and conserving the legacy. And if the same happens, then in for what such is actually necessary for the man to be existent, and what mental co situation does to involve making it a necessity remains also as a question. But if that is only mandated then such can also happen without any form of marriage. And marriage is all about monopolizing such practice of reproduction within a specified entity. And does such monopolization is not wide enough in its ambit to have it's validity beyond the practice of reproduction in lieu of having existent 36 sexes with human bodily construct, is the question here. Such has been discussed in the paper.

2.0 Analysis of Concept of Marriage According to Vedas and Upanishads

If we analyze the concept of marriage according to the definitions given in Vedas as well as in Upanishads we get to see that the definition of marriage mentioned there is far beyond the materialistic meaning attached there by the society. According to the Vedas the entity of marriage is conceptualized into three forms namely *Grihastha Ashrama, Saptabadi*, Equality & companionships. According to the *Grihastha,* & *Ashrama*, it talks about fulfilling the duties if the households. Such stages of Vedas define human life of one to fulfill all the duties of a family and the medium of existence for the same in the world would be through the existence of the family. So through such we can all find is that talks about what should be the dons of the family. What should actually constitute an ideal family through it's significance is the actual concern of the people there. It is nowhere defining the nature of the constituent of the family. The principle upon which

Vedas are actually concerning can actually be possible through any persons irrespective of any kind of barrier. So in that way the possibility of homosexual marriage is also vivid here. The so called restrictions which the society did impose in the name of sanctity, is immaterial to Vedas.

The Vedas also preach the ideology of accomplishment of marriage to be equal partners in righteousness. This in is known as Saha Dharma Chari or Charini in Sanskrit. So here the focus is upon righteousness. The duties of lives, which they together would fulfill, would comply righteousness. And such would mean Dharma. Hence according to dharma, the universal essence lies on safeguarding rights and obligation towards yourself and others. Hence involving in homosexuality with other person does not contrary to the essence of marriage.

According to Upanishads even if we see it does not any way prohibit the essence of homosexual parts or within it's purview does not exclude it. Firstly according to the concept of Upanishads it defines as unity of two souls. According to that concept, it mainly emphasizes upon the synthesis of two souls. Hence much deviated from the materialistic aspect of the entity, thus mainly focusing upon the primordial abstract of living beings. Hence for that no question of bodily demarcation comes which straight away establishes the fact of universalization against heterogeneity of sex. Thus the concept of marriage this way gets established (What Vedas talk about marriage; Liza Borah, Philosophy of Hindu marriage).

3.0 Analysis of the Concept of Homosexual Marriage According to Article 21 of Indian Constitution

Our constitution according to Article 21 grants right to life and personal liberty,

If we analyze the concept of right to liberty, get to find out that the same although having various concepts, of diversion within the same, the freedom to marry according to the choice is also invisible within the same. Within the concept of such liberty, there are various facets that is namely the right to movement, right to against cruelty, right to privacy. And now within the periphery of right to privacy, a subpart of the same can be termed as right/freedom of choice, i.e., freedom of having led the life in their own way. And within that the various subparts, some way or the other through it's essence establishes the supportive stand of homosexual marriage.

If we analyze the freedom of choice, there are various facets which contribute in happening of homosexual marriage. If we analyze such, first is coming that the right to marry a person of choice. Here is straight forwardly directing the person own choice. So a person in true sense mean any wholesome person irrespective of any kind of barriers. And of course such is also devoid of having any kind of gender barrier as well. Hence in the constitution provision itself it making the fact clear that there is utmost freedom given to the people in order to choose their life partner. And as the same being attached with the fundamental rights, which surpasses every other rules and paraphernalia of the society, the only proviso which lies against the same lies is it must not have any detrimental effect to the public order. Here disrupting public order only occurs when there is any harm created to the rights of the people. A person if similar sex marrying together at no probability can harm the rights of other persons. So in that situation, right to marry a person of same sex in such way attains the validity to exist.

After that within such ambit comes also the right to make family, in a greater literal sense of that it actually means that the freedom to make family which would formulate of it's own choice. Hence in such situation, it is also inclusive of the persons of own choice to be there in the family which would actually be devoid of any kind of barrier restricted for the family. On other hand it is also inclusive of having freedom in rearing of child. Now the freedom of child rearing in that sense is also inclusive of having liberty of not having any child to be included in their family. So in that way having a homosexual marriage with no child to be there in the family can also be validated, in that way. Now in that sense if we also analyze the concept of family such would also be inclusive of having living together. Hence in that way such would mean entitlement of right of living together with person of own choice which in this context can be a person of similar sex. In that way it is also fulfilling al the efficacies of marriage. So in that way giving marital status to such entity can also be validated.

Then the next right comes which also has a very vivid relationship with homosexual marriage, and such here is the right regarding taking decisions of one's own body. In a marriage sexual intercourse between partners is inevitable. Hence in such situation for a person to enter

into sexual relationship with another person is totally dependable upon a person of own choice. And here even freedom upon one's own body is also inclusive of changing their sex, it is also inclusive of having taken liberty in reproductive rights. A subpart of homosexual marriage is also inclusive of person to undergo surgery of changing sex and accordingly marrying person opposite to his / her native sex now according to the latest trend it is found the men are also accommodating their body parts suitable for reproduction. Thus in such way a family structure through a homosexual marriage is automatically getting affirmed with the granting of such constitutional rights to them. And not only through constitutional rights but also we find through section 377 of IPC, the decriminalization of consensual homosexual activity has been also decriminalized, thus paving a way towards homosexual marriage.

