



LEGAL ISSUES ON RECOGNIZING SAME SEX MARRIAGE- AN INSIGHT

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Abstract

If we were asked to name a field of law that falls within the exclusive competence of States, family law would probably appear early on the list. It does not come as a big surprise that States try to shield their family law from external influences, considering it often concerns politically and morally sensitive issues, whereas family rights of same-sex couples and their children (so-called 'rainbow families') belong among the most controversial. States considers family law to belong among areas 'particularly sensitive for the ability of a constitutional state to democratically shape itself' and touching on 'decisions of particular cultural importance'.

The Apex Court of India has decided on the issue whether same sex marriage should be recognized in India. This is a sensitive issue. And the Supreme Court has in its verdict denied marriage rights to same sex couple in India. The Human Right Law says that every human being has right to marry. This right does not correspond with any duty. So, it is the choice of the man to marry or not to marry. If he/she decides to marry, whom they should marry is stated in the personal laws. All the personal laws states that the marriage can be solemnized only between men and women. Under such circumstances, when the issue has been raised before the Apex Court and the court, taking the human right perspective, decides to allow same sex marriage, plenty of legal issues will crop up. Same sex marriage is allowed in many countries. But the circumstances over there and here are entirely different. Our land is of multi religion, multi-cultural, multi-language, etc. and that most of our laws are based on the way of life we follow. Laws are nothing but what the nature dictates and according to nature, union can be only of hetero sexes.

The author concedes that by not recognizing homo sexual marriages, the Apex Court has put a coma on the issue but people have filed revision petition challenging the decision. Recognizing same sex marriage leads to

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many legal issues such as adoption, divorce, inheritance, maintenance and guardianship. The effect is long standing especially to India which has embraced vast diverse in its culture and tradition. The article shall shed a light on the matter in light of forgoing argument.

I INTRODUCTION

Marriage is a cultural institution. Same sex marriage is not new to this nation. The *Manusmriti* also holds reference to same sexual relations among individuals of same sexes. In the temples of Khajuraho, there are images of women erotically embracing other women and men displaying their genitals to each other. Scholars have generally explained this as an acknowledgement that people engaged in homosexual acts. Fluidity in terms of gender in reference to yakshas can be traced in ancient Indian texts. Traditional Hindu literary sources do not speak of homosexuality directly,¹ but changes of sex, homoerotic encounters, and intersex or third gender characters are often found both in traditional religious narratives such as the Vedas, Puranas, Mahabharata and Ramayana as well as in regional folklore.

In Hindu mythology there are many examples of deities changing gender, manifesting as different genders at different times, or combining to form androgynous or hermaphroditic beings. Gods change sex or manifest as an avatar (incarnation) of the opposite sex in order to facilitate sexual congress.² Hence, Hindu traditional literary sources say little about homosexuality directly, although there are many references in ancient Hindu religion. Homoeroticism in traditional texts is often masked by adherence to strict gender rules.³ There is no instance that the marriage was of same sex.

In Islamic literature, Babur Nama is the most prominent example of a text referring to same-sex attraction.⁴ There are Sufi poets such as Sufi Saint Bulleh Shah, Sarmand Kashani and others who are some prominent writers have exhibited such references.⁵ When this is the historical mythological illustrations of India, the present scenario is seeking to review the situation and there are cases before the Apex court to recognize such relationship and marriage on the basis of human rights.⁶ In recent decision Supreme Court has elaborately discussed on the rights of LGBT and their right to marriage.⁷

II Human Rights and Same Sex Marriage

¹ Peggy Morgan, et. al., '*Ethical Issues in Six Religious Traditions*', Edinburgh University Press, Scotland, U.K. 2007, p. 15.

² For Ex., Lord Vishnu changes his avatar as women (Mohini) to unite with Shiva so that Ayyappa also known as Harihara *sutha* is born to kill the demoness Mahishi who has blessings to killed by a child born out of two males.

³ Devdutt Pattanaik, '*JAYA, An Illustrated Retelling of the Mahabharata*', Penguin India, 2011, p. 116.

