



MARRIAGE EVOLUTION: TRADITION, CHALLENGES, AND SAME-SEX UNIONS IN INDIA

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Abstract

The debate around the validity of the same sex marriage has again arisen in the recent petitions before the Supreme Court even after various judgements decriminalising same sex relation however the current issue deals specifically with marriage title and the surrounding rights of the either party. The major part of the whole canvas prepared out of bunch of such petitions comes out to be beyond decriminalisation, the demand for marital status in the society and the rights it brings with itself. The proponents of the same sex marriage has their arguments majorly based on broad issues like fundamental rights, equality, non-discrimination etc. This paper seeks to first analyse the contentions of the proponents and then it further tries to understand and analyse the traditional notion of marriage and its public character. The paper also identifies certain issues like that of interpretation of statue along with the question of personal laws, problem of piecemeal approach related to the same sex marriages. In the end the author brings in the alternative of the civil union which has been gathering lot of traction particularly in west however the discussion is that whether such a concept will at all be conducive to a nation like India and suggest that thorough deliberation is required in this matter.

Keywords: Social exclusion, Fatherhood, Procreation, Public Union, Partnership, Civil Union.

Backdrop

Recently, petitions were submitted against the idea that same-sex couples should be granted marriage privileges and be allowed to be hitched. The group of petitioners raising a number of comparable problems were heard by the honourable Supreme Court. The Supreme Court developed a canvass covering wide range of issues, and the main arguments in favour of same-

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sex marriage are as follows two same-sex couples applied for legal recognition at the Supreme Court in November by filing a writ petition. Supriyo Chakraborty and Abhay Dang filed the petition, which is concerned with the Special Marriage Act's validity. A declaration of their rights was also requested, and the petitioner claimed that discriminatory provisions like Section 4(c) of the Special Marriage Act were to blame. Due to this, the issue of same-sex couples' legal ability to marry has come up once more. The topic of the argument is not new, since it has been discussed before in India and other nations. I shall make an effort to clearly state and evaluate the claims made by each side in this work.

Arguments of advocates of same sex marriage.

A. The question of fundamental rights, equality, non-discrimination etc.

First comes the question of fundamental right to marry of the same sex couples then the difficulty around rewriting laws and statutes. In fact, it could be said that the arguments of the proponents of same sex marriage is based on broad issues like equality and rights, equal representation civility, right to self-determination etc. Now let us first discuss this whole canvas of this side. The petitioner's argument for the recognition of same-sex marriage is founded on several compelling reasons. First and foremost, even after the momentous decriminalization of Section 377, which marked a significant milestone for LGBTQ+ rights in India, same-sex couples still do not enjoy the same marital status and rights as their heterosexual counterparts. This inequality not only perpetuates discrimination but also violates the fundamental principles of equality and non-discrimination enshrined in the Indian Constitution. Secondly, the enduring social stigma attached to same-sex couples remains a significant concern. While legal reforms have begun to address this issue, societal attitudes often lag behind. Same-sex couples frequently encounter prejudice, discrimination, and social exclusion, which can have profound adverse effects on their mental and emotional well-being. Recognizing same-sex marriage would not only provide these couples with the legal protections they rightfully deserve but also contribute to reshaping societal perceptions and fostering greater acceptance and inclusivity.

B. Demand for the rights surrounding marital status

Some of the rights which the same sex couples has been deprived off as contended by them includes the issue of adoption of child by same sex couples, automatic right of maintenance, right to surrogacy also gift given by a spouse is devoid of income tax but