Within the purview of freedom of choice freedom of belief and opinion also plays a great role. So through this perception of marriage, the choice to marry can be varied to the established rules and regulations of the society. This way the institution of homosexual marriage can be affirmed.

Above all freedom of choice also encompass within itself the freedom to have one's own lifestyle. This means it gives the freedom to lead one's life according to one's own fashion. And such kind of freedom in its literal sense is having a very wide ambit. And within that a very vital role is actually played with respect to choice of the same for marriage. And obviously that would mean choosing the partner of own choice which is devoid of any kind of barrier provided by society and well as people.

4.0 Analysis of Arguments Stated by Supreme Court Invalidating the Homosexual Marriage

In May, 2023 a 3:2 bench of the Supreme Court invalidated the institution of Homosexual marriage in the case of Supriyo Chakraborty & Anr Vs Union of India. But the arguments, which the same did give is not having a strong stand in establishment of the rule.

Firstly the argument stated was that right to marriage was not to be inclusive of any fundamental rights. But the fact is that once in Article 21 right to personal liberty given it means the utmost liberty to lead their personal life in its own fashion. And as we all know marriage plays a very vital role into the same. Hence within it's mentioned fundamental right only, such right if marriage is inevitably forming a sub part. And as also discussed above it is seen that the within right to liberty comes right to choose ad within that various rights which prominently defends right to homosexual marriage.

In that lines, the another argument which came into forefront is that formulation of law was the part of legislature and not the judiciary. But it's also true that the function of Judiciary is also to interpret. And here we see here such prohibition to homosexual marriage is vehemently prohibiting the right to liberty.

Not only that but also, it implied that the as societal custom does not permit homosexual marriage leading it to invalidate the same. But we all know that the constitutional supremacy prevails overall and right to personal liberty being such fundamental right which accordingly freedom to marry up to own choice, surely establishes the institution of homosexual marriage.

Lastly it also says that the rights given to LGBTQ does not include right to marry. But its true that marriage lays a very vivid prominent role in shaping the life of the people as well as identity of the same in the society. So right to marriage cannot be excluded from the activism of rights for theses LGBTQ community people of the society (Suprio Chakraborty & Anr vs Union of India, Plea for marriage equality.)

5.0 Cases on Affirming the Rigid Rules of Homosexual Marriage

If we analyze various cases in our country as well as throughout the globe, we find out various instances where hormonal problem against heterosexuality led to separation, in marriage.

In the case of Mohammaf Salim Vs State of UP (AIR 2013), we see the wife sought separation in their marriage for his husband having hypogonadism leading to low testerone, as well as low sexual dysfunction. This implies low response to heterosexual instinct. The Apex Court of India court favored the wife declaring such issue as a ground for annulment of marriage.

Then in the case of Anuj Kumar Vs State of Bihar (AIR 2018) where it were seen that the husband did file a case against wife where a man inspite of having XY

chromosomes develops female characteristics on sexual intercourse with the partner as the same having active ale chromosomes. Here Bombay High Court favored the husband on the ground of misrepresentation and against such medical state of the spouse, (Mohammaf Salim Vs State of UP(AIR 2013) https://www.indiakanoon.com. Anuj Kumar Vs State of Bihar (AIR 2018) https://www.indiakanoon.com)

Apart from that if we see globally there also certain cases namely Jessica S vs Gerald S (1990), where we see that the women's husband filed a divorce petition against he due to infertility as well as emotional distress due to the same. Here infertility through diagnosis seen to have less active chromosomes in relation to opposite sex, hence tends towards homosexuality. The US Supreme court, not for emotional distress but surely for having infertility annulled their marriage.

Also in a European case with regard to a French couple the wife filed a divorce for his husband undergoing sexual transition. The court surely affirmed such ground to be the ground of divorce.

In all such cases it was seen that the due to mandated heterosexual form of marriage folks having problem in there genital r hormonal construct tends to misrepresent themselves. And only because of not fulfillment of certain criterion of heterosexuality, the entire marriage is getting annulled ignoring all other factors, having a highly adverse effect to both the parties.

This such specified form of marriage as a mandate is creating a hurdle to all the folks in lieu of varied sexual constraint within the same. Hence there is the necessity to liberalize the conditions of marriage where a prominent part of it is liberalizing the conditions of marriage into the institution of homosexuality.

6.0 Conclusion

On analysis of several factors starting from the pure abstract i.e., the objective regulating the same i.e., marriage as an entity itself, then laws regulating to marriage, the concept of homosexuality is not playing contrary to any of it. But only because of the customary practices, which regulates the society and peoples sentiment highly, as well as the political parties' usage of it to be existent in power due to the same. Hence special focus must be given to that, at the first instance in order to establish the institutionalization of homosexual marriage.

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