⁴ Salam ZU, "An Emperor with Foibles" *The Hindu* (February 15, 2014) <https://www.thehindu.com/books/books-columns/an-emperor-with-foibles/article5692770.ece>., Accessed on July 26, 2023.

⁵ Khalid H, "From Bulleh Shah and Shah Hussain to Amir Khusro, Same-Sex References Abound in Islamic Poetry" *Scroll.in* (June 17, 2016) <https://scroll.in/article/810007/from-bulleh-shah-and-shah-hussain-to-amir-khusro-same-sex-references-abound-in-islamic-sufi-poetry>., Accessed on July 26, 2023.

⁶ For instance in *Navtej Singh Johar & Ors. v. Union of India*, *Shakti Vahini v. Union of India and others* and *Shafin Jahan v. Asokan K.M*, etc.

⁷ *Supriya Chakraborty & Anr. v Union of India*, 2023 SCC Online SC 1348 .

Around the world, countries are in different situations regarding homosexuality and same-sex marriage. Many countries are accepting of these relationships and legally allow same-sex marriages and at the same time other countries are disapproving of homosexuality and even consider it as a crime.

All States are obligated under International human rights law to promote and protect the human rights of all persons without discrimination. The human rights of all persons are universal and indivisible. Everyone should enjoy the same fundamental human rights, regardless of their sexual orientation and their gender identity and expression. Universal Declaration of Human Rights declares that “all human beings are born free and equal in dignity and rights.”⁸ And Article 2 declares, “Everyone is entitled to all the rights and freedoms set forth in this Declaration.” Everyone includes lesbians, gays, bisexuals and transgenders. In a human rights context, these LGBT people suffer some of the same kinds of human rights violations. LGBT individuals in many countries are exposed to the risk of arrest, blackmail, extortion, stigma, discrimination and violence.

In the human rights arena, major international human rights organizations have only committed to including the rights of LGBT people within the past decade or so. Human rights organizations and Human Rights Watch now have campaigns to address LGBT human rights violations. Specialized LGBT human rights groups have been active for much longer. For example, the International Gay and Lesbian Human Rights Commission (IGLHRC) has existed for the past 16 years to secure the full enjoyment of the human rights of LGBT people and communities subject to discrimination or abuse on the basis of sexual orientation or expression, gender identity or expression, and/or HIV status.⁹

Protecting this community from such offences took a priority in India. Under Protection of Human Rights Act, 1993¹⁰ Article 3 protects from torture (mental or physical), inhuman or degrading treatment or punishment, and deportation or extradition (being sent to another country to face criminal charges) if there is a real risk you will face torture or inhuman or degrading treatment or punishment in the country concerned. Denial of the recognition of human rights for any group of individuals is a denial of their humanity, which has a profound impact on health.

III SAME SEX MARRIAGE AND EUROPEAN NATIONS

The earliest, more large-scale, forms of LGBTQ+ activism in Europe started to emerge in the 1950's, which subsequently led the LGBTQ+ community to start to organize itself more professionally. The first big and noteworthy LGBTQ+ rights related case was that of *Dudgeon v. U K*¹¹ in which the ECHR decided that a law in Northern Ireland prohibiting and regulating male intimacy amounted to an unjustifiable interference with Art. 8 of

⁸ Article 1 of UDHR.

⁹ Suzanne M. Marks, 'Global Recognition of Human Rights for Lesbian, Gay, Bisexual, and Transgender People' Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5451102/>. Accessed on 26th July, 2023.

¹⁰ Act No. 10 of 1994.

¹¹ ECHR (1981), No. 7525/76.

ECHR and their right to *private* life.¹² After the *Dudgeon* case and the decriminalization of homosexuality in many European countries, LGBTQ+ individuals were now free to live their lives and have same-sex relationships in the open. Applicants subsequently also started more court cases to have further rights protected and enforced.

The first step to the European Courts was to verify the applicability of the provisions of the ECHR guaranteeing “men and women” the right to marry (Art. 12)¹³ and “everyone” the right to respect of his private and family life (Art. 8). The European Court noted, in this regard, that the textual and contextual¹⁴ interpretation of Article 12 excludes its applicability to same-sex couples. But Article 9 of the European Charter of Human Rights (ECHR) is read, which gives guarantee the right to marry without the reference of men and women. Probably it was drafted deliberately to widen the scope of right to marriage. At the same time, article 9 specifies that the right to marriage is exercised in accordance with national laws and it is made clear, in this regard, that it is a question of taking into account the diversity of laws among states.

