

CONCEPTUALIZING INDIVIDUAL AUTONOMY AND MARITAL RIGHTS FOR SAME-SEX COUPLES IN INDIA

CONCEPTUALIZAÇÃO DA AUTONOMIA INDIVIDUAL E DOS DIREITOS CONJUGAIS DOS CASAIS DO MESMO SEXO NA ÍNDIA

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Abstract: Personal laws are governed mainly by religious scriptures; since they are related, any variations initiated by the parliament or judiciary are hair-triggering. There are numerous concerns revolving around personal laws and its implication in the present era concerning individual autonomy. One such concern is the individual autonomy of same-sex couples and their marital rights, such as the right to adoption, succession, maintenance, and divorce, among others. It has been a couple of years since the Supreme Court of India recognized and legalized the consensual sex between same-sex couples in the case of Navtej Singh Johar & Ors. v. Union of India. But the rate of acceptance of these couples to live a dignified life in a society is low to none because of the lack of proper rule implementation mechanism. Also, same-sex couples often have to migrate to foreign countries recognizing same-sex marriages to get married and get a legal status of their relationship. The paper will discuss the fundamental rights and the contradicting values vis-a-vis the personal laws concerning the recognition of same-sex couples. The paper will further deal with the loopholes in the current personal laws and suggest frameworks/guidelines to include the different aspects of the marital rights of same-sex couples in the existing legal framework of India.

Keywords: Individual Autonomy. Marital Rights. Personal Laws. Same-sex Couples.

Resumo: As leis pessoais são regidas principalmente por escrituras religiosas; uma vez que estão relacionadas, quaisquer variações iniciadas pelo parlamento ou pelo poder judiciário são de fazer arrepiar os cabelos. Existem inúmeras preocupações em torno das leis pessoais e das suas implicações na era atual no que diz respeito à autonomia individual. Uma dessas preocupações é a autonomia individual dos casais do mesmo sexo e os seus direitos conjugais, como o direito à adoção, à sucessão, à pensão de alimentos e ao divórcio, entre outros. Já se passaram alguns anos desde que o Supremo Tribunal da Índia reconheceu e legalizou o sexo consensual entre casais do mesmo sexo no caso Navtej Singh Johar & Ors. v. Union of India. No entanto, a taxa de aceitação destes casais para viverem uma vida digna numa sociedade é baixa ou nula devido à falta de um mecanismo adequado de aplicação das regras. Além disso, os casais do mesmo sexo têm frequentemente de emigrar para países estrangeiros que reconhecem os casamentos entre pessoas do mesmo sexo para se casarem e obterem um estatuto legal para a sua relação. O

documento discutirá os direitos fundamentais e os valores contraditórios em relação às leis pessoais relativas ao reconhecimento dos casais do mesmo sexo. O documento abordará ainda as lacunas existentes nas leis pessoais actuais e sugerirá enquadramentos/orientações para incluir os diferentes aspectos dos direitos conjugais dos casais do mesmo sexo no atual quadro jurídico da Índia.

Palavras-chave: Autonomia individual. Direitos dos cidadãos. Leis pessoais. Casais do mesmo sexo.

1. Introduction

Contemporary India is much more than just having a diverse range of regions, languages and people. It is undoubtedly a multicultural society still trying to fill in the gaps created by the said diversity (PARASHAR, 2008, p. 105). Among others, religion is one of the strongest social institutions that have the capability to enforce certain rules and regulations and drive the implementation mechanism accordingly. One such socially generated characteristic is “Gender” and “Gender-Based Rights”. ‘Gender’ is defined as “the behavioral, cultural, or psychological traits typically associated with one sex” (MERRIAM WEBSTER, gender definition). World Health Organization has explained gender as something which is socially constructed. This can be further strengthened by the definitions provided by the Council of Europe. The Council of Europe, while explaining the Gender and related terms observed that “Sex is a characteristic that refers to the biological differences between a male and female such as sexual organs” whereas the term “gender is not necessarily derived by biological sex.” A gender is very personal to a person and it may or may not align with what the society perceives it to be. Gender is more about the identity of a person that being the biological aspect. A person may choose to identify whatever they want to base on how they feel about themselves. This perspective is again very subjective from person to person in a society and very much deep rooted in the social conditioning. Tracing back history and the archeological remains also asserts the same (MITCHEM, 2018).

