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State's Social Contract: Same-Sex Marriages & its Recognition under the Special Marriage Act

Shivam Tah^aThakor Mohamad Uvesh^b

^aNirma University, Ahmedabad, India ^bNirma University, Ahmedabad, India

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The article aims to list the attributes of marriage, which are the most basic yet significant blocks of a society and state. The article analyses and offers compelling reasons for the state's involvement in the institution of marriage and interference in the private domain. It further argues that by not recognising same-sex marriages, the state fails in its obligations under the social contract. It further analyses same-sex marriage in parlance with the right to freedom of expression and association. It further discusses the magnanimous and kaleidoscopic constitutional intent of the right to life. The article concludes with a discussion of the scope, extent, and jurisprudential analysis of the writ jurisdiction of the Supreme Court under Article 32 of the Constitution.¹ The article comprehensively analyses marriage's legal and philosophical dimensions. It further advocates for a more progressive and inclusive approach, urging the judiciary to act as a catalyst for social change within the ambit of constitutional values.

Keywords: *social contract, same-sex marriages, special marriage act, legal framework, right to life, freedom of expression.*

¹ Constitution of India 1950, art 32

INTRODUCTION

Marriage can signify varied importance to different people and plays a significant societal role. Some consider it a formal agreement or a matter of personal preference, while others perceive it as a religious or cultural practice. Marital arrangements have changed in response to social, cultural, and religious beliefs. Nonetheless, there are still issues with matrimonial rights for the LGBTQIA+ community.

Various countries around the world do not recognize same-sex marriages, which makes life more difficult for LGBTQIA+ people. Due to their sexual orientation, these people frequently face prejudice in spheres like housing, healthcare, education, and employment. Queer people have not been granted equal rights by society which frequently results in their marginalization. These difficulties are exacerbated by the fact that same-sex marriages are not legally recognized, which deprives gay couples of the benefits and safeguards enjoyed by heterosexual spouses.

The Special Marriage Act 1954² in India permits marriages between members of various castes and religions. Despite the law's intention to be inclusive, same-sex couples are not covered under the ambit of this Act. One of the biggest issues faced by the LGBTQIA+ community in this world is this isolation from mainstream society. This article will make the case/statement that same-sex marriages ought to be protected by the Indian Constitution³ as a fundamental right. Additionally, it will examine the reasons for amending the Special Marriage Act to permit same-sex marriages. In addition to guaranteeing that everyone has the right to marry and should legalize same-sex marriages which would uphold the fundamental principles of equality, liberty, and justice included in the Constitution.

STATEMENT OF PROBLEM

Indian Society does not treat the LGBTQ+ Community equally as compared to other people. People belonging to the LGBTQ+ community are disrespected and harassed by certain strata of society. Moreover, the problem becomes bigger when they are treated unequally by the laws,

² The Special Marriage Act 1954

³ Constitution of India 1950

which leads to grave injustice. Even they are not legally allowed to enter into a social institution like marriage. This problem can be solved if the existing Special Marriage Act can be amended to include the marriages of members belonging to the LGBTQ+ community and include the rights arising out of such institution or marriage.

THE RESEARCH QUESTIONS

1. Is it possible to define the term and institution of marriage and list its attributes?
2. Does the Constitution of India allow for the recognition and inclusion of same-sex marriages?
3. Whether a Change or an Amendment is required to give effect to the recognition and inclusion of Same-Sex marriages.
4. Does living under same-sex marriage fall under the contours of the right to life with dignity and individual autonomy in addition to the right to express?
5. What is the Social Contract concerning the Indian State and Constitution?
6. What is the legal and political structure at this juncture and the institutional framework in India regarding the separation of power regarding the recognition of Valid marriages?

RESEARCH OBJECTIVES

1. To Determine the Feasibility and Workability of the Current Constitutional framework to allow the recognition of same-sex marriage in the eyes of the law.
2. To Analyze whether the Contours of Same-Sex marriage are recognized into the domain of the Right to Life as enshrined under Article 21 of the Constitution⁴.
3. To Evaluate the Theory of Social Contract given marriage and property devolution.

⁴ Constitution of India 1950, art 21

4. To Evaluate the possibilities of Amendments to give effect to the recognition and inclusion of same-sex marriage.
5. To Understand and Explain the legal, political, and institutional framework at this juncture and to list all possible amendments to give effect to the recognition and inclusion of same-sex marriages.
6. To define Marriage and Encapsulate the attributes of the institution of marriage.

