

The Recognition of Non-Heterosexual Marriages in The Global System

Amandeep kaur¹, Prabhjot Sidhu², Sushma³, Ritika⁴, Karanvir Singh Gill⁵

^{1,2,3,4,5} LL.M. Scholar, Department of Laws, Guru Nanak Dev University, Regional Campus, Jalandhar, Punjab-144007

Abstract—This research deals with the interpretation and recognition of the non-heterosexual marriages in the global legal system. With the modernization of the society, new concepts like same sex also known as non-heterosexual marriages are gaining popularity. As the primary function of law is to regulate society therefore the law must regulate all the concepts and issues prevailing in the society. The paper further undertakes the legislations concerning same sex marriages across various nations.

Index Terms—Non heterosexual marriages, International Law, Human Rights, Right to Marry,

I. INTRODUCTION

Marriage has traditionally been viewed as a union between a man and a woman. However, societal norms and legal frameworks have evolved to recognize the rights of individuals beyond heterosexual relationships. Same-sex marriages and non-heterogeneous marriages (which include unions beyond conventional male-female partnerships, such as gender-fluid or non-binary relationships) challenge the traditional definitions of marriage and advocate for inclusivity, equality, and legal recognition.

Same-sex marriages primarily refer to the legal and social recognition of marriage between two individuals of the same gender. Many countries worldwide have legalized same-sex marriages, recognizing them as a fundamental human right that upholds equality and dignity. This shift is largely influenced by growing awareness of LGBTQ+ rights and landmark judicial decisions that emphasize the right to love and marry freely.

Non-heterogeneous marriages, which go beyond same-sex unions, include marriages involving individuals who identify as non-binary, genderqueer, or transgender. These unions challenge traditional

gender roles and push for broader legal recognition of relationships that do not fit the binary framework. While many progressive legal systems have started acknowledging these relationships, several nations, including India, continue to debate their legal validity.

The term non-heterosexual marriages denote same sex marriages as well as mixed orientation marriages. Often the terms same sex marriage and non-heterosexual marriages are used interchangeably. But the two terms denote different genre of marriage. Same sex marriages cover those marriages which are performed between two persons having same sex and sexual orientation and on the other hand non-heterosexual marriages denotes those marriages performed between two people having same sex but having mixed or different sexual orientation. The only difference between two terms is the type of sexual orientation and gender between two people who are marrying. It shall be noted here that in the Indian context there is no legal recognition to both the concepts i.e. non-heterosexual marriages and same sex marriages. However, there are ongoing efforts that are being curated like Roadshows etc. demanding to legalise the same. It is considered a basic human right that one shall have freedom to marry someone of their choice. With the emergence of concepts like LGBTQ+, it becomes important to recognize and protect the relationships of the different communities. The legalization of same sex marriages and non-heterosexual marriages is not only confined to the welfare of LGBTQ+ community but will also strengthen the concept of social acceptance and decreased discrimination. This is being advocated all around the world by the human right activists and LGBTQ+ advocates. The legal recognition will not only enhance the protection to these couples but also provide a broader sphere to

socio-cultural attitudes towards couples having same sex or sexual orientation.¹

The term LGBTQ stands for Lesbian, Gay, Bisexual, Transgender, Queer, the sign + has been included in the term to denote other sexual orientations.

II. INDIAN LAW AND NON-HETEROSEXUAL MARRIAGES

The Indian legal system does not recognize non-heterosexual marriages as it is interpreted that the marriage is union of two persons between man and woman. Under section 377 of the Indian Penal Code that dealt with the criminalization of homosexuality had been struck down by the Hon'ble Supreme Court providing a basic to acceptance of rights of LGBTQ community. However, the non-heterosexual marriages and the same sex marriages have not been legalized in the Indian Legal system. Various legal cases and public interest Litigations have been filed to initiate the proceedings of legalizing the non-heterosexual marriages in India. In the year 2017, the Delhi High Court had declared that the same sex couples are empowered to have a stable and healthy relationship but this decision lacked in the legalizing of the same sex marriages.

