

## SCOPE OF SAME-SEX MARRIAGES IN THE CONTEMPORARY SOCIETY

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### ABSTRACT

Marriage is a relationship between two persons i.e. man and woman. This is the formal union of a man and a woman, typically as recognized by law, by which they become husband and wife. Marriage can also be described as a socially or ritually recognized union or legal contract between spouses that establishes rights and obligations between them and their children. The same-sex marriage can be defined as a marriage between two persons of the same biological sex or gender identity. At common law a marriage between persons of the same sex was void ab initio could not be validated by adopting a child. But in the contemporary world the Homosexual marriage has been validated. The first law in modern times enabling same-sex marriage was enacted during the first decade of the 21st century. As of 19 August 2013, fifteen countries (Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, Uruguay) allowed same-sex couples to marry. A law has been passed by the United Kingdom going to be effective in 2014 which validates same- sex marriage. The study in various parts of society shows that there is rising support for legally recognizing same-sex marriage.

**Keywords:** same-sex marriage, biological parents, infertility, sexual fidelity.

### INTRODUCTION

The same-sex marriage laws have been varied by jurisdiction, legislative changes, religious thoughts and mental conditions. The recognition of same-sex marriage is a political, social, human rights and a religious issue around the world and debates continue to arise over whether same-sex couples should be allowed marriage or be denied recognition of such rights. Some analysts state that financial, psychological and physical well-being are enhanced by marriage, and that children of same-sex couples benefit from being raised by two parents within a legally recognized union supported by society's institutions. The American Anthropological Association avers that social science research does not support the view that social orders depend upon not recognizing same-sex marriage. Same-sex marriages can be performed in a secular civil ceremony or in a religious setting. Various faith communities around the world support allowing same-sex couples to marry or conduct same-sex marriage ceremonies such as Buddhism in Australia, Church of Sweden, Conservative Judaism, Humanistic Judaism, Native American religions, Metropolitan Community Church and other progressive and modern Christian, Muslim, Hindu, Buddhist and Jewish groups. But by the same time, there are many parts of the world where same-sex marriage is considered a sin. Homophobia is prevalent in India.<sup>[1]</sup> Public discussion of homosexuality in India has been inhibited by the fact that sexuality in any form is rarely discussed openly. In recent years, however, attitudes towards homosexuality have shifted slightly. In particular, there have been more depictions and discussions of homosexuality in the Indian news media.<sup>[2][3]</sup> and in Bollywood.<sup>[4]</sup> Several organisations, including the Naz Foundation (India) Trust,<sup>[5]</sup> the National AIDS Control Organisation,<sup>[6]</sup> Law Commission of India, Union Health Ministry, National Human Rights Commission of India and the Planning Commission of India have expressed support for decriminalizing homosexuality in India, and pushed for tolerance and social equality for lesbian, gay, bisexual, and transgendered people. India is among countries with a social element of a third gender. But mental, physical, emotional and economic violence against LGBT community in India prevails. Lacking support from family, society or police many gay rape victims stay don't report the crimes.

### Ancient Era of Marriage

The first historical mention of the performance of same-sex marriages occurred during the early Roman Empire. These were usually reported in a critical or satirical manner. Emperor Elagabalus referred to his chariot driver, a blond slave from Caria named Hierocles as his husband. He also married an athlete named Zoticus in a lavish public ceremony in Rome amidst the rejoicings of the citizens. The first Roman emperor to have married a man was Nero, who is reported to have married two other men on different occasions. His first marriage was with one of his freedmen, Pythagoras, to whom Nero took the role of the bride. Later, as a groom, Nero married a young boy who resembled one of his concubines named Sporus in a very public ceremony with all the solemnities of matrimony, and lived with him as his spouse. The marriage was also celebrated separately in both Greece and Rome in extravagant public ceremonies. In 342 AD Christian emperors Constantius II and Constans issued a law in the Theodosian Code prohibiting same-sex marriage in Rome and ordering execution for those so married.

### The Medieval One

A same-sex marriage between the two men Pedro Díaz and MuñozVandilaz in the Galician municipality of Rairiz de Veiga in Spain occurred on 16 April 1061. They were married by a priest at a small chapel. The historic documents about the church wedding were found at Monastery of San Salvador de Celanova.