LITERATURE REVIEW

1. The Article/Theses titled 'Legalisation of Same-Sex Marriages in India through Specific Amendment to Special Marriage Act 1954' authored by Reetam Singh⁵, starts by exploring the history of the Special Marriage Act 1954⁶ and its relation to special marriages and how it helps regulate unconventional marriages when the bride and the groom fall into different religious denominations. It further explores its constitutional necessity and how to amend SMA.⁷ It is the best possible method to safeguard the rights of the LGBTQIA+ community with the help of minimum amendments to the provisions of the statutes. It presented a comparative analysis of the laws and judicial precedents of the USA and the UK.

Review: The Article fails to take into account what changes should be incorporated into the Special Marriage Act 1954 to make it a viable and equitable law for the LGBTQ+ community.

In this current paper, the authors tried to add some suggestions at both national and international levels as to what could be added to the Special Marriage Act 1954 specifically.

2. The Article titled 'GENDER, HOMOSEXUALITY AND THE RIGHT TO MARRIAGE IN INDIA: A CRITICAL ANALYSIS'⁸ explores the history of same-sex relationships in Indian culture and concludes not to be a foreign conspiracy. Further, it tries to focus on the fact that a

⁵ Reetam Singh, 'Legalisation Of Same-Sex Marriages In India Through Specific Amendment To Special Marriage Act 1954' (Masters' Theses, National Law University and Judicial Academy 2022)

⁶ Special Marriage Act 1954

⁷ *Ibid*

⁸ Dr. Wazida Rahman, 'GENDER, HOMOSEXUALITY AND THE RIGHT TO MARRIAGE IN INDIA: A CRITICAL ANALYSIS' (2023) 9(1) NUJS Journal of Regulatory Studies <<https://www.nujs.edu/wp-content/uploads/2024/04/Volume-9-Issue-1-2.pdf>> accessed 25 November 2024

mere integration of same-sex marriage through amending some of its provisions would be insufficient and an insult to the community. It advocates for a constitutional declaration that allows the legislature to make afresh laws dealing with the people of the LGBTQIA community. It further focuses on making key reforms through campaigns to raise awareness among the people regarding same-sex marriages in India.

Review: The article fails to mention the reasons why amending some of the provisions of the law could be insufficient and how the awareness campaigns are going to work if the foundational law itself is not sustainable and equitable for the LGBTQ community.

This current paper aims to address this issue by adding how specific changes are necessary in the meantime and could be very useful until specific laws are drafted in this regard.

3. The Article titled ‘Same-Sex Marriages in Contemporary Society’⁹ explores the legal complexities associated with same-sex marriages and the limitations of personal laws. It also evaluates various sections of the act and gives a brief outlook on how it can be used in regulating same-sex marriages in India. It goes on to delve into various laws. There are some of the key judgments in tackling the topics of same-sex relations and marriages.

Review: This article fails to articulate the legal complexities properly and fails to address the solutions to the problems posed in the article.

This current paper aims to rectify this problem and add some suggestions to the problems presented in this article.

4. The paper titled ‘SAME-SEX RELATIONSHIPS AND MARRIAGE IN INDIA: THE PATH FORWARD’¹⁰ traces the LGBTQIA movement in India and how it has evolved. It also delves into the social contract theory and how society is bound to respect and protect the interests of this community as they are also members and contributors to this society. Further, this paper

⁹ Rayna Joshi, ‘Same-Sex Marriages in Contemporary Society’ (2024)7(5) International Journal of Law Management & Humanities <<https://doi.org/10.10000/IJLMH.118476>> accessed 25 November 2024

¹⁰ Saif Rasul Khan, ‘SAME-SEX RELATIONSHIPS AND MARRIAGE IN INDIA: THE PATH FORWARD’ NERIM Law College <https://law.unimelb.edu.au/_data/assets/pdf_file/0010/3967444/Khan_Saif-Rasul.pdf> accessed 25 November 2024

elaborates on the role of the Delhi High Court and the Supreme Court in creating an equal society.

Review: This paper fails to establish and explain a proper connection between the social contract theory and same-sex marriage and how society surrendered its rights to the government.

This current paper simplifies this connection and tries to answer how society surrendered its right to the government.

5. The paper titled 'EMBRACING EQUALITY A LOOK AT SAME-SEX RELATIONSHIP AND MARRIAGE IN INDIA'¹¹ traces the colonial imposition of section 377¹² and how it criminalized same-sex marriages, which resulted in hostility towards this community for several decades. It also explores the judgments of the Supreme Court and their impact on society and how it solves some of the problems by recognizing the right of same-sex marriages. Lastly, it explores the prospects of this union and the possibility of the legalization of same-sex marriages in the future.

Review: This article fails to take into account the wider ambit of Section 377¹³ and how the removal of Section 377 is a step towards the legalization of same-sex marriage when one is a judicial decision and the other is supposed to be done by the legislature.

This current paper tries to establish a connection between the role of the judiciary and the executive in the legalization of same-sex marriage.