In the light of this cautious overture, the Court ruled that the right to marry should no longer “in all circumstances be limited to marriage between two persons of the opposite sex” and therefore that “it cannot be said that Article 12 is inapplicable.¹⁵ It also mentioned European Directives to develop its understanding of Article 8. Given the rapid revolution in society and family the court stated that a same-sex couple would not constitute “family life” and could at most be considered “private life”. But practically the facts remains that the interpretation implemented in *Schalk and Kopf* case remains ambiguous. There are still miles for recognition of rights of same sex couples in Europe as marriage has deep-rooted social and cultural connotations which differ from one society to another.

Finally, European judges sometimes require same-sex partners be able to enjoy, in the lack of access to marriage, the same benefits as those granted to (different sex) spouses in the areas of tax law, social law¹⁶ or immigration law.¹⁷ It therefore appears that the European Court favours a “small steps” approach as regards the rights of same-sex couples, characterized, by a form of “strategic compromise” that consists of “abandoning” the question of marriage to national legal systems while gradually “crystallizing” the right to an alternative status, to recognition of foreign marriages, and to certain particular rights is several areas of law.

IV INDIAN LAW AND SAME SEX MARRIAGE

India, at its core, is a conservative nation. India is a secular nation which safeguards for all freedom to practice, profess and propagate any religion of choice. Being religiously inclined, many facets of society and

¹² Though Art. 8 ECHR encompassed more than just the right to respect for private life; it also contained the right to respect for family life.

¹³ Art. 12 of ECHR states, “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

¹⁴ At the time the Convention was drafted, in the 1950s, “marriage was clearly understood in the traditional sense of a union between two persons of the opposite sex” (§ 55).

¹⁵ *Schalk and Kopf v Austria*, ECHR, Application no. 30141/04, 2010.

¹⁶ *Aldeguer Tomas v Spain*, ECHR, Application no. 35214/09 2016.

¹⁷ *Taddeucci and McCall v Italy*, ECHR Application no. 51362/09, 30th June, 2016.

personal laws are based on faith. This also includes aspects regarding same-sex relationships. An analysis of the history of same-sex relationships reveals an interesting picture of a transition from an open, liberal society to a conservative one. The legal structure in India was a creation of British and with the drafting of the Indian Penal Code by Lord Macaulay, homosexuality became a criminal offence. This was aided by legal sanction introduced by the British in India via the *Indian Penal Code*, specifically Section 377. This provision made such relationships punishable with imprisonment and fine, thereby creating an atmosphere of domination and discrimination against same sex couples. This legal regulation ran parallel to the social infusion of moral right and wrong and the perception of it being immoral.

If this is the stand of the Legislature in India, the judiciary has been proactive in this subject in the last two decades. This is reflected in many of the decisions of the Courts. The first of the instance can be found in *Naz Foundation v Government of NCT Delhi*,¹⁸ the Delhi High Court declared Section 377 of the Indian Penal Code as unconstitutional. Based on a Public Interest Litigation filed by the NGO, the judgement paved way for the legal review of the British era law. The Court declared it to be in violation of Article 14, Article 15 and 16 (all rights around the concept of equality) of the Constitution of India. But then again in *Suresh Kumar Koushal v. Union of India*¹⁹ the Supreme Court re-criminalized Section 377, which was decriminalized in *Naz Foundation*. The case dealt with a 150-year-old provision that outlawed "carnal intercourse against the order of nature". In the above case, it was decided that Section 377 of the IPC is constitutionally valid and that homosexuality is a criminal offense in India.

