

PLACEMENT OF MARITAL TIES THROUGH SUBSTANTIVE LAWS FOR SEXUAL MINORITIES IN INDIA

*Pooja Tiwari**

I. INTRODUCTION

Marriage is known as the alliance between a man and a woman. It gives legitimacy to the relations between two parties from the opposite sex. However, the traditional notions of gender and sexual relations are now being challenged by the emergence of other identities such as lesbians, gays, homosexuals, bisexuals, etc. The demands put forward for realizing their fundamental and other rights are now making fissures in various laws such as marriage, divorce, and succession. The problem with such demands is that these aspects are covered by personal laws which are hard to amend since they are specially protected by the Constitution. Therefore, any changes by the State in these personal laws may be seen as a threat to their culture and traditions. The present article tries to explore the placement and possibility of such rights for sexual minorities and the scope for amendment by intervention of the judiciary.

When the Supreme Court of India finally de-criminalized section 377¹ IPC as unconstitutional, especially for same-sex people in India, through *Navtej Singh Johar v. Union of India*² (hereinafter '*Navtej Singh Johar*') there was euphoria in the entire country. This arbitrary law which was in law books for more than a century and a half was the tool of harassment by police³ and other authorities for people with different sexual preferences and gender identities. But this judgment raises a lot of pertinent questions of greater significance. The next logical question after de-criminalizing sexual relations between same-sex people would be about marriage and civil union. But is it really possible in a country where the marriage institution is guided by traditional notions? Such issues are now lurking towards the state of India. There have

* Research Scholar, Faculty of Law, University of Delhi.

¹ The Indian Penal Code, 1860 (Act 45 of 1860), s. 377: “**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.”

² W.P. (CrI.) No. 76 of 2016.

³ Shreya Raman, “Denied visibility in official data millions of transgenders can’t access benefit services” *Indiaspend*, June 11, 2021.

been various petitions which are pending before different forum such as the Delhi High Court to challenge this cultural and traditional idea of marriage. However, the response⁴ of the central government that there is no state interest in allowing the same-sex marriage is disheartening. It sort of lays the ground, that to achieve this fundamental right to choose a partner for the matrimonial alliance would further require time and impetus by the stakeholders and community. Various judgments which give liberty⁵ to adults to decide and choose their partners stand in direct conflict with the position of the government.

The government says that recognition of same-sex marriage is against 5000 years old Sanatan Dharma, it goes against the constitutional rights which are available to every citizen in India. An interesting point to mention here is that the government is reluctant to accept their marriage not only under the Hindu Marriage Act, 1955 but also under the Special Marriage Act, 1954, and civil unions as well. Before explaining the challenges that this community face while agitating for same-sex marriages, it is imperative that we try to understand the background of the entire debate which is responsible for mooted the idea of same-sex marriage in Indian society.

II. BRIEF HISTORY OF THE JUDICIAL RECOGNITION OF SEXUAL MINORITIES IN INDIA

The Delhi High Court in the case of *Naz Foundation v. NCT of Delhi*⁶ brought to fore what was the major requirement of sexual minorities. The views of political leaders, institutions play an important role in changing and shaping the ideology of law. So, when the verdict of this case was delivered, it was indeed a historical moment. The petitioner in this case was NGO Naz Foundation which filed the public interest litigation (hereinafter 'PIL') stating that the law in the statute book was violative of articles 14, 15, 19, and 21 of the Indian Constitution. Apart from relying upon various fundamental rights, the court also cited international statutes such as UDHR, ICCPR, Yogyakarta principles, etc. An interesting fact about the reply of the Union of India in this case was that the two respondents, the Ministry of Home Affairs was in favor of retaining section 377 of IPC while the Ministry of Health and Family Welfare was in favor of striking the provision because it hampered the HIV/AIDS related health programs. The Court

⁴ Nivi Shrivastava, "Same sex marriage demands gain steam in India" *Deccan Chronicle*, Oct. 20, 2020, available at: <https://www.deccanchronicle.com/lifestyle/viral-and-trending/201020/same-sex-marriage-demands-gain-steam-in-india.html>.