6. The paper titled 'MOVING AWAY FROM TRADITIONAL HOMOGENOUS FAMILIES: A CASE FOR SAME-SEX MARRIAGES IN INDIA'¹⁴ deals with the importance of valuing the rights of homosexuals and how people discriminate against them without even noticing them in their day-to-day activities. This further deals with the various judicial precedents and

¹¹ Meha Khiria, 'EMBRACING EQUALITY A LOOK AT SAME-SEX RELATIONSHIP AND MARRIAGE IN INDIA' (2024) 3(1) Humanities and Social Science Studies

<https://www.researchgate.net/publication/380376247_EMBRACING_EQUALITY_A_LOOK_AT_SAME-SEX_RELATIONSHIP_AND_MARRIAGE_IN_INDIA> accessed 25 November 2024

¹² Indian Penal Code 1860, s 377

¹³ *Ibid*

¹⁴ Ashmita Mitra and Amulya Baid, 'MOVING AWAY FROM TRADITIONAL HOMOGENOUS FAMILIES: A CASE FOR SAME-SEX MARRIAGES IN INDIA' (2019) 14 *Supremo Amicus* <<https://supremoamicus.org/wp-content/uploads/2019/11/A5vol14.pdf>> accessed 25 November 2024

concludes how recognizing same-sex marriage not only helps in establishing a fair society but also helps in removing the colonial biases against this community.

Review: This article does not elaborate on what kind of discrimination is faced by the community and also places the entire ownership on the colonial powers.

This current paper tries to shed light on the types of discrimination faced by the members of the LGBT community and how the discrimination goes back many centuries and is intertwined with cultures and traditions.

7. The article titled 'Same-Sex Marriage in India: A Road to Legalization and A Comparative Analysis with Other Countries'¹⁵ compares the validity of same-sex marriage in India with other countries like the UK and the USA. This article further explores the impact of cultural, legal, and social factors and how movements against discrimination played pivotal roles in each of these countries. This also explores various foreign precedents of the UK chancery bench and concludes how Indian courts can incorporate some of these judgments in the Indian context.

Review: This paper tries to inculcate the foreign precedents in the Indian diaspora, which the above article fails to do properly and in a simplified manner.

8. The paper titled 'Applicability of Special Marriage Act, 1954 to Same-Sex Marriage'¹⁶ also elucidates the application of various sections of the act.¹⁷ They can be interpreted differently, and provisos can be added specifically to make them compatible with the needs of the LGBT community in regulating their marriages. This paper concluded that this is only a temporary measure as many other things like inheritance, adoption etc. need to be separately regulated.

Review: This article does not give enough details on the changes that are supposed to be incorporated into the act.

¹⁵ Swastik Yadav, 'Same-Sex Marriage in India: A Road to Legalization and A Comparative Analysis with Other Countries' (*Legal Service India*) <<https://www.legalserviceindia.com/legal/article-10820-same-sex-marriage-in-india-a-road-to-legalization-and-a-comparative-analysis-with-other-countries.html>> accessed 25 November 2024

¹⁶ Bhakti Khule, 'Applicability of Special Marriage Act, 1954 to Same-Sex Marriage' (2021) 1(1) *Indian Journal of Law and Legal Research* <<https://www.ijlr.com/post/applicability-of-special-marriage-act-1954-to-same-sex-marriage>> accessed 25 November 2024

¹⁷ Special Marriage Act 1954

The current paper tries to rectify this by giving enough reasons and details about the amendments that are to be incorporated.

INSTITUTION OF MARRIAGE AND THE CHALLENGES FACED BY THE QUEER COMMUNITY

The Institution of Marriage is a basic block in society, and yet a term of such importance is hard to define. Defining marriage is a herculean task and a practice common to all cultures, regions, societies, and religions which lacks a universal definition. The nature of marriage is contingent on culture, society, and religion as for some it is a sacrament, for some a contract & for some companionship of this life.

The LGBTQIA+ community faces discrimination in many areas of life due to a lack of acceptance and facilities which requires due attention. Public spaces like washrooms and security checks often follow strict male-female rules, making people feel uncomfortable and left out. Schools and workplaces can also be unwelcoming to queer people who often face bullying, rejection, or fewer job opportunities. Many transgender individuals struggle to find work and many even drop out of school early due to discrimination.

At home also, queer individuals often face violence or rejection from their families which leads to harmful practices like 'conversion therapy' or marriage against their will. These people also have other difficulties such as finding a house to rent is tough because landlords and neighbours often discriminate. Even police and prison officials can cause harm, such as ignoring their safety or mistreating them in custody. All these difficulties create fear and force them to hide their identity or pretend to be someone they are not.