Gender has always been used by the law makers and the concerned authorities as way for determining the rights and liabilities. The legislations are drafted accordingly. For the past decade the feminists have put across the arguments supporting gender neutral rights and that the differences of gender Identity should be recognized which includes sexuality of a person among others such as race, religion, region, and caste (PARASHAR, 2008, p.105). It will be appropriate to say that the term gender and its associated identity are not just socially constructed but also based on something permanent i.e., based on the genitals (MCCONAGHY, 1979). To determine

the rights- the fundamentals of being a human being based on something which a person does not have control on, poses uncomfortable questions on the lawmakers and calls for a reform.

Gender based inequality and gender-based violence arising therein is not a new phenomenon and has been there in existence for quite a while now (MERTZ, 1994). Though the predator can be of any gender, this paper is specifically talking about the atrocities on the same-sex couples who are also put under various terminologies such as queer, trans men and women etc. and recognizing their rights related to marriage, property, and others (SHARMA, 2015).

A. Marriage as a Social Institution: A Way for Rights

Scrutinizing gender and gender inequality and tracing the social construction of the notion leads us to the social institution of marriage and how the institution carved its place in the society (SINGH, 2019). Today marriage is much more than just companionship. It is one of the strongest bases of a social relationship and a legal right to have kids and ascertain child rights and paternity (DESWAL, 2019). Over the years the state has enacted various laws dealing with marriage and the rights attached thereto. In India marriages are governed under the personal laws, and there are in existence different personal laws guiding different religion marriages. For inter-religion marriages, India has legislations, such as Special Marriage act 1954 and Foreign Marriage Act, 1969 for inter-state marriages thus providing a clear picture of having a statute in place even after so many diversities (JAIN, 2017). Muslim personal law treats Marriage as a social contract providing marital rights to the couple whereas the Hindu & Christian Personal Laws treats marriage as sacrament and focus is on the rituals and the religious practices. In the Hindu traditions, a wife is also considered as ‘ardhangini’ and rights are assigned accordingly (WESTERMARCK, 1906). Hence it will not be wrong to say that the notion of gender, marriage, and religious/personal laws are very much interlinked and assuming changes to the same is impossible until and unless it is made statutorily.

Theories that explain the evolution of marriage and family, talks at length about the importance of marriage and how it forms the bases of a social being (LAFF, 2022). One such theory is Family Systems Theory that explains the need of family at first place. This theory emphasizes on the point that a family not just forms a social relationship but also help in making complexities within these relationships easy and allot the rights as per the relations and address the concerns related to the boundaries in such family complexities (HAMMOND et al., 2010).

Another important theory is of functionalism that relies on the functional perspective of having a family and getting their due rights accordingly (NEWMAN, 2011).

Thus, Family is the social objective that a marriage fulfils and at the same time marriage helps to ascertain the rights such as attaching paternity to a child, divorce, maintenance, property rights among others (GEROGAS, 2004). In such a scenario, same sex couples pose certain technical questions with respect to the fundamentals of their relationships and their marital rights. The most common ones are

- (a) If they can marry
- (b) If they can have a child together
- (c) If they can claim maintenance and on what grounds
- (d) Ascertaining child rights
- (e) Ascertaining Property Rights

Apart from these basic questions, the violence against them and them getting ostracized from the society that force them to migrate to a separate country to live a dignified life is one big issue that needs to be addressed and the same can be done through a separate legislation recognizing these Rights.