⁵ *Shafin Jahan v. K.M Ashokan, Lata Singh v. State of U.P.*, etc. which gives liberty to individual to choose their life partners.

⁶ WP(C) No.7455/2001.

invoked the grounds of the right to equality, right to dignity, right to privacy which are discussed elaborately.

This judgment was immediately challenged in the Supreme Court by Suresh Kaushal. The court in *Suresh Kumar Kaushal v. Naz Foundation*⁷ overruled the decision of the Delhi High Court. The amusing reasoning given by the court that since homosexuals are a miniscule population in the country sends the message that only the majoritarian set of groups are important, and only their claims are worth demanding attention. Since people from the LGBTQIA+ community are lesser, or “miniscule” (to say in the language of the court) then perhaps in the future, other minorities, for instance, Parsis or any other minorities based on the irrational ground shall not be protected, their rights cannot be upheld just because they are part of the minority population. The problem with the reasoning of the court is that the parameter of majority as a ground for protecting the rights is vague and unreasonable. It could be used as a tool to further legitimize the marginalization of the weaker sections and community. The judgment reeks of majoritarian conformity of sexuality. The heteronormative forms which clearly outnumbers the sexual minorities hence, are the natural form of sexuality.

Finally, the curative petition filed by dancer Navtej Singh Johar along with four others overruled the judgment of *Suresh Kumar Kaushal v. Naz Foundation*⁸. The Constitutional Bench of the Supreme Court read down section 377 IPC. It decriminalized consensual same-sex relations on the cornerstones of articles 14, 15, 19, and 21 of the Indian Constitution. It is also important to mention that *K.S Puttaswamy v. U.O.I*⁹ explicitly recognized the right to privacy as part and parcel of Article 21 of the Indian Constitution. The observation made by the court that sexual orientation is part of privacy highlighted that section 377 of the IPC was violative of privacy and dignity of sexual minorities in India.

Apart from these judicial pronouncements, Supreme Court of India in *NALSA v. U.O.I*¹⁰ declared that transgenders are socially and educationally backward class. The Court further held that right to self-perceived identities is an important aspect of dignity of transgenders. This judgment also takes into account the social and cultural context of identities of transgenders

⁷ WP(C) No.7455/2001.

⁸ *Ibid.*

⁹ Writ Petition (Civil) No. 494 OF 2012.

¹⁰ Writ Petition (Criminal) No. 208 of 2014.

present in India. Hence it explains that transgenders are known as *Hijras* in the northern part of India, *Kothis*, *Panthis*, *Jogappas*, *Jogtas*, *Aravans*, etc. are some other examples of these identities in India. The court further explains that this community held important positions during earlier times. They are engaged in singing *badhais* during various important functions and ceremonies in India. The court declared guidelines for transgenders such as - there should be reservations in education, employment, healthcare services for transgenders, etc.

All the above judicial pronouncements have highlighted the range of identities which had been masked because of the presence of section 377 of IPC and the ghost of the colonial past in the name of the Criminal Tribes Act, 1871. Sexual minorities have come to the forefront due to the journey of decriminalization of section 377 of IPC from *Naz Foundation* to *Navtej Singh Johar* case. They have highlighted that sexual orientation and gender identity is an implicit ground for discrimination on the basis of sex under different Constitutional provisions in India. Sexual orientation means an individual's enduring physical, romantic, and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people and their sexual orientation may or may not change during or after gender transmission, which also includes homosexuals, bisexuals, heterosexuals, asexual etc.

On the contrary, the notion of gender identities has been covered by the verdict of *NALSA v. U.O.I*¹¹. Gender identity means¹²:

...each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category.