VALID MARRIAGE AND INVOLVEMENT OF THE STATE

The Institution of Marriage precedes law. The legal framework established in India about marriages and divorce is covered by various personal laws based on religion and secular laws enacted by the State, namely, the Special Marriage Act and Foreign Marriage Act, which are modelled and styled on the Special Marriage Act. Although marriage is more archaic than law, the State to regulate society has made such laws that are instruments of the state. The Indian

State first recognizes the categories of marriage, then sets *sine qua non* for valid marriages. It regulates the behaviours to prevent and punish marital abuse and violence and provides rules for succession and grounds for divorce & remedies of maintenance thereafter.

The State has played a dominant role in shaping personal laws, from establishing and modifying the minimum age for marriage to ensuring free consent. It has also driven significant reforms, including the abolition of Sati, the legalization of widow remarriage, the granting of Hindu women the right to divorce, and declaring instantaneous Triple Talaq unconstitutional.

In 2023, the Hon'ble Supreme Court in the case of *Supriyo v UOI*¹⁸ held that the 'Right to marry' is not a fundamental right under the Constitution of India and rejected a plea of petitioners to include same-sex marriages under the scope and realm of the Special Marriage Act 1954. Thus, this article will delineate why and how same-sex marriages should be considered as Fundamental rights and should be under the realm of the Special Marriage Act.

THE SOCIAL CONTRACT & BREACHED OBLIGATION

As the obiter of Lord Marshall in *Goodridge v Department of Health*¹⁹ remarked, 'Truly marriage has three parties; two willing partners and third approving state'. The major intention behind the state as an active party is to fulfil its obligation under the Social Contract.²⁰ It is the protection of the property rights of citizens who gave up their uncontrolled freedom for a just and fair order. To establish justice, fairness, and order, the State has provided both visible and invisible incentives, such as the protection of property rights through equitable devolution, matrimonial and child welfare schemes, maintenance provisions, protection from marital abuse, and other legal safeguards. This has given rise to an implicit societal sanctity associated with marriage. Only those marriages that meet the essential conditions of validity, as recognized by the State, receive these benefits. Conversely, marriages that fall outside this framework remain unrecognized and are deprived of these legal and social incentives, preventing them from attaining societal legitimacy.

¹⁸ *Supriya Chakraborty & Anr v Union of India* (2023) 2023 INSC 920

¹⁹ *Goodridge v Department of Public Health* [2003] 798 N.E.2d 941

²⁰ Jean-Jacques Rousseau, *The Social Contract* (Hafner Publishing Company 2010)

Therefore, a democratic Indian State must recognize same-sex marriages to fulfill its fundamental obligation under the social contract – ensuring justice, order, and the protection of property rights. Failure to do so would result in an unjust exclusion of same-sex couples from the legal and social benefits afforded to other marriages. In addition, the Constitution of India put an obligation on the State, through the instrument of marriage, to establish a society based on the preambular ideas of liberty, equality, and fraternity.

RIGHT TO FORM INTIMATE ASSOCIATIONS

Article 19(1)(c)²¹ guarantees that citizens of India can form Associations. It can be of any nature, be it of business, commercial, political, platonic, or romantic nature. It was envisaged that it would supplement the 'Right to Expression' as humans have intrinsic qualities to form a group and to associate political, commercial, romantic, and social ideas. The same is also agreed upon and reiterated in *Roberts v U.S. Jaycees*,²² which was accepted by the Supreme Court of India in the case of *Supriyo v UOI*²³. It casts a duty on the Indian state to recognize same-sex marriages as they are exercising their right to express and associate. If the State fails to create the necessary framework for the exercise of fundamental rights, it would amount to an infringement of those rights.

The outdated jurisprudence that viewed fundamental rights merely as negative obligations has been set aside. Instead, contemporary jurisprudence, as expounded by the Hon'ble Supreme Court of India, imposes both negative and positive obligations on the State. This includes the duty to establish a secure, equal, and well-regulated space that upholds democratic and constitutional values as its foundation. Therefore, except for legally reasonable and permissible restrictions, the right to form intimate associations should remain unrestricted and actively upheld.

²¹ Constitution of India 1950, art 19(3)(c)

²² *Roberts v U.S. Jaycees* [1984] 468 US 609

²³ *Supriya Chakraborty & Anr. v Union of India* (2023) 2023 INSC 920

KALEIDOSCOPIIC CONSTITUTIONAL INTENT & RIGHT TO LIFE

In *Maneka Gandhi v UOI*²⁴, the Hon'ble Supreme Court did away with the mechanical and technical interpretation of Article 21²⁵. Thus, the law would spread colours in the kaleidoscopic interpretation of Fundamental Rights, Directive Principles of State Policy, and preambular values.