same is not available to them, medical insurance of the spouse, rental accommodation also cannot be availed by them further payment of gratuity act provide pension only to spouse if married as per conventional rule of marriage. Another contention which has been raised is the constitutional enforcement of the right to marry to substantiate this point the petitioners have delved into fundamental rights and various judicial pronouncements as follows. Delving into the issue as to which forum should take up the issue the petitioners have on and again contended that we have seen the cases such as Navtej and Puttuswamy that when an issue of societal importance arises so as to call for immediate deliberation the people need not to wait for the legislature to act moreover if the issue involves the question of fundamental right. The whole intent behind articles such as Article 32 and article 226 is that when the legal injury is of such intensity so as to affect one's own fundamental right one can directly approach the court under the above mentioned jurisdiction as not allowing the same will result in more harm and restriction of one's fundamental right also the breach of one's fundamental right itself allows for the provision to approach the court directly without waiting for the legislation. It is to be noted that these rights are so fundamental in the sense that these are constitutionally protected and come with immediate hearing in the court. Following this argument the petitioners have argued that their fundamental right to marry has been protected by articles 14, 19 and 21 and their fundamental right is no less than the rights of the same sex couples. Article 21 provides for personal liberty therefore there has to be no discrepancy regarding the same. The petitioners relied on the case of Vishakha v. State of Rajasthan wherein the courts took the cognizance of the matter and provided for the interim law till the time no legislation was there pertaining to the subject matter. However they say that the situation here is different, we have seen that there have been in past cases where things have been recognised but no affirmative action has been done and therefore we are still on arguing on this issue. Delving deeper into the issue the petitioners have argued that in Navtej also the question of equal rights between homosexual and heterosexual couple is not undertaken it simply decriminalises the sexual conduct between two same sex couples. Petitioners have contended that all the citizens of the country are having equal right as provided by the preamble of the Indian constitution and there is no dispute to the fact that preamble is part of Indian constitution². Preamble calls India as a secular, republic and further

² Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225.

provides that “to secure to all its citizens (i) JUSTICE, social, economic and political; (ii) LIBERTY of thought, expression this is to say that it recognises the diversity and pluralism in the country³. Also secularism was held as the basic structure of the Indian constitution⁴. Rights under article 21, 14 and 15 provides for the rights which constitutes the fundamentals of the constitution⁵. Another thing which has been raised by the petitioners that denying them the equal recognition of marriage is actually discriminating them on the basis of gender discrimination and sexual orientation. Court have deliberated on this in the case of Nalsa. Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the⁶ 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, such as dress, speech, and mannerisms. Gender identity, then, refers to an individual's self-identification as a male, woman, transgender, or other defined category. Whereas sexual orientation is that you are physically or emotionally sexually attracted towards other person. This orientation can be between two people of same sexes like homosexuals or between two different sexes like the heterosexuals or there can be a case where the person is attracted to both the sexes which is called bisexual or no sex at all that is asexual .

C. Hinch of sexual autonomy and sexual orientation

Coming back to the issue the petitioners have argued that both these two things sexual orientation and gender identification forms the intrinsic part of one's personality and is important aspect of his dignity and freedom which is protected under Article 21. Another aspect which is covered under article 21 is that of right to family which forms the basic unit of the society. Family does not only provide institutional support to an individual but also emotional and psychological support. Same sex couples also have got the equal right to get their basic unit recognised there is no doubt that the right to meaningful family life, which allows a person to live a fulfilling life and helps in retaining her/his physical, psychological and emotional integrity would find a place in

³ T.M.A.Pai Foundation & Ors v. State of Karnataka & Ors (2002) 8 SCC 481.

⁴ S.R. Bommai v. Union of India (1994) 2SCR 644.

⁵ I.R. Coelho v. State of Tamil Nadu, AIR 2007 SC 861.

⁶ Vishaka & Ors v. State of Rajasthan & Ors (1997) 6 SCC 241.

the four corners of Article 21 of the Constitution of India⁷. Family relationships can take form of queer relationships also, these manifestations of love and of families may not be typical but they are as real as their traditional counterparts. Such atypical manifestations of the family unit are equally deserving not only of protection under law but also of the benefits available under social welfare legislation.⁸ The petitioners have also highlighted the fact this right has also been recognised internationally like that in UDHR and European Union's charter on fundamental rights also the Yogyakarta principles which provides for various facets of human rights recognising the fact that everyone has the right to marry and have family irrespective of his or her sexual orientation and gender identity.