In *NALSA v. Union of India*,²⁰ a case which came in the aftermath of the criticised judgement in *Suresh Kumar Koushal v. Union of India*, the Supreme Court decriminalized Section 377. The National Legal Services Authority led the charge towards raising relevant questions in favour of the transgender community. This judgement declared transgender persons as the third gender. A comprehensive set of guidelines, protecting the rights and freedoms of the transgender community, was laid down in the judgement. Subsequent to that, legislative developments followed to provide a clear statute that shall forward their rights. There were extensive debates and versions of law presented which culminated in 2019 with the *Transgender Persons (Protection of Rights) Act, 2019*.

To claim the rights enumerated in the Act, the person has to be certified by a District Magistrate as a Transgender. In *K. S. Puttaswamy v. Union of India*, it was held that granting the right to privacy as a facet of Right to Life and Liberty under Article 21 and it is an integral part of a human's life and that it extends to all individuals, notwithstanding gender and sex.²¹ In the judgment, Justice Chandrachud observed that the LGBTQ community should be entitled the right to privacy, particularly autonomy and freedom from interference from the

¹⁸ 160 DLT 277 (2009).

¹⁹ (2014) 1 SCC 1.

²⁰ AIR 2014 SC 1863.

²¹ (2017) 10 SCC1. AIR 2017 SC 4161.

state. A special observation was made in context of the right to choose partners of one's own choice, sexual freedom and autonomy. The Court observed that, "The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14 (right to equality), 15 (discrimination on grounds of sex) and 21 (right to life and personal liberty) of the Constitution."

This judgment was the primary precursor to the breakthrough *Navtej Johar* case (*Navtej Singh Johar v. Union of India*).²² This judgment speaks on the right to live with dignity, the freedom to autonomy and choice in personal life. Then the question was of recognition of same sex marriage, whether should be under the Hindu Marriage Act or the Special Marriage Act? The argument forwarded that the term 'spouse' under Hindu law can include only a male and female and that such judicial interference will cause complete havoc with the delicate balance of personal laws. The central government stated that the decriminalization of Section 377 did not automatically mean that such relationships would be entitled the right to marry. Referring to the Indian traditions and those marriages are based on rituals, ethos and social values, marriages have a spiritual aspect to it and thus, such same-sex marriage rights cannot fall within the purview of the judicial adjudication; but it a matter for the government and legislature to review and determine. Now that in *Supriyo v. Union of India*,²³ the petitioner sought to recognize same sex marriage based on the judgment pronounced in *Navtej Johar* case where Section 377 of the IPC was decriminalized. On 17th October, 2023, the Apex Court delivered its judgment on same sex marriage where it denied to recognize same sex marriage. There are number of Revision Petitions filed on the judgment. In the back drop of this, the issues that would arise, if same sex and transgender marriage were recognized will be elaborated as below-

A. Marriage, and recognizing same sex marriage-

The social structure in India does not allow to recognize same sex marriage. India is in core conservative nation. According to the Hindu Law Marriage is a body for the performance of religious duties. It is deemed as a holy union in Hindu Law. It is also considered to be a union of flesh to flesh and blood to blood. It is a religious sacrament and not a civil contract. The *Hindu Marriage Act 1955*²⁴, Sec.5 provides right to marry under statutory condition. The provision consists of five conditions that are to be followed to solemnize a marriage between two Hindus. The conditions are, 1. Neither of the couples should have a living spouse at the time of marriage, 2. Both parties must be of sound mind and both the parties must not be unfit for marriage and procreation 3. Both parties must be of the age prescribed by the law. 4. Both parties must not fall within the prohibited degree and 5. Both parties must not be *sapindas*. Hence, under the second condition fitness for marriage and procreation of children is an important condition. In homosexual marriage, the parties are unfit to procreate children. Right to procreation has been held by our Apex Court as a fundamental right under Article 21.²⁵ The sentiments of the parties to the marriage, the community involved expects procreation of children. And among the Hindus, procreation of

²² AIR 2018 SC 4321.

²³ W. P. (C) No. 1011/2022.

²⁴ Act No 25 of 1955.

²⁵ *Rajita Patel v. The State of Bihar, Criminal Writ Jurisdiction Case No.1868 of 2019.*

children is regarded as one of the basic objects of marriage. In same sex marriage, the core object is missing. Marriage is not just staying together. It is bringing new life to the world.