Various developments have been noted in the Indian Legal system that shall provide future implications regarding the same sex marriages in Indian legal system. The Indian Government introduced Personal Data Protection Bill 2020 a significant part of which emphasizes on Right to Privacy on all persons irrespective of Sex, Gender and sexual orientation. Various advocates of same sex marriage argue that this may lead to legalizing of same sex marriages as it includes empowering individuals to have control over their lives as this is one of the aspects of privacy that one should have control of their own life.²

The development of the LGBTQ+ community and their rights traces back to colonial era as it was the British Government who drafted and enacted Indian Penal Code 1860 and incorporated Section 377 in the Indian Penal Code. As discussed above, the nature of Section 377 of IPC provided that homosexual acts are criminal in nature. This law was not changed or amended even after gaining independence in the year

1947. As at that time, the concept of same sex marriages was not prevalent in India.

The revolution of LGBTQ+ community and their rights emerged in the late 20th Century in India. In the 1990s the first organization of the LGBTQ+ community was formed namely, AIDS Bhedbhav Virodhi Aandolan in order to fight against the discrimination and violence faced by the persons belonging to LGBTQ+ Community. Again, a prominent institution called as Naaz Foundation filed a public interest litigation (PIL) challenging the constitutionality of Section 377 of the Indian Penal Code. However, the said institution faced backlash and received a significant opposition from the society, religious leaders of all the groups as well as conservative groups³ in 2007, section 377 was declared to be unconstitutional by the Delhi High Court. But the homosexuality was still considered as an offence even after the decriminalization of the homosexuality.

The Hon'ble Supreme Court exercising powers of judicial review overturn the judgment given in the case of Naz Foundation in 2013, which resulted in reinstating of the Section 377.

Again, in the year 2018, a five-judge bench of the Supreme Court of India declared Section 377 as unconstitutional again reversing its decision given in 2013. This is one of the landmark cases in the Indian Legal system concerning the rights of LGBTQ community and non-heterosexual marriages. But this in no way led to validating and legalizing non-heterosexual marriages.

The same sex marriages and non-heterosexual marriages are not recognized also in addition to that there is no marriage equality along with the rights and benefits attached to it such as inheritance rights, property ownership, joint property ownership etc. In the case of Navtej Johar case had recognized their right to love and intimacy without fear of persecution or prosecution.

But this has not changed any significant movement in the society. it can be considered as first step to mark greater acceptance, visibility, and advocacy of rights and freedoms. The advocates of the same sex propose that denying right to marry to individuals based on the sexual orientation is a infringement of fundamental rights and freedoms. Everyone shall be entitled to live life out of choice also extends to right

to marry. Also, it imparts the right to equality and protections to all the persons irrespective of their sexual orientation. As LGBTQ+ community is also marginalized, the protection of rights of such community becomes essential. This step will also ensure positive impact on the mental health of the children.⁴

III. THE TRANSGENDER PERSONS (Protection of rights) ACT 2019:

This act has been enacted to provide protection to the rights of transgender individuals and enable the legal recognition. The act prescribes that there shall be no discrimination regarding persons belonging to LGBTQ+ community. The act prescribes that LGBTQ persons shall apply for the same to the competent authority for the certificate of identity stating change in gender and other prescribed changes. It is also prescribed that the appropriate government shall be providing welfare measures by the government. The act also prescribes establishment of redressal mechanism and right of residence to persons belonging to LGBTQ community. The act also constitutes National Council of Transgender Persons. The act also prescribes various facilities like obligation of educational institutes to provide inclusive education to transgender persons, providing vocational training, self-care employment and healthcare facilities.⁵