Coming to the question that since the issue relates to the personal laws and therefore state representation is required which can be only done when the issue is discussed in the parliament have been rebutted by claiming that the Hindu marriage act is a statutory law and is devoid of its personal character since earlier marriage laws in India was particularly based on Hindu sanskritik notions of marriage however after the codification various reformative provisions were added like that of provision for divorce , intercaste marriage ,adoption which was never there in traditional Hindu marriage laws.

D. Parliament or court what is the appropriate forum for addressing the issue.

Next coming to the question of whether Court will be the correct forum to hear the matter the petitioners have argued that since their fundamental right as construed by them under article 14, 15 and 21⁹ is violated this itself gives them the locus standi in the court . Even after cases like Nalsa and Navtej we see that the similar petitioners are time and again coming involving questions relating to the same sex marriage and related rights which is why we have come to court to get our this right recognised also when court recognises a right it has the same effect as that of the legislation as we have seen in Vishakha case wherein till the time there was no law relating to the issue the court came to fill this void it has been no answer to the constitutional court that one has to wait for the parliament to act also rightly under article 32 itself comes at aid of

⁷ Lakshmi Bhavya Tanneeru v. Union of India & Ors. (2014) 4 SCC 427.

⁸ Deepika v. Central Administrative Tribunal (2022) SCC OnLine SC 1088.

⁹ The Constitution of India, arts. 14,15,21.

the one who are minorly represented there can't be any justification that since the same sex couples are in minority so let the situation be, they are also equal citizen of the country and have right to be represented now this representation can only come by way of declaration by the court which the petitioners have been asking for a constitutional declaration of marriage not just an amendment to the acts as the same will again arise questions as to the rights arises out marriage. Therefore, recognition of this right has to be done through secular act of declaration where no question of personal laws are involved and which will give rise to the flow of equal rights for same sex marriage couples.

E. Is same sex marriage an urban elitist concept?

Answering the question of urban elitist concept the proponents have been saying that it is not at all related to being elite or urban the topic is such which is innate in oneself and is not something which is influenced by the surrounding, there have been several if not many examples where poor and slums also feels the same however their voice is subdued. Such issue was never in debate like it is today since people have now become more aware and particular about their existence, the concept is urban in the sense that people are now actually manifesting the notions of gender identity and sexual orientation and want to get them and their rights recognised. Petitioners have also been arguing that since the government has defined valid marriage as a marriage between a man and a woman so by definition it is wrong and it serves to be a self-validating statement this is to say that the legislature's purpose can't itself be discriminatory¹⁰.

Now since we have seen the contentions and its reasoning from the side of the petitioners we now have an overview of the whole canvas which revolve around the issue of same sex marriage. This will help us to deeply delve into the issue. One thing is clear that the petitioners are more concerned about the broader issue like that of equality and fundamental right, discrimination etc. This being acknowledged I now shall take you to the other side of the table particularly the importance of the traditional notion of marriage not as a direct response to the issue of same-sex marriage, but rather as a position rooted in longstanding cultural norms. At the same time, it's important to

¹⁰ Deepak Sibal & Ors v. Punjab University and Another, 1989 AIR 903.

remain open to the idea that there are potential implications associated with granting legal recognition to same-sex marriages.

Why marriage is not just a discussion of constitutional debate and why traditional notion of marriage is to be seen as non-discriminatory?