### And the Contemporary Time

Denmark was the first state to recognize a legal relationship for same-sex couples, establishing registered partnerships like marriages in 1989. In 2001, the Netherlands became the first nation in the world to grant same-sex marriages. Same-sex marriages are also granted and mutually recognized by Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland and New Zealand etc. In Mexico, same-sex marriage is recognized in all 31 states but only performed in Mexico City, Quintana Roo and Chihuahua. In Nepal, their recognition has been judicially mandated but not yet legislated. In the United States, thirteen states and the District of

Columbia permit same sex marriage. The New Jersey Supreme Court on Friday denied the state's request to temporarily prevent same-sex marriages, clearing the way for same-sex couples to marry in the state starting Monday on Oct. 21, 2013.

### Scope of Same-Sex Marriage

The scope of same-sex marriage can be stated as it involves same-sex couples who wish to marry, or persons who at some point in the future may want to marry someone of the same sex. As an issue, it involves those people in all fifty US states and in all two hundred some odd countries in the world. As for time, same-sex marriage has a history dating back to at least Ancient Roman times, is a major political issue in many places in the world today, and will have an effect continuing into the future for as long as mankind exists. The limitations of same-sex marriage are that it does not involve heterosexual persons, persons who are already married to someone of the opposite sex, entities that are not mortal humans subject to civil law, people who are dead and buried, and members of the clergy of certain religious groups that are required to remain celibate and therefore can never marry.

### Whether Same- Sex Marriage is Unconstitutional

Gay marriage is unconstitutional in places where they have passed constitutional amendments banning it, usually at a state constitution level. It does not violate any other parts of the constitution besides this. Opinion of constitutionality of gay marriage at a national level i.e. in India cannot be said to be unconstitutional. The Article 19 gives all citizens the right to use free speech, practice their religion, to assemble peacefully etc. It's about equal rights and protecting and defending the rights of individuals and minorities. Gay rights weren't even on the table when the founding fathers were debating the founding doctrine of this country. But in that same spirit, gay people today should receive equal protection. The 14th article says that all citizens within a state are entitled to equal treatment and equal protection under the law.

### Same-Sex Marriages in India

There is no explicit mention of homosexuality or hemophilia in any of the statute books of India. A person cannot be prosecuted for being a homosexual or hemophilic. But the sexual act of sodomy is a criminal offence. The major provisions of criminalisation of same-sex acts if found in the Section 377 of the Indian Penal Code (IPC) of 1860.

"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment of either description for a term which may extend to ten years and should also be liable to fine."

The offence of homosexuality is read under this section as an Unnatural Offence. The term Carnal Intercourse used in this section refers to sexual intercourse between men or in other words, homosexual relationships. Section 377 of the Indian Penal Code, was enacted by the British in 1860. The Indian law against homosexuality seems to be too harsh. The Constitutional validity of section 377 of IPC was challenged in the Delhi High Court as being violative of fundamental rights guaranteed under the Indian Constitution. Homosexual intercourse was a criminal offence until 2009 under Section 377 of the Indian Penal Code, 1860. This made it an offence for a person to voluntarily have "carnal intercourse against the order of nature." This law was struck down by the 2009 Delhi High Court decision in **Naz Foundation v Govt. of NCT of Delhi**, which found Section 377 and other legal prohibitions against private, adult, consensual, and non-commercial same-sex conduct to be in direct violation of fundamental rights provided by the Indian Constitution. Whilst homosexuality is still not widely accepted Marriage in India is at Federal level. There are several state laws regulating certain aspects of marriage such as rules around marriage registration. In India Same-Sex Marriages are not adopted to legalize but these can be legalized by an amendment to current act by Parliament. Second, there could be an order by Supreme Court which would then become law. There is also the option that we should consider to put in place a system of civil partnership that

would provide the benefits that come with marriage to Same-Sex couples. This is more of a religious debate than a political one. Large number of people specially in India are opposing it, as they say it is unnatural, uncouth and immoral. Prime Minister Mr. Manmohan Singh on asking what he thinks about the Canadian law of homosexual marriages he replied it is not appreciated. Those people who are opposing it their arguments are based on religious and natural law belief. Some people don't consider them as natural because they do not produce kids. If nature wanted same-sex people to live together, there would only be one sex rather than different sexes. Our society is based on opposite sex marriage.

### ARGUMENTS AGAINST OF SAME - SEX MARRIAGE

#### Absence of biological parents in child's life

Homosexual couples using surrogate mothers deliberately create a class of children who will live apart from their mother or father. Yale Child Study Centre psychiatrist Kyle Pruett reports that children of In Vitro Fertilization (IVF) often ask their single or lesbian mothers about their fathers, asking their fathers about their mothers<sup>[7]</sup>. The study clears that all children have the same feelings having by Homosexual couples.