2. Background of Same Sex Marriage

Historical background can be understood in both the National (Indian) and international perspective as a lot of these concerns is directly influenced by the cultural adoption (JHA, 2021). National Perspective can again be classified into Historical Background and Constitutional and Court-Judgment perspective.

a) International Perspective:

The debate around recognizing same sex couples and their marital rights gained a lot of popularity and importance throughout the world to an extent that almost 30 countries have considered legalizing same-sex marriage. The first among them was Netherlands who legalized and recognized the same sex couple way back in the year when the Dutch Parliament passed the bill allowing the same sex relationship. This was followed by Belgium who allowed the same in the year 2003, Spain and Canada in 2005, South Africa in 2006, Norway in 2008, Sweden in 2009, Iceland, Portugal and Argentina in the year 2010, Denmark in 2012, Uruguay, New

Zealand, France, Brazil, England and Wales in the year 2013, Scotland and Luxembourg in the year 2014, Finland, Ireland, Greenland and United States in the year 2016, Germany, Malta, Australia in the year 2017, Austria, Taiwan, Ecuador and Northern Ireland in 2019, and Cost Rica in 2020 (WILLS, 2022). The major argument favoring the recognition of same sex marriage was privacy and consent of two adults. Although a similar lay work of legislation cannot be made applicable to different countries and the same is done taking into consideration of the diversities and other relevant factors varying from country to country (ESKRIDGE, 1993).

b) Same Sex Marriage in India: Lessons from Indian History

Same sex relations or Homosexuality have a long history and have been in existence since a long time now. Many instances tracing back to around 1500 BC can be found regarding the homo sexual preferences in the writings of Rig Veda, in the descriptions of Kamasutra, in the sculptures of various temples and place of religious abode (BHATTACHARYYA, 2021). Mahabharata characters like Sikhandi who was born female and later went on to become a male is one such example. There are also instances of 'Rakasa' women kissing and embracing other women in Valmiki's Ramayana (JOSHEPH, 1996). The temples of Khajuraho have showcased sculptures of women embracing women and men showing genitals to each other again ascertain the same. Evidences provide that Indian mythology was homosexual-friendly, liberal and quite eclectic about the same-sex partners (HEGARTY, 2003).

c) Recognition of Same Sex Marriage in India: Evidences from the Indian-Court Judgments

India has always been very particular about its traditions and ritualistic practices. It is no surprise that homosexuality was a big-time taboo. The debate of legalizing same-sex couples started back in the (Naz Foundation v. Govt. of NCT of Delhi, 2009) case where the petitioner called out a particular section criminalizing the same-sex relation for being unconstitutional and very much violative of the fundamental rights enshrined under Article 14, 19 and 21 (The Constitution of India, 1950). Delhi High Court in this case, held section 377 of Indian Penal Code, 1860 unconstitutional to the extent where consensual sexual conduct between two consenting adults irrespective of the gender was concerned. This did not settle too well with the people at large or with the with the Supreme Court of India and in the case of (Naz Foundation

Trust v. Suresh Kumar Koushal, 2016), the two-bench judge refused the observation by the Delhi High Court in the Naz Foundation Case and upheld section 377 of the Indian Penal Code. The Supreme Court finally legalized the consensual sexual relationship between the same sex couple in the case of (Navtej Singh Johar v. Union of India, 2018) and decriminalized section 377 of the Indian Penal Code which penalized same sex relationships. The major argument was in respect to the life, dignity and privacy of an individual who are entitled to marry and have consensual sex with their choice. The court also referred to the case of (National Legal Services Authority v. Union of India & Ors, 2014) where it considered the point of individual autonomy and that gender identity is a personal phenomenon to a person.

3. Anatomy of Navtej Singh Johar v. Union of India: Constitutional Paradigm

This case was all about seeking a right to sexuality and sexual preference i.e., irrespective of any gender. Section 377 of the Indian Penal code not just penalizes same sex relationship and people very consciously put under the terminologies like Gay and Lesbians and Queer but also violate the fundamental rights guaranteed by the Constitution of India under the Article 14, 19 and 21. In this case, the petitioner challenged the said provisions seeking right to individual and sexual autonomy and the right to choose sexual partners. The petitioners rightfully contended that Homosexuality, bisexuality is just different forms of sexual orientation which forms expressions and the same are protected under the constitutional provisions. Moreover, these expressions are natural and not just born out of some conditioning or peer pressure and to try to divert such natural process is not constitutionally validated.

The Court took into consideration certain factors and constitutional provisions while deciding onto this case. The major issue arisen was

(a) That discriminating individuals on the basis of sexual identity is clearly violative of the Article 14 of the Constitution of India.