I will adhere to my argument that the traditional notion of marriage is not discriminatory in itself as there do exist important differences as to the legitimate public and societal purpose between heterosexual and same sex marriage. It is not discrimination to treat different relationships differently.¹¹ The cynosure question which revolves around the debate is whether our traditional notion of marriage is discriminatory? If the debate is about extending legal and other benefits to the same sex couple then that is a different tangent altogether the question we are concerned with is of moral and societal character. At the same time I would like to advance that marriage is not a relationship invented by the government, owing to its strong origins in nature, marriage is first and foremost a social institution. Marriage must be supported by the law, culture, and society if it is to matter at all.¹² However its inherent character remains to be that of a social institution. The civil law cooperates in the task of creating a marriage culture which matters, but in fact, the legal institution of marriage is at this point relatively weak, as the increasing number of cohabiters demonstrates.¹³ But even when the law was a stronger player, the most important thing about marriage was that it was—and still is—a social institution.¹⁴ Marriage as a social institution regulates the sexual behaviour of the people also the main public good of marriage is to bring together mothers and fathers into stable unions, in which they raise their children together. The premise behind calling marriage as a social institution is the social norms and regulation which surrounds it and regulates the sexual behaviour of the people also another strong factor which is the default scenario for sexual encounters is the creation of own young ones. The constitutional debate which revolves around the topic misses on the fact that marriage is not a creation of law. This contrast emphasizes how the primary purpose of marriage is overlooked when the marriage discussion is framed largely

¹¹ Cf. Erwin Chemerinsky, "In Defense of Equality: A Reply to Professor Westen", 81 *MICH. L. REV.* 575, 577–85 (1983).

¹² MG Collins, "Reconstructing *Murdock v Memphis*" 98 *Va Law Rev* 11, 12 (2012).

¹³ Maggie Gallagher, "(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman", 2 *U. ST. THOMAS L.J.*, 38 (2004); INST. FOR AM. VALUES & INST. FOR MARRIAGE & PUB. POLICY, Marriage and the Law: A Statement of Principles 12–14), <http://www.marriedebate.com/pdf/imapp.mlawstmnt.pdf> (Visited On September 16).

¹⁴ Barbara E. Johnson, "Contemporary Marriage: Comparative Perspectives on a Changing Institution" 66 *Social Forces* 432 (1985); George P. Murdock, *Social Structure* 83–260 (The Free Press New York 1edn 1965).

as a constitutional debate. If marriage is how the law is constructed, changing the law will inevitably alter the construct. If you alter the corporate legislation, corporations will change as a result. But if the marriage legislation maintains enough distance from the social conception of marriage, the Law loses its effectiveness in important ways. This has repercussions for marriage as it already exists and for same sex marriage as its supporter's desire for society to comprehend it. Marriage also extends the social benefits to child born out of a union. We know there are substantial advantages to children who are born to and raised by their own married mothers and fathers.¹⁵ We also know the majority of children conceived in marital unions will enjoy this great good.¹⁶ It is also only this union which forms a line of connect between their mother and father. Courts in various countries where this issue have been raised have outwardly declined to accept this kind of marriage¹⁷, not to say that they did not ponder on the question of right and equality etc. but were actually considerate of the repercussions the society will have if homosexual marriages are allowed. Key legitimate public purposes clubbed in marriage of a heterosexual couple, an alternative term as used by Professor Lynn Wardle is "responsible procreation"¹⁸. When New York high court was faced with the question of how marriage is perceived by the society and how society wants to see it the court opined that present generation should have a chance to decide the issue through its elected representatives¹⁹. For people who supports the idea of marriage as one based on romantic love between two individual it's pretty simple to say that if two people share romance and love then they should be allowed to marry, and they also attach to the notion of rights. However, the people who have a traditional notion of marriage focuses on the procreation and its societal implication. Treating same-sex unions as marriage greatly alters the institutional and public understanding of marriage.²⁰ This to say that if we allow same sex marriage it means marriage is about the sexual choice of the people then it totally disposes the historic concept of marriage which is responsible procreation. Marriage changes, adapts, and evolves²¹ however the marriage remains to be intrinsic in the

¹⁵ Kristin Anderson Moore, "Marriage from a child's perspective: How does family structure affect children, and what can we do about it?", Child Trends, available at <https://cms.childtrends.org/wp-content/uploads/2002/06/MarriageRB602.pdf> .(Visited On September 20,2023).

¹⁶ Elizabeth Terry-Humen, "Births Outside of Marriage: Perceptions vs. Reality" Child Trends, available at <https://www.childtrends.org/publications/births-outside-of-marriage-perceptions-vs-reality> (Visited on September 22,2023).