Therefore, it was because of these judgments that these different identities were highlighted in India. However, it does not mean that they were not present in India before the

¹¹ *Ibid.*

¹² *Id.*, para 20.

judgments. These were hidden, masked because of presence of section 377 of IPC which rendered them criminals. The said provision was responsible for indirect discrimination. Prima facie it claimed to protect children and also prevent unnatural offence against the order of nature but it had indirect bearing on the sexual minorities. They have different sexual preference as compared to other identities who fall under gender binaries of male and female.

III. NAVTEJ SINGH JOHAR AND ANALYSIS OF FOREIGN JUDGMENTS CITED BY THE SUPREME COURT

The crux of the *Navtej Singh Johar* is that the Supreme Court has read down section 377, IPC. This section is unconstitutional with respect to same-sex consensual major adults. However, it is still valid for non-consensual sexual relations, minors' same-sex relations, and committing bestiality against animals. However, the court also cites various foreign judgments to explain what are the different remedies provided by the courts in different jurisdictions for same-sex people. Although the case laws discussed are non-binding but they have persuasive values in India. The foreign judgments cited have relevance for the future cases where there would be more pressing and different demands for recognizing the fundamental rights of people with different sexual orientations and gender identities. One such example is covered in the next part of the article where the interpretation of the terms bride and bridegroom was an issue before the Madras High Court in the case of *Arun Kumar v. Inspector General of Registration*¹³. The High Court gave relief to a transwoman relying upon the judgment of *Navtej Singh Johar* and the progressive interpretation of the word "bride". Therefore, the range of issues discussed through foreign precedents in *Navtej Singh Johar* could be considered as pathbreaking in realizing the rights of this community.

In case of *Egan v. Canada*¹⁴, the Old Age Security Act, 1985, was in dispute as it provided securities and guaranteed income supplements from the government to couples. Petitioner was denied allowance because under section 2 of the Old Age Security Act, 1985 the spouse meant member of the opposite sex. Therefore, the petitioner was denied the benefit which was available to heterosexual couples. The Court read into sex in section 15 of the Canadian Charter of Rights and Freedom as one of the grounds of discrimination.

¹³ WP(MD) No. 4125 of 2019.

¹⁴ [1995] 2 SCR 513.

In *Obergefell v. Hodges, Director, Ohio Department of Health*¹⁵ discussing the rights of sexual minorities under the Constitution of the United States of America, it was held that they were equally entitled to marriage under the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution. Kennedy J noted that “No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. It would misunderstand these men and women to say they disrespect the idea of marriage.

In Israel, *El-Al Israel Airlines Ltd. v. Jonathan Danielwitz*¹⁶ case involves the issue of benefits of availing discounted and free plane tickets for the spouse of the employee. However, the spouse only included the spouse of the opposite sex, hence the petitioner, in this case, was denied this benefit because the employee in this case was involved in the same-sex relationship. Granting relief to the petitioner on the grounds of discrimination, arbitrariness, and injustice, the court held that¹⁷:

The principle of equality demands that the existence of a rule that treats people differently is justified by the nature and substance of the issue...therefore, a particular law will create discrimination when two individuals who are different from one another (factual inequality), are treated differently by the law, even though the factual difference between them does not justify different treatment in the circumstances.

It is important to mention here that all the above rights are still pending for people with different sexual orientation and gender identity. However, these case laws can prove to be a guiding-lights when such issues are raised before different High Courts and before the Supreme Court of India. The judiciary is incumbent on the petition and case which is filed before them to give relief, in the meantime, one can look at the current state of affairs after the *Navtej Singh Johar* to understand where the society is heading for the upliftment of the rights of these people.

¹⁵ 576 U.S. (2015).

¹⁶ H.C.J. 721/94.

¹⁷ *Id.*, para 14.