Human beings inherently seek companionship for self-development, forming associations through which they share emotions and ideas, including grief, love, joy, and affection. At its core, this reflects the fundamental need to build relationships—whether romantic, platonic, professional, or educational. The sense of belonging to a family is essential, as it fosters mental, physical, and spiritual growth, ultimately contributing to the development of both society and the State.

The full and meaningful exercise of the right to form such associations is best realized when the State grants recognition to these relationships. Such recognition ensures a level playing field, provides mutual protection and extends both tangible and intangible benefits that legally recognized relationships enjoy.

The Constitution imposes a duty on the State to ensure that families with single parents or queer parents are treated equally. The State must extend to them all benefits available under social welfare legislation, by constitutional values, particularly the principle of equal protection under the law. The Honorable Supreme Court in *Deepika Singh v Central Administrative Tribunal*²⁶ made it clear that there can be multiple ways and manners of expressing love and forming families.

Drawing from the wisdom of the Hon'ble Supreme Court's decision in *Francis Coralie Mullin v The Administrator, Union Territory of Delhi*²⁷, the right to life encompasses the right to live with human dignity. This includes the freedom to express oneself in various forms, engage with

²⁴ *Maneka Gandhi v Union of India* (1978) 2 SCR 621

²⁵ Constitution of India 1950, art 21

²⁶ *Deepika Singh v Central Administrative Tribunal* CA No 5308/2022

²⁷ *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1981) 2 SCR 51

fellow human beings, and perform activities essential to the fundamental expression of one's identity.

The Supreme Court in *Navtej Singh Johar v UOI*²⁸ held that restriction to enter into a union based on sexual orientation suffers from constitutional infirmity and is violative of Article 15²⁹ Of the Constitution. In the *Supriyo* case, it also allowed transgender persons to marry heterosexual partners under the existing law.

INTERNATIONAL PERSPECTIVE ON THE RIGHT TO MARRY, FREEDOM OF EXPRESSION, AND DIGNIFIED LIFE

The Indian legal system is based on a common law structure where laws are interpreted and given effect with conjoint reading of black letter statutes enacted by the legislature, judicial precedents, and settled conventions. Therefore, it is imperative to discuss judicial precedents on the right to marry, freedom of expression, and dignified life. The case of *Minister of Home Affairs v Fourie*³⁰ originated in South Africa, shaped the landscape in the realm of LGBTQ+ rights. In the said case, the definition of marriage stated in section 30(1)³¹ of the South African Marriage Act Common Law was challenged on the grounds of under-inclusivity of LGBTQ+ Communities. The Hon'ble Supreme Court of Africa held it unconstitutional as the section of the law was suffering from under-inclusivity and excluded same-sex couples and LGTBQ+ communities.

In a landmark case,³² The Laws of England were discussed where the tenancy rights would pass to a spouse in case a tenant who has said rights dies. The respondents of the case where a same-sex couple and the transfer of tenancy rights was not given effect. The respondent argued that the terms of the Rent Act are discriminatory and are interpreted diametrically opposite to the Human Rights Act 1998 and Article 14³³ of the European Convention on Human Rights. The Courts agreed to their argument & allowed tenancy rights to be passed to same-sex spouses.

²⁸ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1

²⁹ Constitution of India 1950, art 15

³⁰ *Minister of Home Affairs v Fourie* [2006] 1 SA 524

³¹ The Marriage Act, 1961, s 30(1)

³² *Ghaidan v Godin-Mendoza* [2004] UKHL 30

³³ European Convention on Human Rights 1953, art 14

The Supreme Court in a landmark case³⁴ struck down all laws that prohibit the licensing of same-sex marriage obligated all US states to register and license same-sex marriage at par with heterosexual marriages and held that liberty as per the American constitution should be exercised to the fullest in the realms and boundaries of the law. The Court here rejected to give a straight jacket formula like mathematics to identify Fundamental rights. The court arrived at the decision based on the reasoning of the 14th Amendment to the US Constitution³⁵ and the Due Process Clause which furthers the spirit of liberty. The right to choose a partner is ingrained and deeply rooted in the idea of individual choice and autonomy. The recognition of marriage is the fulfillment of the promise of the state under a social contract.

READING FOREIGN PRECEDENTS CUM GRANO SALIS

Doctrines, theories, judicial interpretations, and opinions originating from foreign jurisdictions should be approached with caution. Directly transplanting such doctrines or decisions into the Indian legal framework would be imprudent, as the factors influencing legal development, institutional capabilities, and governmental structures in foreign jurisdictions may differ significantly. This distinction is evident in cases such as *Obergefell v Hodges*³⁶, where, before the ruling, states had already legalized same-sex marriage.