(b) Article 21 does include Individual Identity and recognizes Individual autonomy. Criminalizing and penalizing consensual-sexual acts is violative of the same.

(c) Sexual preference of an individual is an important form of expression which is protected under Article 19 of the Constitution and any such act that prevents such expression is very much violative of the same.

Hon'ble Justice DY Chandrachud observed that

Socio-Historical context differ from jurisdiction to jurisdiction and that comparative law making allowances should be looked into in order to consider the question of law. But at the same time any matter of importance that gained a lot of popularity overseas and there is a high demand of recognition of something like same-sex marriage that reflects a growing consensus can be referred by the court not to confirm the guarantees provided by the law but also to give an interpretation and provide a conclusion to such guarantees. (Navtej Singh Johar v. Union of India, 2018)

The Court further observed in the pretext of penalizing unnatural offences, the law should not punish individual having same-sex partner preference. Unnatural offences can be dealt under section 375 of Indian Penal Code and under the POCSO Act. The Court also acknowledged the freedom of expression for same-sex couples and concluded that sexual partner preference is a right to expression under Article 19 (The Constitution of India, 1950). Moreover, the Court also agreed on widening the scope of Right to Privacy to include and protect sexual preference as 'sexual privacy.' The court also dealt with the question of "order of nature" and held that to draw the line of difference between the naturalness and unnaturalness is difficult and not legally valid and the same should not be sole criteria of penalizing an individual based on their gender identity. Further it also discussed at length the question of "Constitutional morality" and held that constitution is not just meant for the validation of society but it should be used as an important tool to reform the society however and whenever required.

In a way this judgment can be treated as legalizing same sex marriage as well but at the same time in the absence of the any specific statute or substantive amendment to the existing statute to that effect recognizing marital rights of same sex couples, the ascertainment of the same is difficult.

4. Aftermath of decriminalizing Section 377: Need for Separate Law

India is a country where deep rooted customs and traditions have been overriding the new Cultural adoptions and western influence. New statute/Regulations have always been the need of the hour whenever such influence has taken over the state and when the court of Justice finds some relevance and the need to recognize the same. There have been so many instances where the court has taken cognizance of such a public demand and the lawmakers ended up introducing and passing a law with respect to same (MANOHAR, 2010). One such example is recognizing the transgender rights and then passing of The Transgender Persons (Protection of

the Rights) Act, 2019 which not only defined the transgender persons and recognized their rights but also put the appropriate government under the obligation of safeguarding their rights and taking active participation in providing them inclusion in the society. Chapter 4 of the said act provides for Welfare measures by government and the same provides at length the provisions for the same ensuring the transgender person rights (PURKAYASTHA,2003). Having said that, social conditioning hold a strong place in the Indian Scenario which has a lot to do with the affecting the new act coming to existence or any amendment to take place. The deep-rooted values have always had the upper hand on the newly adopted values that the societies often refer to as cultural shock (SARKAR, 1958).

Decriminalizing of section 377 and recognizing the rights of the same sex people is one such situation where just the act of decriminalizing will not suffice in a society like India because of its long history of existing taboos and homosexuality is one of them. India has a complicated set of personal laws (Hindu Laws, Muslim Laws among others) and regulations governing the interpersonal relationships and providing step by step procedures to be followed by the Individuals. Marriage, the rights related to marriage such as divorce, maintenance, etc., adoption etc are governed under the same laws (SONI, 2010).

Though the Supreme Court of India had struck down the provisions penalizing homosexuality but it seems Indian Society is yet to accept the decision. Moreover, apart from feeling the inclusion in a society, the same-sex couples face a plethora of problems in the absence of a proper statute lining rights related to such unions/marriage. Some of the basic and major issues are:

a) **Registration of Marriage:** Registration of marriage is a compulsory act in both the Hindu and the Muslim personal Laws. In Muslim Marriages Registration Act, 1981, Marriage is treated as a civil contract making registration of the same an important step and there are certain pre-conditions that need to be fulfilled in order to get this registration of marriage done. One of such condition is that both the parties should be Muslim by faith and that the marriage is taking place for the purpose of procreation hence the parties should be a Man and a Woman. Under the Hindu Marriage Act, 1955, a marriage is a Sacrament and not just a mere civil contract and the same require the registration of the same after the marriage is solemnized by the Hindu rituals (AHMED, 1989) (CAROL, 1981).