IV. AFTERMATH OF *NAVTEJ SINGH JOHAR* JUDGMENT

Since section 377 of IPC has been decriminalized so far as there are consensual same-sex relationship but that does not mean that the said judgment has also allowed sexual minorities to get married. The following inference is drawn by the fact that during the petition, the central government had left the matter to the wisdom of the court. However, the center also requested the court in their affidavit¹⁸ that if any subsidiary right would be flowing by decriminalizing section 377 of IPC, then it should be given an opportunity to present its case. In the failure of the same, it would be a violation of the principle of natural justice. Although the matter in controversy was only with respect to reading down section 377 of IPC, however, the judgment also talks about the doctrine of progressive realization of rights for citizens in India. This entails that sexual minorities have equal citizen rights which are available to other citizens. Therefore, the rights for them include, rights against discrimination, equal employment opportunity, right to medical facilities, right to marry, right to have family etc.

The pertinent question regarding the fate of same-sex marriage Madras High Court while allowing marriage between a man and a transwoman where *Navtej Singh Johar* case was cited. In *Arun Kumar v. Inspector General of Registration*¹⁹ Madras High Court granted recognition to the marriage for sexual minorities. The matter was with respect to the solemnization of marriage between two people, one of whom was a male and a transgender. Although the marriage was solemnized in a temple, while seeking permissions, however, the registrar of marriage refused to give a marriage certificate on the ground that the bride was a transwoman. She was not a woman and this is not allowed under Hindu Marriage Act, 1955 according to which marriage can only be solemnized between bride and bridegroom. The court relied upon a progressive interpretation of the word ‘bride’.

It also relied upon Justice G.P Singh’s principle of statutory interpretation and held that “the bride under section 5 of Hindu Marriage Act cannot have a static and immutable meaning. It should be interpreted in the light of the legal system that is present in today’s times²⁰”. Hence, we can say that even though *Navtej Singh Johar* does not confer extra rights on the sexual

¹⁸ Affidavit filed by Union of India in *Navtej Singh Johar* case, *available at*: <https://barandbench.com/wp-content/uploads/2018/07/ASG-Tushar-Mehta.pdf> (last visited on March 05, 2022).

¹⁹ *Supra* note 13.

²⁰ *Ibid.*

minorities but it does lay a ground for future. This judgment is persuasive for providing more rights for sexual minorities in India. Looking at the judgment, it seems that the next logical step could be recognition of civil rights for LGBTQIA+ but the struggle for them is long and real because that would further require the changes in personal laws.

V. MARITAL RIGHTS THROUGH SUBSTANTIVE LAWS

As mentioned earlier marriage is considered an alliance between male and female. It provides a bundle of rights to the people who enter into it. At the same time, it changes the social and legal position of a person. There are various personal laws in India which cover this aspect of citizens. In a country with so much diversity and different religions, each religion has different practices, ceremonies, and customs of marriage. In this article the focus is on the Hindu Marriage Act, 1955, the Christian Marriage Act 1872, Muslim personal laws, and the Special Marriage Act 1954.

A. Possibility of Same-Sex Marriage Under the Hindu Marriage Act, 1955

Under Hindu Marriage Act, 1955, marriage is considered as a sacrament. It is a holy alliance which is guided by their customs as well which are prevalent in their families. When we talk about parties of the marriage, it is always between male and female. The logic for the same is that the alliance is entered into by the parties to further the generation and name of the family. The children have very important and specific roles to play. E.g., requirement of male child for *pind-daan* which is required for salvation of the departed souls. This is only possible through alliance between male and female because their sexual relation would be responsible for producing children from the blood of the family.

The example of the judgment of *Arun Kumar v. Inspector General of Registration*²¹ gives the flavor of the future issues that would be erupting for sexual minorities. The problem of interpretation of the terms bride and bridegroom for marriage is one such case. The denial of certificates by the concerned authorities of marriage could be another issue who may cite religious reasons for denying such certificates to the couple. The recent remark of the union gives us this idea that the road to recognition of the same sex marriage would not be a smooth ride.