Similarly, in *Ghaidan v Godin-Mendoza*³⁷, the presence of legislative frameworks like the Human Rights Act and the European Convention on Human Rights influenced the decision. However, such legal instruments are absent in India's domestic legal framework.

INSTITUTIONAL LIMITATION OR UNDER THE COURT'S AUTHORITY?

As marriage is integral to the Right to life enshrined under Article 21³⁸ and conjoint reading of the right to life, the right to expression and the right to form association boil down to the fact that expression of sexual orientation and their wish to associate with other partners of the same gender under a romantic relationship is constitutionally permissible.

³⁴ *Obergefell v Hodges* [2015] 576 US 644 (2015)

³⁵ 14th US Constitution Amendment 1868

³⁶ *Obergefell v Hodges* [2015] 576 US 644 (2015)

³⁷ *Ghaidan v Godin-Mendoza* [2004] UKHL 30

³⁸ Constitution of India 1950, art 21

Our Constitution permits its citizens to express themselves and associate in diverse and legally permissible ways. Thus, the right to marry may be considered a fundamental right. Part 3 of the Constitution³⁹ casts both positive and negative obligations on the State to create a favourable and secure space where such enumerated and instrumental rights can be exercised freely. It thus strikes the nicest balance.

The phraseology adopted while drafting Article 32 of the Constitution⁴⁰ reflects that the writ jurisdiction of the Supreme Court is inclusive of striking down of law or policy when it suffers from constitutional infirmity. The same can be construed from the broad drafting of Article 32⁴¹ and choosing phraseology as 'to issue directions, orders, or writs' & 'including' in Clause 2 of said article. It is not antithetical to the separation of powers but strengthens and checks the deficits and excesses of other organs. Keeping in mind that the Court should exercise this jurisdiction while being cognizant of settled restraints. To protect the independence of the judiciary, the Apex Court read 'consultation' as 'concurrence' and should issue guidelines to further gender justice. The Supreme Court does possess requisite jurisdiction and should give direction to give effect to the rights of queers.

AMENDMENTS REQUIRED IN THE SPECIAL MARRIAGE ACT

Gender-neutral terms such as first spouse and second spouse should be inserted in various places where the terms wife and husband have been used. Gender-neutral laws are not only the need of the hour for the LGBTQ community but also the need of society. For instance, the wording of the earlier IPC sections 375⁴² and 376⁴³ are framed in such a way that suggests that only males can be the perpetrators in cases of rape which is not true. Justice Verma's committee has recommended making these laws more gender-neutral. In the context of SMA⁴⁴, the wording of some of the sections is already gender-neutral, like sections 5⁴⁵, 8⁴⁶ and 11.⁴⁷ Use the term

³⁹ Constitution of India 1950, art 3

⁴⁰ Constitution of India 1950, art 32

⁴¹ Constitution of India 1950, art 32

⁴² Indian Penal Code 1860, s 375

⁴³ Indian Penal Code 1860, s 376

⁴⁴ Special Marriage Act 1954

⁴⁵ Special Marriage Act 1954, s 5

⁴⁶ Special Marriage Act 1954, s 8

⁴⁷ Special Marriage Act 1954, s 11

‘parties’ that could easily include any non-binary gay or lesbian individuals. Sections 26⁴⁸ and 27⁴⁹, use the term ‘parties’ instead of attaching any gendered connotations. However, in some of the sections like sections 22⁵⁰, 23⁵¹ and 25⁵², the act still uses terms like ‘husband’ and ‘wife’ which needed amendment to make it gender-neutral. These amendments can be said to be in line with the basic objective of the SMA which is to give recognition to marriages that do not fall in the line of traditional inter-caste or inter-religious marriages.

1. Section 4(ii) of the SMA⁵³ explicitly states that if the spouse is suffering from any mental disorder due to which he is unable to procreate. Such types of marriages cannot be solemnized. This is a very age-old notion as it is considered that the primary duty of marriage is to procreate and raise offspring which is not compatible with today’s conditions. Marital intercourse indeed forms an integral part of marital obligation but it is not necessary that such intercourse results in procreation. By definition, the consummation of marriage is different from the capacity to conceive a child. In cases such as *Renuka v Rajendra*⁵⁴, *Mary Kurian v T. Joseph*⁵⁵, and *Jayaraj v Mary*,⁵⁶ the court has condemned the issue of impotence and held that this should be dealt with in a very sensitive manner; otherwise, this could lead to bigger problems.⁵⁷
2. The age limit of both spouses should be kept at 21 years, which is presently different for husband and wife under Sec 4(c) of the Special Marriage Act⁵⁸.
3. An exception clause should be inserted in Sec 2 of the SMA,⁵⁹ which includes prohibited relationships, such that this provision does not apply to homosexual couples.