#### Role of Fathers

If same-sex civil marriage becomes common, most same-sex couples with children would be lesbian couples. This would mean that we would have yet more children being raised apart from fathers. Among other things, we know that fathers excel in reducing antisocial behaviour and delinquency in boys and sexual activity in girls<sup>[8]</sup>. The fathers exercise a unique social and biological influence on their children. For instance, a recent study of father absence on girls found that girls who grew up apart from their biological father were much

more likely to experience early puberty and a teen pregnancy than girls who spent their entire childhood in an intact family<sup>[9]</sup>.

#### Role of Mothers

Although homosexual men are less likely to have children than lesbians, homosexual men will be raising children. These couples deny children a mother. Among other things, mothers excel in providing children with emotional security and in reading the physical and emotional cues of infants. Obviously, they also give their daughters unique counsel as they confront the physical, emotional, and social challenges associated with puberty and adolescence<sup>[10]</sup>. This is the misfortune for such children not having mothers.

#### Not good Parents

This is understood that the same- sex couple would not be able to do such a good parenting as is needed. A man has only masculine knowledge and a woman only the feminine. The children find lack of emotions if living with father and lack of courage if living with mothers<sup>[11]</sup>. The research in this area shows the lack of good parenting at all.

#### Gender and Sexual Disorders.

Although the evidence on child outcomes is sketchy, it does suggest that children raised by lesbians or homosexual men are more likely to experience gender and sexual disorders. It is found that lesbian parenting may free daughters and sons from a broad but uneven range of traditional gender prescriptions. The study<sup>[12]</sup> also shows that sons of lesbians are less masculine and that daughters of lesbians are more masculine and that children of lesbians are more likely to report homoerotic attractions.

#### Norm of sexual fidelity

The main problem in same-sex marriage is that it would probably undercut the norm of sexual fidelity in marriage. Actually, there is more likely to be greater understanding of the need for extramarital outlets between two men than between a man and a woman<sup>[13]</sup>. More than 79 percent of heterosexual married men and women,

along with lesbians in civil unions, reported that they strongly valued sexual fidelity.

### Loss of Procreative purpose of Marriage

Traditionally, marriage and procreation have been tightly connected to one another. Indeed, from a sociological perspective, the primary purpose that marriage serves is to secure a mother and father for each child who is born into a society. The danger with this mentality is that it fosters an anti-fatalist mindset that fuels population decline, which in turn puts tremendous social, political, and economic strains on the larger society. Same-sex marriage finds no necessary link between procreation and marriage. It is also notable that the countries that have legalized or are considering legalizing same-sex marriage have some of the lowest fertility rates in the world. For instance, the Netherlands, Sweden, and Canada which have low fertility rates<sup>[14]</sup>.

### ARGUMENTS IN FAVOUR OF SAME-SEX MARRIAGE

Gay and lesbian rights activists from various parts of the countries were protesting for their rights and for decriminalizing the homosexual conduct. There is a big debate in our country too whether it should be legalized or not. I am giving some of the arguments in favour of decriminalizing it, specifically in Indian context- in view of Section-377 of the Indian Penal Code.

#### Violation of Right to Liberty

It violates right to liberty guaranteed under Article-21 of the Indian Constitution, which covers private consensual sexual relations. The fundamental right to liberty (under Article-21) prohibits the state from interfering with the private personal activities of the individual

The concept of privacy is so broad that no comprehensive and all encompassing definition of the term can be given. In the case *National Coalition for Gay and Lesbian equality V. Ministry of Justice*, the South African court held that, Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. Even at the international level, the right to privacy has been recognized in the favour of lesbians and gay man.

#### Criminalization is unreasonable

Criminalization of homosexual conduct is unreasonable and arbitrary:

Infringement of, the right to equal protection before law requires the determination of whether there is a rational and objective basis to the classification introduced. There should be a just and reasonable nexus between the classification and the object sought to be achieved by the legislation. Section-377 of IPC, its legislative objective is to criminalize all the sexual activities which are against the order of nature, thus punishing the unnatural sex. Section-377 assumes that natural sexual act is that which is performed for procreation. Hence, it thereby labels all forms of non-procreative sexual act as unnatural. This gives a very narrow view to the distinction between the procreative and non-procreative sexual act. Hence, the legislative intent of creating a public code of sexual morality has no rational nexus with the classification created. Further the very object of the section is vague, unreasonable, arbitrary and based up on the stereotyped notion that sex is only for procreation. Now if this presumption is accepted is correct then, what justifies the policies of family planning and the use of the contraceptive devices

#### Marriage is changeable

Marriage has evolved throughout history so it is not difficult to make changes in it. Different cultures of the society have treated marriage differently. Some promote arranged marriages while the others love marriages. Many others tied marriage to dowries. Still there are many who see marriage as a political relationship through which they could forge family alliances. But all these variations still embraced the fundamental, unchanging essence of marriage. They still saw it as a life-long partnership between one man and one

woman for the sake of generating and raising children<sup>[15]</sup>. But the supporters of same-sex marriage have the good clue of having faith in changing identity of marriage. So, they said that it is a modern kind of marriage only and hence are supported by everyone. This understanding predates any government or religion. It's a pre-political, pre-religious institution evident even in cultures that had no law or faith to promote it.