¹⁷ *Hernandez v. Robles* 855 N.E.2d 1 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007).

¹⁸ Lynn D. Wardle, "Multiply and Replenish: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation" 24 *HARV. J.L. & PUB. POL'Y* 771, 781–84(2001).

¹⁹ *Hernandez v. Robles* 855 N.E.2d, 12(2006).

²⁰ Transcript of Closing Argument, *supra* note 18, at 3045

²¹ David Blankenhorn, *The Future of Marriage* 91 (Encounter Books, New York 1st edn, 2009).

diversified society. One can't simply claim marriage as a personal right as it has got certain important public purpose as well, it is also a public union²² this is where one has to distinguish between a spouse and a lover. Family marriage is a partnership in which the man and woman's rights and obligations toward one another and any offspring her body produces are fixed by public definition and endorsement. This implies that we do not rely on teenagers going through erotic, romantic, sexual, and psychological turmoil drama to choose for themselves what this vast area of human nature entails knowledge means. That is what institutions are for—they are substitutes for the process of requiring individuals, on their own, to figure out best practices without any aid from civilization.²³

Fatherhood's Impact: A Crucial Consideration

Another question which the same sex marriage poses is the question of fatherhood. For a child both mother and father is necessary, it is fatherhood that is conceptually most at stake in the marriage debate.²⁴ Just for the sake of discussing this further let us for a while keep the debate of gender difference aside. Only having a biological connect between the fathers mothers and children will not suffice a strong mechanism such that of cultural ties is needed so as to regulate the sexual and erotic behaviour of the individual. This all is dependent on the fact as to how important is for us that a child is raised by both a mother and father. Marriage should be reconnected to a greater purpose rather than being severed from love or romance. By doing this, the intention is to turn romance into a positive force for the children it produces. All of this poses a serious question as to why again and again different societies come with the same cardinal notion of marriage. Answer to this question is rudimentary to the human existence, society needs babies. Today reproduction has become optional even in heterosexual marriage however it is an established fact that only societies that have persisted are those that have managed to address the procreative consequences of male and female desire.

²² Katherine K. Young & Paul Nathanson (eds.), *Divorcing Marriage: Unveiling the Danger in Canada's New Social Experiment* 45 (McGill-Queen's University Press., 2004).

²³ *ibid* at 97–99.

²⁴ Jason S. Carroll & David C. Dollahite, "Who's My Daddy?" How the Legalization of Same-Sex Partnerships Would Further the Rise of Ambiguous Fatherhood in America, in *WHAT'S THE HARM? DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY?* 47, 59–64 (Lynn D. Wardle ed., 2008).

Cracking the code: Unravelling the complexities behind inclusive statutory interpretation

It can also be seen that the supporters of the same sex marriage are wanting a change in interpretation of various statutes so as to be inclusive of the homosexual couples. However, this will involve a lot of difficulty, ambiguity and serious questions like that of personal laws. Let me explain this in detail. Special marriage act defines the concept of half-blood and full blood. Two person are related to each other by full blood if they are descended from a common ancestor (that is male) by the same wife and Half-blood if descended by common ancestors but by different wives. Now we can't really reconcile this section because it states that a woman was biologically created by one man, also a child between lesbians won't be full blood even if it was created through artificial insemination. This makes many other provisions impossible to reconcile not just this it will unavoidably have an effect on succession. Now let's take section 3(g) of the Hindu marriage act ²⁵ which talks about restricted relationships now this whole section is based one's lineage also the section uses the words the intention of the section comes out to be referring to the biologically male husband and biologically female wife. Coming to section 3 (f) ²⁶we see the concepts of sapinda and sagotra all these concepts are taken from the traditional Hindu law and therefore it can't be said that the Hindu marriage act is a secular law which again brings us to the issue of state representation . Further if we see section 4 (c) of the special marriage²⁷ act we see that words like male and female are used , now even if we replace this with person still it will not make the section logically coherent to include whole of the LGBTQ community . Also section 11 deals with declaration by parties and witness and it requires a statutory forms to be filled under the third schedule of the act which has got the words like bride and groom also the form in the second schedule uses the word "widower" and "divorcee" the whole point here is if we try to change the interpretation of this section so as to be inclusive of the homosexual couple there will arise a need to change these statutory forms as well which will further affect other legal rights and obligation arising out the marriage.

