



Same- Sex Marriages in India United States of America and European Union: A Comparative Analysis

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Abstract: Marriage is a socio-legal right which gives opportunity to express one's love to someone else. It is a sign of commitment of love and a legal union of two individuals. Lesbian, gay, bisexual and transgender people are just as human beings. So if two people want to unite their destinies then it should be celebrated as same-sex marriage harms no one and it does not take anything away from heterosexual marriages. So third party interferences is not called for since marriage is a union of two spirits and the spirit is not male or female. But critics argue that marriage is defined as union of a man and a woman and to change that would undermine the institution of marriage and the family role in holding the society together. A growing number of countries around the world have legalized same-sex marriage. So a civilized country like India should not discriminate persons on grounds of race, religion, sex and sexual orientation. So denying lesbian, gay, bisexual and transgender people their right to marry would be discriminatory and homophobic. So the present topic aims to compare and contradict equality and discriminatory laws for marriage in India, United States of America and countries in European union with a view to provide solution for local problems.

Key Words: Bisexual, Eunuch, Gay, Homophobia, Lesbian and Transgender.

Introduction:

The recognition of same-sex marriage is a political, social and religious issue in many countries around the world. Various faith communities around the world support it where as there are other major religious groups who oppose it and have agreed that recognition of LGBT marriage would erode the religious freedoms and undermine the right of children to be raised with their biological mother and father or institution of marriage itself. Currently same-sex marriages are legal in twenty one countries where it is regulated through law, customs, religion in most countries. The legal and social responses have ranged from celebration on one hand to

criminalization on the other. The issues of same-sex marriage have frequently sparked emotional and political clashes between supporters and opponents. By the early twenty-first century many countries have legalized it and in some countries constitutional measures are adopted to prevent the same.

Same-sex marriages in India:

India's attitude towards lesbian, gay, bisexual and transgender marriages swings both ways from ambivalent acceptance to downright denial. LGBT marriages are considered immoral, creepy, filthy and is considered sin even from ancient times. It has never been approved nor recognized by our society. Indian



legal system is heterosexually ordered and there right to marry is distorted by statutory bottlenecks in Hindu Marriage Act 1955, Indian Christian Marriage Act 1872, Parsi Marriage & Divorce Act 1936 and Special Marriage Act 1954. India does not recognize same-sex marriages and LGBT community feel lesbian marriages are more stable than that of gay couples who are thought to be more promiscuous. However case studies in India suggest family reactions range from support to violent persecutions while police harass such couples. Indian Newspapers over the last twenty-five years have reported several same-sex weddings leading to cases of Joint suicides mostly lesbians in small towns. In India so far no such progressive change has taken place and LGBT people remain victims of violence in different forms supported by state and society. Though same-sex marriages are not legal in India but that did not stop a Gurgaon Court in 2011 from effectively recognizing a marriage between two women. Since marrying the couple started receiving threats from friends and relatives in their village, they were threatened with dire consequences. The couple ultimately shifted to a safe house and has been provided security on the perception of threat and in this case the couple feared that their families might be against their relationship. Even an Indian tribe has given consent to a lesbian marriage in Eastern Indian state of Odisha. A priest belonging to a Kandha tribe led the ceremony between Weka Polang aged 30 and Melka Nilisa aged 22 in Koraput district. Both the women are day labourers and now live together in Dandabadi village. Sociologist says that the community blessing was unheard of India. The local community fiercely protested the idea so both of them eloped

to another village to escape the wrath of their neighbours. So after much persecution by family members Kandha villages of Dandabadi village gave consent to formal wedding. There has also been a couple of high profile. Same-sex marriage of designer Wendell Rodricks with his French partner Jerome Marrel conducted under French law in Goa India.

Bisexuals live in gender segregated societies and have been overlooked in same-sex marriage debates they are promiscuous and are indiscriminate about satisfying their carnality and people say they enjoy best of two worlds but in practice it is worst of the two.

Transgenders (hijras) in India do not marry. Nobody wants to marry hijras because they cannot bear children. However they do have live-in relationship where they live like married couples with men women and with other members of community as per convenience. They have found their husbands unscrupulous pleasure seeking men who promise them love, respect and acceptance. Some eunuch have proved to be very caring wives, their husbands get everything from them except natural sex and progeny. However exceptions prove the rule to quote one sub-registrar of marriage confirmed that in her career spanning of twenty two years she had registered four marriages between eunuchs and non-eunuchs. One between a eunuch and a women while the other three were between eunuch and men. She mentioned in marriage application form both parties need to be mentioned along with proof which is an uphill task. Since official record of their gender at births is found to be at variance with assumed



gender identity it leads to social and legal complications.