Even among the Muslims Personal law, procreation of children stands to be the main object of the community. Muslim marriage, as described by Justice Mahmood, is a “purely civil contract” which forms an institution by its recognition of either a sacrament or as a contract and confers the status of husband and wife on the parties and confer upon them a plethora of mutual rights and obligations, namely, the legalization of sexual promiscuity and is of prime importance in the reproduction of children, the promotion of kinship, love and union between the parties, with the view of earning collective livelihood.²⁶ Even among the Islamic nations, ten nations have recognized same sex marriage but with no protection. For ex. While homosexuality is technically legal in Mali, prevailing cultural and religious beliefs view it as immoral.

Under *Special Marriage Act, 1954*,²⁷ Section 4, conditions are laid down for solemnization of marriage which are eligible for registration. Section 4 (b) (ii) says “though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children”. Here also procreation of children has been used which shows the legislative intent that the consummation of marriage is with a purpose of having children, though might not be dominant factor. The SMA is intended to regulate marriage between heterosexuals irrespective of caste and religion.

Marriage, whether considered as a sacrament or as a contract, apart from giving rise to certain mutual rights and obligations, confers the status of husband and wife on the parties, and of legitimacy on the children of marriage. Same sex marriage does not fit into the core condition of marriage and if law permits such marriage, the definition of marriage provided in the laws needs repeal.

B. Adoption by same sex couples

The law relating to adoption is an age-old law for Hindus. The earliest recorded instances of adoption in Hindu society can be found in ancient Hindu texts, such as the Vedas, the Puranas, and the *Manusmriti*. These texts provide guidelines for adoption and mention the practice of adopting a son to continue the family line and perform ancestral rituals. The first comprehensive legal text on adoption was the *Mitakshara*, written in the 12th century by *Vijnanesvara*, a Hindu jurist. The *Mitakshara* laid down rules for the adoption of sons and daughters and emphasized the importance of continuing the family line. The main purpose of law of adoption is to provide consolation and relief to a childless person and in modern law its purpose is also to rescue the helpless, the unwanted, the destitute or the orphan child and provide it with parents and home.²⁸

Among the Mohammedans adoption is not recognized. It has nothing similar to that what is laid out in Hindu law. The only thing that Muslim law recognizes is ‘Acknowledgment of Paternity’. It is the principle which

²⁶ Abdul Kadir v. Salima, (1886)8 All 149.

²⁷ Act No. 43 of 1954.

²⁸ Shripad v. Dattaram, 1974 SC 878.

establishes legitimacy of the child. However recently, the Supreme Court in a landmark judgment extended the right of adoption to Muslims also. In the Case titled as *Shabnam Hashmi v Union of India*,²⁹ the Supreme Court declared that the right to adopt a child by a person as per the provisions of Juvenile Justice Act would prevail over all personal laws and religious codes in the country.

Christianity, Parsis and the Jews too do not have laws related to adoption and, therefore, if they wish to adopt, they must take up the guardianship of a child under the rules laid out in the Section 8 of the Guardians and Wards Act, 1890. And, hence, if the couples are not Hindus, and are same sex couple, then they do not have right to adopt, but can be guardian of the child. Under CARA same-sex couples and gender nonconforming couples are prevented from availing joint adoption.³⁰

Now that, adoption has become secular law, if same sex marriage is recognized, the couple may next opt for adoption. Apex court has clearly stated that even when the law is secular, the purpose of adoption is to give normal upbringing to the child which has been adopted. In the said above case, the Apex Court in the five-judge bench gave a 3:2 verdict on adoption rights for the LGBTQIA community where the majority held that they do not have adoption rights and normal upbringing of the child is difficult. While Chief Justice DY Chandrachud and Justice Sanjay Kishan Kaul asserted that queer couples should be given adoption rights, Justices Ravindra Bhat, Hima Kohli, and PS Narasimha disagreed.³¹

In an Empirical research conducted in Netherlands, where same sex marriage has been legalized, the problem of adopting a child and psychological impact has been recorded. Same-sex parents anticipate rejection not only of themselves, but they expect the rejection of their children, which adds stress unique to same-sex parents to general stress experienced by all parents. Combining insights from family system theory and minority stress theory, one can assume that children growing up in same-sex parent families may experience more psychological problems than children growing up in different-sex parent families due to excessive stress on the family system as a whole.³²

C. Law of Inheritance and same sex couple

The law of succession under Hindu law is governed by the Hindu Succession Act, 1956. There were many amendments to the law and major was in 2005. Despite this, there is no evidence that we have totally departed from the old framework. The basic classification of inheritance to the property of Hindu female and Hindu male still exists. The HSA prescribes different rules for succession based on gender. The property of the Hindu male

²⁹ (2014) 4 SCC 1.