#### Equality in Marriages

The current marriage laws already treat all people equally. Any unmarried man and unmarried woman can marry each other regardless of their sexual orientation; the law is neutral with respect to orientation as it ignores race and religion. Same-sex marriage advocates argue that it is discriminatory to favour heterosexual spouses over homosexual couples<sup>[16]</sup>. With all of the benefits flowing from marriage, this unfairly endorses one set of relationships over another. The advocates of same-sex marriage said that there should be equality in all the spheres and they should not be denied by marrying with same - sex person as this will violate their right to equality as is provided to other normal couples<sup>[17]</sup>.

#### Right to Marry

The government is interested in the propagation and stabilization of society, it promotes and regulates that marriage is not about adults; it's about children. Marriage is not just a relationship between two individuals it is a public institution. The freedom to marriage has been given to all the individuals of society so the supporters are right while stating that they have freedom to do it and they are capitalizing of their right only. There is no need to State to be concern about it.

#### Redefining Same-Sex Marriage

If we redefine marriage as simply a loving, romantic union between committed adults, what principled reason would we have for rejecting polygamist? They do not believe in the older systems of marriages i.e. producing children. Procreation is the main reason of civil marriage which is limited to two people. When sexual love replaces children as the primary purpose of marriage restricting it to just two people make the supporters happy as they do not have any concern regarding the parenthood. They have their own definition of love and marriage which is limited to them.

#### Procreating children is not the Criteria

This argument concerns if same-sex couples can't marry because they can't reproduce, why do infertile couples marry. There are two relatively rare situations: infertile couples and same-sex couples. If marriage is about children, why does the state allow the infertile couples to marry? The divorce and sexual revolutions of the last four decades have seriously undercut

the norm that couples should get and stay married if they intend to have children. If it is made necessary to have children to married couples then like the infertile couples they have option to adopt and it happens. Surrogate mothers are also a good option for such couples.

#### Same-Sex Marriage and Religion

There are many arguments for and against the gay marriage which often involve religious factors. Some religious associations refuse to employ or offer services to same-sex couples. But at the same time there are Christian groups who argue for same-sex marriage tend to believe that lesbian and gay people are created by God and so they have the same rights as others. There should not be an attack on people with same-sex attractions. All people, regardless of sexual orientation, deserve to be treated with dignity and respect. Instead an institution that touches all people and cultures should be redefined and religion must not restrict one's willingness.

#### CONCLUSION

Most of us acknowledge there should be at least some limitations on marriage for social or health reasons. As in common marriage for example, a man can't marry his daughter or a close relative. And if a

man is truly in love with two different women, he's legally not allowed to marry both of them, even if both agree to such an arrangement. In the same way Same-Sex marriages are not good for society. Men who are married with a woman earn more, work harder, drink less and live longer. If the distinctive sexual patterns of "committed" gay couples are in any relationship it is unlikely that homosexual marriage would domesticate men in the way that heterosexual marriage does. It is also extremely unlikely that the biological effects of heterosexual marriage on men would also be found in homosexual marriage. Thus, gay activists who argue that same-sex civil marriage should be legalised is not a good argument as their responses are emphatically nonreligious. They don't depend on any sacred text or divine revelation. They find the base of their arguments only in reason, philosophy and history. The conflict over same-sex marriage is a big one because of the many social and legal factors involved. Hence we find that legalizing gay marriage is not only a matter of justice but a matter common sense. About half of all Americans (52%) believe that same-sex marriage should be legal in all states while 43% are opposed, according to a recent survey by the Gallup Organization. But a new study suggests that opposition to same-sex marriage may be understated in public opinion polls. Using pre-election polling data in states that have voted on same-sex marriage measures, political scientist Richard J. Powell found that pre-election surveys consistently underestimated opposition to these laws by 5 to 7 percentage points. Blame "social desirability" bias—the tendency of people to give what they believe is the socially acceptable view rather than disclose their true feelings about sensitive topics.

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