Transgenders and eunuchs do have a right to marry as held in *Paramaswami v. Somathamal*¹ where the Madras High Court said Eunuchs are outside place of marriage and constitute a class which earns its livelihood by singing and dancing on occasion of birth and marriages. Sometimes eunuchs are brought up in families either as male or as female and marriage do take place of such persons one such case came up before Madras High Court where the wife was a eunuch. The question of validity of her marriage arose after the death of her husband as an issue. Justice Alagiri Swami equated such person with an impotent person and the marriage was voidable and the only person who could annul the marriage was the husband who being dead. So the validity of marriage could not be questioned. It was submitted that the judgment was fully correct because a marriage between two persons of same-sex is void abinitio. But a marriage between a person either male or female with a neutral gender such as eunuch is not void under any law because one may marry a eunuch solely for companionship. It was in this context the judge said eunuchs have prima facie right to marry. Such will be the case of an impotent marrying another or one eunuch marrying another.

There may also be a case where a potent person may happily live with his or her spouse who is impotent or eunuch. In such a case a couple if desires to have children they can take recourse to adoption. In case if after marriage they find it impossible to live together they may get their marriage annulled. So it was submitted that the marriage of an

impotent or a eunuch should be voidable at the instance of other party.

In India the process of transition for sex reassignment surgery (SRS) is not so smooth. So in absence of statutory regime the across beyond gender people use to face serious discrimination until 2014 when Supreme Court in **National Legal Service Authority v. Union of India & others**² recognized transgenders as third gender and the court not only upheld the rule of law but granted certain benevolent rights including right to marry. The court said it is hard to digest the **Corbett v. Corbett**³ principle of biological test rather gave precedence to psyche of a person in determining sex and gender and prefer psychological test instead of biological test. In India homophobia is deeply intertwined with modern nationalism as law has criminalized the existence of LGBT people and Indian law on marriage issues though remains murky still in 2016 on Valentine's Day began with a new life journey for six transgenders in Delhi as they tied knots with their male lovers at community centre in Kashmiri gate area. According to a report the unusual wedding ceremony was organized by an NGO called "space" which works for rights of transgenders said after the wedding the couples shared interesting stories that at last culminated in marriage. These couples also have a right to live their life if their families support them.

Same-sex marriage in United States of America:

United States of America has fifty states and District of Columbia. The right of lesbian gay bisexual and transgender was initially available to LGBT couple as



civil right in thirteen states and District of Columbia. Thirty seven states had statutes and constitutional prohibitions prohibiting marriage between two people of same-sex. But in the year 2003 the US Supreme Court delivered a landmark judgment in **United States v. Windsor**⁴ which forced federal government to recognize same-sex marriage where it was legal. The court struck down Section 3 of Defence of Marriage Act (DOMA) which limited the definition between a man and women for the purpose of Federal benefits as violative of US constitution and deprived equal liberty of persons that is protected by Fifth Amendment of US constitution. The Year 2014 was perhaps the biggest turning point in the history of same-sex marriages because it became legal in thirty seven states. However the change wasn't driven by a bevy of new laws or a big decision instead it was a slow burning sequence of District Federal court rulings. State Supreme Court decisions, legislative statutes and referendums. With that veteran tennis star Martina Navratilova married her long time lesbian partner Julia Lemigova in Pennsylvania. So with this Supreme Court ruling LGBT couples in US were entitled to several federal benefits that flow from marriage.

In US lesbians frequently marry each other but bisexuals have been overlooked in same-sex marriage debates firstly where same-sex marriages were illegal, those campaigning for it have failed to highlight the inconsistencies of marriage to bisexuals whose right to marry depended solely on their gender of all partners. But where same-sex marriages were available a bisexual partner was either referred to a gay or lesbian.

Finally on 26th of June 2015 the American Supreme Court in a historic landmark decision in **Obergefell v. Hodges**⁵ held that the recognition of provisions of same-sex marriage is a fundamental right guaranteed under fourteenth Amendment of US constitution. The court said the decision requires all fifty states to recognize same-sex marriage validly performed in all jurisdictions and even outside. The ruling arrived like a thunder bolt after a series of back and forth battle over same-sex marriage and is a big step in USA's march towards equality. The court with a 5-4 ruling struck down state bans on same-sex marriage as unconstitutional. So gay, lesbian and bisexuals exercised their right to marry just like heterosexual persons.