IV. STATUS OF SAME SEX MARRIAGE ACROSS THE GLOBE

Various countries have legalized the same sex marriages and non-heterosexual marriages. The first country that legalized same sex marriage was Netherlands. And the most recent country that has legalized same sex marriages and non-heterosexual marriages is Costa Rica in 2020. Internationally, the topic of same sex marriages non-heterosexual marriages has gained more popularity nowadays as compared to earlier times. The most advocated argument served by the proposers of the non-heterosexual marriages is that it is a basic human right that shall be not be denied to any individual, the concept of human rights is also emergence of

international law. Earlier the nation's used to have the principle of police state which has now changed to welfare state. The main purpose of the welfare state is to ensure welfare of its citizens and people living in it which are also known as its subjects. Therefore, with the enhanced acceptance of the concept of welfare state, the ideals and laws of the nations are also changing according to the changed nature. Likewise, the Taiwan became the first Asian country to enact legislation on the same sex marriages. In a landmark judgement of Japanese court, it was held that the failures to enable same sex marriages are violative of Article 14 which guarantees Right to Equality.

But this cannot be interpreted as acceptance of the non-heterosexual marriages as a matter of right to individuals because many Asian countries still have criminalized same sex marriages. The Human rights campaign discusses various developments regarding the legal recognition of the same sex marriages. Total no of 38 countries have legalized same sex marriages and framed legislations regarding to hetero-sexual marriages namely, Andorra, Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Denmark, Ecuador, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Liechtenstein, Luxembourg, Malta, Mexico, The Netherlands, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, Thailand, United kingdom, United States of America, Uruguay and New Zealand. All these countries have laid emphasis on marriage equality through their legislations and Court Precedents.⁶

Furthermore, in addition to these countries legalizing the Non heterogeneous marriages, international law also deals with several principles related to same sex marriages and non heterogeneous marriages which are as follows:

1. International law prohibits any kind of discrimination between unmarried different sex cohabitants and unmarried same sex cohabitants.
2. A legal obligation to recognize existing same sex marriages from other jurisdictions at least for some purposes.
3. An obligation to respect existing marriages that are becoming same sex because one of the spouses is having change of gender or sex.

4. An obligation to recognize existing registered partnership from other jurisdictions at least for some purposes,
5. An obligation to give same sex couples access to a legal framework for their relationship.
6. An obligation to give same sex couples access to rights and benefits derived from the marriage and their free enjoyment.

In the Universal Declaration of Human Rights, it is mentioned that everyone has right to contract the marriage, therefore there is no explicit mention of any gender or nothing heterosexual about the term. Various decisions across the globe also support Non heterogeneous marriages and Same sex marriages.⁷

In the case, *Obergefell v. Hodges*, 576 U.S. 644 (2015)⁸ states U.S. Supreme Court ruled that same-sex marriage is a fundamental right under the Fourteenth Amendment, legalizing it across all 50 states. *United States v. Windsor*, 570 U.S. 744 (2013)⁹ struck down the Defense of Marriage Act (DOMA), which defined marriage as between a man and a woman for federal purposes. *Lawrence v. Texas*, 539 U.S. 558 (2003)¹⁰ have decriminalized same-sex relationships by striking down sodomy laws, laying the groundwork for same-sex marriage rights. In the case, *Steinfeld and Keidan v. Secretary of State for International Development* [2018] UKSC 32¹¹ laid down UK Supreme Court ruled that restricting civil partnerships to opposite-sex couples was discriminatory, leading to equal marriage and partnership rights. In *Halpern v. Canada (Attorney General)* (2003)¹² Ontario Court of Appeal ruled that restricting marriage to opposite-sex couples was unconstitutional, leading to the legalization of same-sex marriage in Canada. In *Minister of Home Affairs v. Fourie* [2005] ZACC 19¹³ The Constitutional Court of South Africa ruled that denying marriage rights to same-sex couples was unconstitutional, leading to the legalization of same-sex marriage in 2006. In *Oliari and Others v. Italy* (2015) (Application nos. 18766/11 and 36030/11)¹⁴ stated The ECHR ruled that Italy's failure to provide legal recognition for same-sex couples violated Article 8 (right to private and family life) of the European Convention on Human Rights. In this case, *Schalk and Kopf v. Austria* (2010) (Application no. 30141/04) The ECHR ruled that the European Convention does not obligate states to