Now a greater difficulty arises when one sees section 19 of the special marriage ²⁸act. Section 19 provides that person of Hindu , Buddhist and Sikh if wants to get their marriage solemnised under the act then they have to sever from their religion however this is not applicable to Muslim , Parsi and Christian their personal laws will continue to exist except for related to

²⁵ The Hindu Marriage Act, 1955 (Act 25 of 1995), s. 3 (g).

²⁶ The Hindu Marriage Act, 1955(Act 25 of 1995), s. 3 (f).

²⁷ The Special Marriage Act, 1954(Act 43 of 1954), s. 4 (c).

²⁸ The Special Marriage Act, 1954(Act 43 of 1954), s. 19.

succession which is dealt by section 21. Under section 21 succession law ²⁹is applicable across the religion but no other personal law of Parsi and Christian. Now here even for the Hindus the personal laws which were taken under section 19 ³⁰comes to play again under section 21 ³¹since it lifts the disability which was created by section 19 this means that when a marriage is solemnised by any member of the undivided family under the act of any of the stipulated four religion then that person severs only from the family status in the sense that one will only loose the coparcenary rights however in respect of all the other aspects one will still be governed by one's personal laws. Therefore, it may not be a choice to touch upon the personal laws as the same is interwoven.

These are some of the issues which revolve around the issue of same sex marriage to say the least. All these problems require though deliberation before anything is decided on the matter. Looking at the issue only from one perspective mainly as an issue of rights and recognition will be dealing with the issue in piecemeal.

Civil union- Will India Embrace a New Relationship Paradigm?

One of the suggestions which is gathering a lot of force is that of the civil union or civil partnership however the question which requires a thorough deliberation is that whether the concept of such a union will be conducive to India. Since India is diverse and culturally rich nation also it has got complex web of state and federal laws. All these may pose serious repercussions which needs to be well thought.

Civil union is a legal status which provides status parallel to marriage and confers the rights and duties similar to that of marriage however is not at par with the status of marriage. The first distinction which arises is that civil union is a purely legal status whereas marriage holds a socio-legal status. Marriage is self-recognised within the society. Beginning with the premise that entirely denying same-sex couple's relationship rights breaches the principle of equal protection, the skirmishes between advocates for civil unions and those for full marriage recognition arises.

It is a point of thought that if the demand of the same sex couples is just to acquire equal rights as that of the married couples which is purely legal in its sense then it can be said that the concept such as this will turn to be useful. This conforms to the view that marriage devoid of

²⁹ The Hindu Succession Act, 1956 (Act 30 of 1956), s. 21.

³⁰ Ibid 30.

³¹ Ibid 31

its legal ramifications is merely a name, and that denying someone that name without denying them any quantifiable advantages is not necessarily a serious constitutional issue. However, if the demand is to get equal status as that of marriage as a matter of equality and rights then this concept is itself discriminatory as what it brings with itself is the status which is secondary to that of marriage owing to the requirement of social recognition, it is uncontested that social recognition holds much more power than that of its legal counterpart. This is evident from that the fact that institution of marriage first evolved as a social institution.

In conclusion, exploring alternatives to same-sex marriage, such as civil unions, is a complex and nuanced endeavour, especially in a diverse society like India. It is imperative that we approach this issue with utmost care and consideration for the values, traditions, and social dynamics that define our culture. Before embracing any alternative, we must engage in thoughtful discussions and consultations with all stakeholders, including the LGBTQ+ community, legal experts, religious leaders, and policymakers. Only through such a comprehensive and inclusive approach can we determine whether these alternatives will be relevant and meaningful within the Indian context, and whether they will contribute to a society that respects the dignity and rights of all its citizens, regardless of their sexual orientation.