²¹ *Supra* note 13.

B. Sexual Minorities and Christian Marriage Act, 1872

The Christian Marriage Act, 1872, is a civil union between man and woman who become united through covenant. Section 60 of the Christian Marriage Act, gives conditions on which the marriage would be certified. It has three subsections. It stipulates that man intending to marry shall not be under twenty-one year's age and the woman intending to be married shall not be below eighteen years. It further says that neither of the person intending to be married shall have a husband nor wife still living. The oath includes that ²² "I call upon these persons here present to witness that. I, A. B., in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee, C. D., to be my lawful wedded wife [or husband]" or words to the like effect. The question who is a man and who is a woman? How would the Court interpret it? Apart from the Judo-Christianity opposition would be seen in Christian marriage as well because this was used as justification to control the same-sex activity by Britishers.

Similarly, Muslim personal laws also put emphasis on the requirement of procreation²³ where marriage is considered as contract.

C. Special Marriage Act, 1954 and Civil Union in India

Under the Special Marriage Act, 1954, the requirement of religious ceremonies or grounds are relaxed. They are considered as secular marriage. The parties from different religion can get married here. However, the requirement of heterosexual couple is also mentioned here. It talks about age of bride and bridegroom. Therefore, for allowing the same sex marriage this Act also requires amendment under section 4(c) of the Act or relaxation in the definition of male and female.

To accommodate same-sex civil unions, there is again requirement of enactment of new laws and amendments in the law relating to "Indian Succession Act, 1925, Guardians and Wards Act, 1890, Workmen's Compensation Act, 1923 and a host of other legislations relating to

²² The Christian Marriage Act, 1872 (Act 15 of 1872), s. 60(3).

²³ Siddharth Narrain and Birsha Ohdedar, "A legal perspective on Same-Sex Marriage and other Queer relationships in India", Orinam, *available at*: <http://orinam.net/resources-for/law-and-enforcement/same-sex-marriage-in-India/> (last visited on March 02, 2022).

succession, adoption, pensions etc. so that a partner in a same sex civil union is given the same status as a spouse and considered to be family²⁴”

VI. MARRIAGE AND SUBSIDIARY RIGHTS

Since marriage changes the social and legal position of parties, the amendments in the marital laws would further result in changes in various other laws and rights which flow from the marriage. To give one example, actress Bobby Darling who is a transwoman had filed for dissolution of marriage in the Bombay family court²⁵ against her husband. However, her husband questions the validity of marriage on the meaning of bride as requirement for marriage, as she is not a woman. He questions the identity of the actress and denies his liability.

Apart from divorce other rights which are available to heterosexual couples such as maintenance, succession, pension rights, adoption are not available to sexual minorities. Recent pandemic has highlighted how this community is vulnerable. There are instances where same sex couple were stuck due to lockdown and were not able to contact with their partners as they are not recognized as couples. The authorities are not sensitive enough to understand their needs and relationship.

These are some issues which demands engagement and intervention as well because the court just has recognized the rights of sexual minorities as self-autonomous, added on the touchstones of privacy, dignity, equality, universality, and indivisibility of human rights. However, will the court be able to intervene in Personal Laws which have always been a hot debate in the country. Even the Special Marriage Act 1954, has the same understanding of husband and wife on the heteronormative sexuality and it does not accommodate the rights of LGBTQIA+.

VII. ALTERNATE VIEWS ON CIVIL RIGHTS – MARRIAGE AND DIVORCE

There are alternate views on marriage and divorce around the world, such as anthropologist, sociologist and even feminist. They have tried to give their own logics for

²⁴ Nayantara Ravichandran, “Legal recognition of same sex relationships in India” 5 *Journal of Indian Law and Society* 95-109 (2013).