legalize same-sex marriage but recognized that same-sex relationships fall under the concept of "family life." In *Navtej Singh Johar v. Union of India* (2018) AIR 2018 SC 4321¹⁵ has Decriminalized homosexuality by striking down Section 377 of the Indian Penal Code but did not legalize same-sex marriage. In *Supriyo Chakraborty v. Union of India* (2023), The Supreme Court of India refused to legalize same-sex marriage but emphasized non-discrimination and the need for legal protections for same-sex couples.

V. CONCLUSION

In the 21st century also, same sex marriages are still considered as a social stigma in many countries. The legalization of non-heterogenous marriages is done only by 38 countries which is very less. The right to marry is one's own choice as it is their life and they should decide that with whom the lifetime partnership shall be done. the recognition of same-sex marriages is a significant step toward equality and inclusivity in society. Granting legal and social acceptance to these unions not only upholds fundamental human rights but also strengthens the values of love, commitment, and family. As societies evolve, it is essential to ensure that all individuals, regardless of their sexual orientation, have the freedom to marry the person they love. Embracing diversity and fostering acceptance will lead to a more just and harmonious world for future generations. same-sex marriage is not just a legal issue but a matter of human dignity, equality, and social progress. Denying individuals the right to marry based on their sexual orientation reinforces discrimination and prevents them from accessing the same legal, social, and emotional benefits as heterosexual couples. Recognizing and legalizing same-sex marriages strengthens the foundations of democracy, ensuring that all citizens enjoy equal rights under the law. As societies grow more inclusive, it is crucial to foster a culture of acceptance, respect, and love, allowing every individual the freedom to build a life with the person they choose. Moving forward, continuous efforts in education, legal reforms, and awareness will help eliminate prejudice and create a more just and equitable world for future generations.

REFERENCES

- [1] Law Commission of India, 'Reform of Family Law' Report No. 277 (2018)
- [2] SC verdict on same-sex marriages Explained," The Indian Express, October 17, 2023,
- [3] A. Faizan, "SC's Marriage Equality Judgment: Manufactured Classifications and Return of Minuscule Minorities," The Wire, available at: <https://thewire.in/law/scs-marriage-equality-judgment-manufactured-classifications-and-return-of-minuscule-minorities> [Last visited on February 4, 2025]
- [4] Dipika Jain, "LGBT+ rights claims for marriage equality and the possibilities of recognition in India," International Journal of Constitutional Law, Volume 21, Issue 4, December 2023,
- [5] Universal Declaration of Human Rights, 1948, Article 16, available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights> [Last visited on February 3, 2025)
- [6] Obergefell v. Hodges, 576 U.S. 644 (2015) (U.S. Sup. Ct.)
- [7] United States v. Windsor, 570 U.S. 744 (2013) (U.S. Sup. Ct.)
- [8] Lawrence v. Texas, 539 U.S. 558 (2003) (U.S. Sup. Ct.).
- [9] Steinfeld and Keidan v. Secretary of State for International Development, [2018] UKSC 32 (UK Sup. Ct.).
- [10] Halpern v. Canada (Attorney General), (2003) 65 O.R. (3d) 161 (Ontario Ct. App.)
- [11] Minister of Home Affairs v. Fourie, [2005] ZACC 19, 2006 (1) SA 524 (Constitutional Ct. of S. Afr.)
- [12] Oliari and Others v. Italy, Applications Nos. 18766/11 & 36030/11, Judgment of 21 July 2015 (ECHR).
- [13] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321 (India)