⁴⁸ Special Marriage Act 1954, s 26

⁴⁹ Special Marriage Act 1954, s 27

⁵⁰ Special Marriage Act 1954, s 22

⁵¹ Special Marriage Act 1954, s 23

⁵² Special Marriage Act 1954, s 25

⁵³ Special Marriage Act 1954, s 4

⁵⁴ *Smt. Renuka v Rajendra Hada* (2007) RLW 3 Raj 1839

⁵⁵ *Mary Kurian v T.T. Joseph* (1980) Ker LT 530

⁵⁶ *Jayaraj Anthony v Mary Seeni Ammal* (1969) 2 MLJ 194

⁵⁷ Singh (n 5)

⁵⁸ Special Marriage Act 1954, s 4

⁵⁹ Special Marriage Act 1954, s 2

4. An amendment should be introduced where Sec 4(d) of SMA⁶⁰ Which deals with degrees of prohibited relationships should be omitted for the homosexual couple as many customs are either not clear on queer relationships or are explicitly against it.

To constitute a valid custom, it should fulfill 5 criteria, namely the following:

1. The existence of such custom should be from time immemorial;
2. It must be practiced continuously over some time;
3. It must be rational and beneficial and not affect society negatively;
4. It must not be struck down by any competent court or any legislation at the time;
5. It should not contradict other customs of different religious denominations.

The customs find their relevance as valid laws from Article 13 of the Constitution⁶¹. In case, there is no valid piece of legislation to deal with a matter, the customs take precedence. Marriages of different religions are mainly dealt in accordance with the personal laws, which take inspiration from customs and traditions. Many times, these traditions are deemed oppressive and non-compatible with the requirements of modern-day problems. In such cases, the courts try to construct the statutes in a harmonious manner so that they do not contradict the basic rules of natural justice and the rule of law.

In the recent case of Sabarimala⁶², the SC held that the age-old custom of not allowing women in the temple was unconstitutional and against Article 14⁶³. The court held that the court must uphold constitutional morality and not public morality. A similar view is taken in the case of the Jalikattu Animal Sports Judgement,⁶⁴ where the age-old custom of taming a bull is considered animal cruelty and a violation of Article 51-A⁶⁵.

⁶⁰ Special Marriage Act 1954, s 4

⁶¹ Constitution of India 1950, art 13

⁶² *Indian Young Lawyers Association v State of Kerala* (2019) 11 SCC 1

⁶³ Constitution of India 1950, art 14

⁶⁴ *Animal Welfare Board of India v A Nagaraja & Ors* (2014) 7 SCC 547

⁶⁵ Constitution of India 1950, art 51-A

The importance of a legal natural heir cannot be ignored in any given family. All types of rights, like property rights, are passed on from one generation to another through heirs. The importance of children is enriched in Article 39(F) of the Constitution⁶⁶, which provides for their welfare. Now, for heterosexual couples, various laws govern various aspects of adoption, guardianship, and inheritance, but for homosexual couples, things become a little complex. Hindu Adoption and Maintenance Act 1956⁶⁷ and Juvenile Justice Act 2015⁶⁸ both assume and include only heterosexual couples and frame laws in that manner. Surrogacy Regulation Act 2021⁶⁹ excludes homosexual couples and hence denies them the right to assisted reproduction.

All these laws need more liberal interpretation and amendments which could ease and facilitate the rights of homosexual couples. This could be done by taking inspiration from the Guardians and Wards Act 1890,⁷⁰ which allows the court to appoint guardians based on the welfare of children without any discrimination. India could also take inspiration from the US laws where there is a designation of the 'legal parent' instead of an automatic assumption of parenthood in heterosexual couples like that in India.

FINDINGS

1. LGBTQIA+ people are not covered under the Special Marriage Act (SMA) since it is fundamentally heteronormative and only applies to opposite-sex couples.
2. Queer relationships are marginalized and inequality is sustained by the SMA's and related legal systems' lack of gender-neutral vocabulary.
3. Progressive interpretations have been made possible by judicial activism in support of marital equality, but they lack the permanence and scope of legislative action.

⁶⁶ Constitution of India 1950, art 39

⁶⁷ Hindu Adoptions and Maintenance Act 1956

⁶⁸ Juvenile Justice (Care and Protection of Children) Act 2015

⁶⁹ Surrogacy Regulation Act 2021

⁷⁰ Wards Act 1890

4. The stigma associated with LGBTQIA+ people, the absence of clear anti-discrimination legislation, and the underappreciation of their rights all contribute to the persistence of prejudice against them.

5. Comparative legal systems show that inclusive legislation can greatly alter cultural beliefs and legal acceptance, especially in nations that have marital equality.