²⁵ Swati Deshpande, “Bobby Darling to be in Bhopal family court on Friday” *Times of India*, available at: <https://timesofindia.indiatimes.com/tv/news/hindi/bobby-darling-to-be-in-bhopal-family-court-on-friday/articleshow/71641635.cms> (last visited on March 02, 2022).

marriage institutions. Going by the dictionary meaning of marriage, it is considered as institution for union between male and female. Marriage in certain countries is considered as consensual legal contract recognized by the government or the religious institutions. In some institutions and countries, it is considered as sacrament as well e.g., Earlier societies in India and even modern Hindu families consider it as partly sacrament and partly contract. According to Muslims, it is a contract of union of two different sexes. It gives legitimacy to children and sexual rights to spouse. The reasons for marriage are many from emotional, economic, spiritual, religions, family obligations, procreation, and protection of children etc. and it changes the personal and social status of individual who enters into it.

A. Anthropologist Views on Marriage Institution

Anthropologist Edward Westermarck²⁶ in his book defined marriage as a “more or less durable connection between male and female lasting beyond the mere act of propagation till after the birth of the offspring” but later in his work²⁷ he defines marriage “as a relation of one or more men to one or more women that is required by custom or law.” So, if we notice earlier his emphasis or rather reasoning for marriage was for not only rearing child but also lasting relationship between men and women but in his later definition that relationship is between more than one man with one or more than one woman which is either recognized by custom or law. It has no mention of child/property in the relationship.

Anthropological handbook ‘Notes and Queries’ (1951) defined marriage “as a union between a man and a woman such that children born to the woman, are recognized legitimate offspring of both the partners”. Here the emphasis on the legitimacy-based relation of children with parents is given. The same has been accepted by Edmund Leich. However, Duran Bell²⁸ criticizes this legitimate-based definition and proposes defining marriage in terms of sexual access rights.

B. Sociologist View

Sociologists say that marriage is not only about gaining wife or husband but more about social & economic relationship and accordingly kinship as well. There is shift from coalition,

²⁶ Edward Westermarck, *The History of Human Marriage* (Macmillan, 5th ed., 1921).

²⁷ Edward Westermarck, *The future of Marriage in Western civilization* (Books for Libraries Press, 1936).

²⁸ Duran Bell, “Defining marriage and legitimacy” 38 *Current Anthropology* 237-253 (1997).

association, and partnership to being relatives by marriage. This helps in the construction of a family and ultimately there is stability in society.

C. Conservative/Traditionalist View

They believe that family is the basic building block of societies which preserves the fabric of cultural values. It not only provides emotional and sexual support but protects the couples from hostile conditions prevalent in the world. It pressurizes on moral values as well.

D. Feminist View

Marriage is an institution which is rooted in the patriarchal structure and it promotes male superiority and power over women. If we see feminists' views on marriage, they first attack the patriarchal structure. E.g., Kate Millet²⁹ attacks the structure of power in society that originates from patriarchy. This structure reinforces the stereotypical role of women as primary care giver confined within the four walls of private spheres while males are the provider working in public sphere. Through these societal norms within family structure the individual learns to accept sexual oppression as 'natural'. There is a natural way as to how women should behave and aspire to be – a submissive, a wife, a caretaker etc. This is against the concept of egalitarian marriage where work/ labor is equally divided but not on the basis of sexual / gender roles.

Within feminist view, there is an alternate view regarding the need to reconsider the institution of marriage by liberal feminist Betty Freidan. Through her work called 'The second stage', she ask the feminists to move away from anti- family rhetoric. She asks for reconsideration of marriage by not only addressing the needs of women but also the desires of men. This humanistic approach would enrich the institution of marriage.

Apart from that if we see the social settings in India, caste system is followed here. Caste is something that is deeply rooted within the psyche of the people. The issue of intersectionality is also responsible for not recognizing the hierarchies of identities which denies transgender the life of dignity and respect. The quest of purity of blood, maintaining the successive generation are the reasons for not only denying inter-caste marriage but also responsible for resistance for

²⁹ Kate Millet, *Sexual Politics* (Columbia University Press, United Kingdom 1970).

recognizing same sex relations³⁰. Hence, the marital relations are confined between male and female.