³⁰ CARA/ICA013/1/2022Administration; "CARA Circular".

³¹ *Supriyo v. Union of India*, W. P. (C) No. 1011/2022.

³² Deni Mazrekaj, et. al., 'Behavioral Outcomes of Children with Same-Sex Parents in The Netherlands', *International Journal of Environmental Research and Public Health*. 2022 May, 19. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9141065/>, Accessed on 10th October, 2023.

devolves to the sharers and in the absence of sharers to the residuary.³³ Now in the same sex marriage, if the both the partners are female, who is the father and how the property has to devolve? To resolve this, if we consider both as mothers, then property is to be divided as per the rules given under section 14 and 15 in case, they adopt a child. Otherwise, in case of death of any partner, other does not have right over the property of the deceased as no such provision in the Hindu Law. As of now the marriage, even if it is solemnized is void.³⁴

V Conclusion

Marriage is not simply a benefit or privilege. Rather, it forms the very basis of a couple's ability to fully participate in society. Marriage is a source of social validation, dignity, self-respect, fulfillment, security (financial and otherwise), and other legal and civil benefits including in the domain of tax, inheritance, adoption, etc. It is up to Parliament to enact a special code regulating non-heterosexual unions and the specific issues that such unions would face during and after the partnership, after comprehensively engaging with all stakeholders;. Marriage is a creation of statutes. The State by virtue of Entry 5 of List III of the Seventh Schedule has the power to regulate the institution of marriage. In exercise of this power, the legislature has prescribed various conditions which must be fulfilled before legal recognition can be given to a union. The State has a legitimate State interest in legally recognizing heterosexual relationships for the sustenance of society; Marriage is a legal privilege. It is conditional upon statutory or societal conditions. The right to choose a partner does not necessarily imply that there is a right to marry a partner of choice;

Both the father and the mother have a significant and unique role in the upbringing of children. In non-heterosexual unions, the child born out of surrogacy or artificial reproductive technology or adopted by the couple would feel the absence of either a father or a mother. Recent decision of the Apex Court³⁵ has enlightened us on a couple of issue relating to same sex marriage. The argument of the petitioners was to recognize same sex marriage under the Special Marriage Act, 1956, which is their basic human right. The common ground on which the batch of petitions claim relief is that LGBTQ+ persons are entitled to solemnize and register their marriage in other words, they claim a right to legal recognition of their unions within the marriage fold. The petitioners rely on fundamental rights to equality and nondiscrimination, of dignity and autonomy and of expression and association. Some of the prayers also relate to the right of such couples to adopt under existing laws in India.

The Bench consisting of 5 Judges unanimously held that there was no fundamental right to marry and that the Court could not recognize LGBTQIA+ persons right to marry under the Special Marriage Act. Under the majority decision pronounced Justice S. R. Bhat opined that, 'Different traditions view marriage as sacraments, and indissoluble unions and most, if not all, place importance on procreation, creation of family, co-habitation, shared values as the important markers; at the same time, these traditions also recognize - in varying degrees, importance

³³ Section 8 of Hindu Succession Act, 1956.

³⁴ Supra note 29.

³⁵ Supra note 23.

of companionship, spiritual union, friendship and togetherness of the spouses, in every way. In what constitutes marriage, all traditions and societies, have by and large, historically understood marriage as between heterosexual couples. The ‘legal’ dimension of marriage, in the US – the jurisprudence of which the petitioners relied on, is markedly different from the nature of marriage in India, and its evolution. Social acceptance is an important aspect of the matrimonial relationship.....’