Though by most measures USA now is a country with best opportunity in the world for transgenders and transsexuals people, they are treated with par with normal genders people but so far as marriage issues are concerned transgender in USA still face legal barriers with regard to marriage because some people are aware that transgender people are able to enter heterosexual marriages after undergoing sex-reassignment surgery (SRS) but what is less known however is that transgender person may also be married to a person of same-sex. There is handful of cases involving transsexual marriages and the holdings are mixed. Courts in California, Florida and New Jersey have held that an individual is considered to be post operative sex for the purposes of determining the validity of marriage. Where as in Kansas, New York, Ohio, and Texas have held that the individual is considered to be their assigned sex at



birth following an older English case **Corbett v. Corbett**⁶.

If a couple chooses to stay together as many do the result is a legal marriage in which both partners are male or female alternatively in states that do not allow trans people to change his or her legal sex. Some of them marry a people of same-sex to all outward appearances and to couple themselves. But in the eyes of law it is different sex-marriage because technically speaking the law continues to view transgendered spouse a legal member of his or her birth, so even after sex reassignment surgery. In short marriage is a very real option of circumstances. In the year 1999 the Texas court invalidated a seven year marriage between Christine Littleton a transgender women and her deceased husband.

The case arose when Littleton brought a wrongful death claim suit seeking damages for husband's death as a result of alleged medical practice. Rather than ruling on the merit of the case the court held that a person's legal sex is genetically fixed at birth and Mrs. Littleton should be deemed to be legally male despite her female anatomy and appearances despite she had lived as a woman for most of her adult life. So Littleton was denied all her rights as a legal spouse.

In contrast in 1997 a trial court in Orange County affirmed the validity of marriage involving a transgender man. The case arose when a wife sought to invalidate the marriage in order to deprive her husband of his parental right vis-à-vis the couple's child who was born through artificial insemination; the trial court rejected the wife's argument that

the transgender husband should be considered legally female and refused to nullify the marriage. The court held that California law recognizes the post-operative sex of transgender person for all legal purposes including marriage. Notably however the court had ruled differently or the transgender spouse had not undergone the extensive and expensive sex reassignment surgery prior to marriage. It is likely that he would have lost any right to maintain a relationship with a child.

Same-sex marriages in European Union:

In European Union LGBT people's right to marry is legally recognized in Netherland, Belgium, Norway, Spain, Sweden, Portugal, Denmark, France, England and very recently Ireland and Luxemburg. In EU LGBT rights specially marriage is proteted under EU treaties and law and several EU laws after protection from discrimination. Article 12 of European Convention of Human Rights (ECHR) 1950 which says men and women of marriageable age have a right to marry and found a family according to national laws governing their exercise of right and not limiting marriage only to heterosexual couples.

In 2010 the European court of Human rights ruled on **Schaik and Kopf v. Austria**⁷ a case involving an Austrian same-sex couples who were denied right to marry. The European Court of Human Rights have nevertheless decided to give the contracting states a margin of appreciation in granting same-sex couples access to marriage giving textual interpretation to Article 12 of European charter of Human Rights.



Marriage is love bondage in personam. So a moralistic bias against the basic rights of LGBT people in European Union has no defence. So like USA in European Union the marriage issues of lesbian gay and bisexual are not so important. However a majority of countries in European Union give transsexual people the right to at least change their first name and most of them providing a way to change the birth certificates. But there are several other EU nations which recognizes the right of transsexuals to marry in accordance to their post operative sex like Czech Republic, Denmark, France, Germany, Italy, Netherland, Norway, Portugal, Romania, Sweden, Spain and UK all recognize this right. But transgenders rights and protection is not covered the same way in European Union law despite European Parliament adopting a resolution on transsexual rights as early as 1989. Thus all EU sex discriminations apply to transgender people and like US the marriage of a transgender is also a big issue. This was demonstrated in **Joanne Cassar v. Malta**⁸

Conclusion:

So from the above discussions one can philosophise the whole idea and conclude that LGBT same-sex marriages is not only a social reality in India but also in western countries as it has its roots in its past. As of now same-sex marriages is legal in twenty-one countries including United States and some countries of European Union but in India it has a long way to go so far as legal recognition is concerned because Indian society at large considers homosexuality as a taboo and Indian society is not mature enough to adopt western style of sexuality in Indian family discourse. If

this viewpoint is accepted, it will cause fissures in social fabric of the nation. Barring a minuscule support by a new high class influential persons majority of people in India strongly condemn it as it spoils the basic pious purpose of marriage and pleaded to be unnatural and against the principle of nature of which the universe is formed. But today the theatre of law is changing thick and fast the new age family is moving towards both married and live-in adults one never knows what will happen to the fate of same-sex marriages in India let us hope for the best and be prepared for the worst what happens after the curative petition is disposed.

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