VIII. MARRIAGE- A HETERONORMATIVE STRUCTURE, A QUESTION OF SPACE FOR LGBTQIA+ COMMUNITY

As mentioned earlier the meaning of marriage is the union of male and female only. The consideration for marriages such as emotional, social, sexual, economical support etc. are confined to male and females only which ignores the entire spectrum of people from LGBTQIA+ community. But with the emergence and recognition of spectrum of identities within the rainbow it challenges the traditional definitions and concepts. This in result is questioning the hegemonic idea of marriage and family. So, the question that emerges before us is that how and where the gay community would find its space for marriage? If we look at anthropological and sociologist view, they both focus on relationship, companionship between male and female with legitimization of children

If we look at feminist perspective, they are rejecting the stereotypical and traditional notions of marriage and family through attack on patriarchy. Feminist believe that there is power dynamics between men and women within a familial set up which is responsible for lower status of women in comparison to men. Whether people from same sex relations be placed in such a structure? Such a view may not be correct as there is not necessarily power dynamics between female and male within LGBTQIA group especially in case of lesbian couples where both of them are women. Apart from that it is also argued by many scholars³¹ that feminist have also sidelined the cause and issues of people from LGBTQIA stating that those issues (pertaining to LGBTQIA) are secondary. In a movie called “If these walls could talk³²” the second part of the movie depicts the same notions when the lesbians who founded the group for other women and gender issues were sidelined and removed from the group giving the reasons that their issues may be taken up later and women’s issues relating to discrimination and sexual violence is more important than lesbianism.

³⁰ Nishant Upadhyay, “Hindu nation and its queers: Caste, Islamophobia, and De/coloniality in India” 22(4) *Interventions* 464-480 (2020).

³¹ Bonnie Zimmerman, “What Has Never Been: An Overview of Lesbian Feminist Literary Criticism” 7 *Feminist Studies* 451-475 (1981).

³² Jane Anderson and Anne Heche, *If these walls could talk* (USA, 2000).

If we look at conservative / traditional families, we see that the people from gay community may find their space as they focus more on companionship, sexual and emotional support and protection of couples from harsh / hostile conditions of the world. However, their ultimate aim is to preserve cultural and moral values and the marriage of same sex may be seen as threat to the very same culture and morals, which they are trying to preserve from the point of view of supporters. Without falling into the same pit or putting them in a particular view / ideology of marriage the choice and agency should be given to them. Since they are citizens with fundamental rights, they should also be given all the rights which are available to others and decide freely as independent citizens.

IX. CONCLUSION

Looking at the existing substantive laws, the position with respect to marital ties is clear. There is lacuna regarding right to marriage for same sex persons, also with respect to transgender persons whether they have or have not undergone sex reassignment surgeries. The biggest roadblock against them is lack of will on the part of the government to amend such laws or to introduce laws which gives rights to them at par with people of heteronormative identities. However, there has been a lot of awareness and education towards such identities in India. At the international level, through principles such as Yogyakarta and Yogyakarta +10, reports of the office of human rights commission there has been recognition of the structured discrimination and gender- based violence against them. However, the focus should not confine to gender-based violence or discrimination only. There must be collective and conscious move to further and elaborate the human and fundamental rights of the community, although recognition of such discrimination is first step towards that realization. The identities must be included in the curriculum as well to spread awareness about them. The stereotypical and prejudicial notions that were prevalent because of Criminal Tribes Act, 1871 should be debunked using such awareness. Only when such identities are included in the main stream, there would be change in perception towards them by people at large. Australian court has quoted that there is no harm in recognizing the marital rights to same sex people, the same approach should be followed by the Indians because at the end of the day they are also humans who require someone to love and take care of them.