ANALYSIS

1. The results emphasize the necessity of changing the Special Marriage Act (SMA) to guarantee equality for everyone and include same-sex couples. The SMA's current wording excludes LGBTQIA+ people from rights including marriage registration, inheritance, and maintenance because it solely presupposes opposite-sex marriages. This disparity deprives LGBT couples of legal protections and fosters inequity.

2. Even though courts have upheld LGBTQIA+ rights in various cases, the courts can only read the law and not make changes to it. To create inclusive, long-term solutions, comprehensive legislative reforms are necessary. Adding gender-neutral language to the SMA would be a big step in guaranteeing equal rights.

3. Legal acceptance of same-sex marriages may lessen discrimination and mainstream LGBT relationships, but social stigma persists. To foster public acceptance, awareness initiatives are required in addition to legislative changes.

4. Countries that have successfully enacted marriage equality laws, such as Canada and the Netherlands can also teach India a lot. These instances demonstrate the beneficial effects of inclusive legislation on society and how it grants all people equal rights.

5. To sum up, to preserve the constitutional ideals of equality and dignity for all persons regardless of sexual orientation, marriage equality necessitates both legislative changes and social transformation.

SUGGESTIONS

Some steps can be undertaken both by the government and society to ensure that the LGBTQ community gets the respect they are entitled to in this society. Some of these are as follows:

1. As the saying goes, any change first starts from the home itself. People must begin to understand that belonging to a different sexual orientation is normal and perfectly fine, as already proved by various studies. This change cannot be brought about overnight, but gradual efforts should be undertaken by both the people and the government by launching awareness programs and including them in the school textbooks.
2. The judiciary should issue guidelines to bridge the gap until legislative measures are enacted. For example, interim directions could ensure property rights, maintenance, and child custody protections for queer individuals in unrecognized marriages.
3. A dedicated welfare board for the development of the LGBTQ community should be set up just like the women and children welfare board, which could look after the interests and grievances of the community and inform the government so that they could take measures to solve the problems.
4. As said earlier, in the long term, laws should be amended to make them gender-neutral, and various other changes should be incorporated so that the LGBTQ community gets the right to marry and enjoy all the rights and privileges that a married couple enjoy in the country.
5. Strong penal laws should be introduced in the upcoming amendments so that people who exploit the community by promoting and conducting inhuman practices like conversion therapy can be punished severely. Although Conversion therapy is banned in India, it is required that the term is properly defined to ensure that it is criminalised and a penalty could be added to it.
6. On a global level, adapting successful frameworks from countries like South Africa and the UK where same-sex marriage is legalised should be the prime focus of the Indian Government.

CONCLUSION

Recognizing same-sex marriage is not merely a matter of social progress; it is a fundamental question of upholding the constitutional guarantees of equality and non-discrimination. The Indian Constitution, in its promise of justice, liberty, and equality, envisions a society where all individuals are treated with dignity and respect. Denying same-sex couples the right to marry directly contravenes this foundational principle. It perpetuates a system where LGBTQ+ individuals are treated as second-class citizens, denied the same legal recognition and social acceptance afforded to heterosexual couples. This disparity not only infringes upon their personal liberties but also undermines their sense of belonging and participation in society. The Preamble to the Constitution, with its emphasis on fairness and liberty, serves as a guiding light, reminding us that laws must reflect the evolving understanding of equality and human rights. Excluding same-sex couples from the institution of marriage is a clear violation of this constitutional spirit.

Furthermore, the global trend towards recognizing same-sex marriage underscores the universality of these fundamental rights. Courts in various countries, including the United States and South Africa, have recognized the inherent injustice of discriminatory marriage laws and have taken steps to rectify them. These decisions reflect a growing understanding that love, commitment, and family are not defined by sexual orientation. In India, judicial activism has played a crucial role in advancing LGBTQ+ rights, often stepping in to protect personal liberty and dignity when legislative action has lagged behind social realities. This highlights the vital role of the judiciary in safeguarding the rights of marginalized communities and ensuring that the Constitution remains a living document that adapts to the changing needs of society. The Special Marriage Act of 1954, in its current form, perpetuates outdated notions of marriage and must be amended to reflect the principles of inclusivity and equality.

Amending the Special Marriage Act to include gender-neutral language is not just a legal formality; it is a symbolic act that would send a powerful message about India's commitment to human rights and equality. It would affirm that LGBTQ+ individuals are valued members of society and deserve the same legal protections and social recognition as everyone else. This change would also bring India in line with international human rights standards and

demonstrate its leadership in promoting equality and non-discrimination. By embracing diversity and inclusivity in its marriage laws, India can strengthen its social fabric and create a more just and equitable society for all its citizens. It is time to move beyond prejudice and embrace a legal framework that reflects the true meaning of equality and justice for all, as enshrined in our Constitution.