- **Special Marriage Act, 1954-** Provisions under the Special Marriage Act, 1954 allows a marriage registration between two individual where both are not from the same religion say Hindu, Muslim, Jain or Buddhist. The major criteria provided in the said act for the

registration of marriage between two parties is contract based where both the party to this marriage contract has attained minimum age and has consented to marriage. Hence, same sex marriage can be easily added here itself without making any significant change in the act (ARULKALAPPAN, 2018).

b) Maintenance: According to the different dictionary around the world, the term ‘maintenance’ means to support or sustenance. Maintenance in a personal relationship is provided for the purpose of sustaining the livelihood of their partner. Different personal laws govern this provision accordingly. The basic criteria for availing the sustenance are same as the conditions required for registration of marriage that a relation between a man and a woman. And this precondition excludes the scope of same-sex couples from applying for the same (Madan Mohan Singh v. Rajni Kant, (2010).

c) Adoption Rights- Another major hindrance faced by same-sex Couples are the procedure of Adoption. Muslim prohibits Adoption entirely leaving no loose ends. With respect to other personal Laws the criteria laid underlined makes it an impossible task for the same sex couples to adopt kids (O’NEIL, 2012).

- Central Adoption Resource Authority provides for the eligibility criteria that must be fulfilled by the prospective adoptive parents in order to adopt a child. The criteria are provided in regulation 5 clause 2 as “Any prospective adoptive parents, irrespective of their marital status and whether or not they have a biological son or daughter, can adopt a child subject to the condition that there is a consent to such adoption by both the spouses in case of a married couple”. It also provides that though a single female provided the age conditions are fulfilled can adopt a child of any gender whereas a single male will not be in any circumstances be allowed to adopt girl child. Thus, the interpretation of the above provides that same sex couples are excluded from the right to adoption.

d) Divorce and grounds for divorce: Personal law prescribes rules and procedures for the divorce as well. It also lays down the grounds for which divorce can be filed. Recognizing same sex couple will also recognize the way for such other rights (VANITA, 2022)

e) Other Marital Rights: Other marital benefits that can make day to day life of a same sex couple sustainable and make them inclusive in a society. The rights include having recognition in all the government documents, educational institution documents, claiming property related to marriage etc (NARRAIN, 2015). Moreover, the same sex couple find difficulty in traveling even throughout the Country as a married couple because of lack of such legal recognition which can be indefinitely rectified through providing the same-sex couples with

their marital rights which is also a right to live with dignity guaranteed under Article 21 of the Constitution of India.

5. Conclusion

Based on the above discussion and after conceptualizing the notion and importance of marriage recognition in any working society, it is strongly recommended that same sex marriage should be legally recognized and to be provided with their marital rights. In (*Abhijit Iyer Mitra v. Union of India*, 2020), one of the major contentions put forward against the marriage of same-sex couples was that in the case of *Navtej Singh Johar*, the court merely decriminalized the consensual sexual act between two same-sex couples and it nowhere had mentioned about legalizing marriage making the need of recognizing these marriages of more social importance. The legal recognition can be incorporated through different ways and the same has been discussed below:

a) Civil Unions- Civil union is one of the alternative social unions where marital benefits are extended to such unions and groups. Many countries like United States of America, Latin America, Australia, and New Zealand have this concept of civil union instead of recognizing same-sex couples in their legislations governing the marriages and the related rights. There are countries like Germany and others which provide a limited scope for entering such unions. The legal rights provided to these unions are extended to recognition, adoption, and insurance/taxation (RAVICHANDRAN, 2014). Having said that, the question remains can these Civil/Social Unions can be adopted in Indian Scenario having strata of personal and universal laws governing and directing the marriage and the related rights? It will be most definitely a difficult task to inculcate such a regulation where there exist a plethora of statutes defining such marriage related rights. For example, if civil union is adopted in India, then the concerned authorities have to go through making amendments in the legislations related to Succession (*Indian Succession Act, 1925*), law governing Wards and Guardianship (*Wards and Guardianship Act, 1890*) among many others so that the purpose of these same-sex couples' marriage is fulfilled to be recognized as a family and to get benefit of all those related rights.

b) Expanding Special Marriage Act: The major criteria provided in the said act for the registration of marriage between two parties is contract based where both the party to this marriage contract has attained minimum age and has consented to marriage. Hence, same sex

marriage can be easily added here itself without making any significant change in the act as ratio in the judgment of the 'Johar' case was based on the privacy and consent of the couple.

c) Recognizing Foreign Marriage: Because of lack of any proper legislations or regulation recognizing same-sex marriage in India many couple either migrates to other country or register their marriage under Foreign Marriage Act. It is recommended to legally recognize such marriage in order to work on inclusion of such couple in a society

d) Uniform Civil Code: The concept of Uniform Civil Code was evolved to get to rid of the complexities of the personal laws in India. Every major religion has its own personal laws governing and guiding the inter-personal relationship and provides rights hereto. No religious text or the laws provide for same-sex marriage and hence the incorporation of Uniform civil code or the UCC will be of great help. The UCC draft which came into limelight in the year 2017 provided laws for the same-sex marriage and providing with all the marital rights. The definition provided by the same included a sexual relationship between a man and a woman, woman and a woman, & man and a man thus widening the scope of such inter-personal relationships.

e) Amending personal laws: Another alternative can be amending personal laws dealing with marriages and adding/expanding provisions in favor of same-sex couples recognizing and legalizing their marital rights.

6. Suggested Framework for a Separate Legislation dealing with the Same-Sex Couples and their Inclusion in the Society

Making amendments in the existing legislation would be a difficult task for many reasons which include number of steps involved in the amendment process and complex set/strata of legislation dealing with the aspects of inter-personal relations in such a diverse set-up. Hence, coming up with a separate legislation dealing not just with same-sex marriage but also regarding their social inclusion is the need of the hour. The act will also deal with the powers and functions of the concerned authority putting obligations on them.

The major provisions that the act should deal with are discussed below:

a) Expanding the meaning and scope of prohibition against Discrimination. That any individual recognizing themselves as gay, lesbian, queer or anyone whose sexual partner preference is same as their sex, should not be discriminated on the basis of the same in the society that includes educational establishment, Employment sector, Healthcare services, etc.

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- b) Recognizing the identity of same-sex couples and by adding a definition to that effect
 - c) Putting an obligation on the appropriate government that it shall take necessary steps to assure the same-sex people inclusion in the society like it has been there under article 15(3) of the Constitution of India where the appropriate government is empowered to make women and children welfare friendly laws and the same will not be violative of any other rights.
 - d) Putting an obligation on various establishments and social institutions for non-discrimination and to provide with the grievance redressal mechanism.
 - e) To provide with the Right of residence
 - f) To recognize same-sex marriage and provide the same-sex marriage registration provisions
 - g) To provide with the Right to adoption to the married couple
 - h) To provide with the marital rights that include property claim, maintenance benefits, and provision for divorce and to lay down grounds for divorce.

Social conditioning has a lot to do with the social inclusion and just introducing a new law will not be of much help until and unless the changes are brought within the roots. The gay-lesbians have been put under the umbrella term of LGTQIA+ since a long time now and there has been a lot of activism going around the same talking about their rights and how the same can be done. There has been a lot of NGO's that are working for the said community rights and here the governments can collaborate with the NGO and the community people the NGO's are closely working with in order to understand the actual scenario and the required social changes and to incorporate the same in the amendments or new legislations.

Having said that, the role of social Conditioning is undeniable but at the same time we live in a society that believes in customs and traditions more than law but even their beliefs does not stop them from following the law for one reason that is the fear of law and punishment. One of the major reasons that same-sex marriage must be recognized is to get the legal rights attached to it; hence recognition of same-sex marriage as well as their related rights is the need of hour.

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