

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 4

2023

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He or She! Rethinking the Paradoxical Dilemma surrounding Marriage Equality

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ABSTRACT

The tussle between marriage equality and the cultural and societal values associated with the institution of marriage is quite intense in India considering the conservatism and ethnocentricity in the society. India is grappling with the conversation of legalizing homosexual relationships and whether the route to rejecting the deep-rooted stigma associated with it is the simultaneous acceptance of same-sex marriage. The problem with legalizing homosexual marriage is that Indian traditional households are not prepared to accept colossal changes in marriage laws as the society only recognizes the union of a binary male and a female. Customs and traditions concerning the institution of marriage have profound value in India. Considering the ongoing developments, a question arises that whether or not India should consider recognizing same-sex marriage. On the route to legally recognizing same-sex marriage, age-old customs, and societal values seem to be standing in between.

Keywords: *LGBTQIA+, Same-sex Marriage, Marriage Equality, Personal laws, The Special Marriage Act.*

I. INTRODUCTION

The year 2018 was a breakthrough against conservatism and religious antagonism in India. The decision of the Supreme Court in *Navtej Singh Johar v. Union of India*² was a liberating victory for the LGBTQIA+ community as Section 377 was declared unconstitutional to the extent it criminalizes consensual sexual intercourse between non-heterosexual partners.

Prejudice against the lesbian, gay, bisexual, transgender, queer, intersex, and asexual (*shortly* LGBTQIA+) community is inveterated and miasmatic. It was only in the 1990s that dialectics on LGBT rights began at the aegis of the United Nations. Earlier, there was merely any recognition for those who desired to defy the sex and gender assigned to them at birth. For decades nations continued to outlaw consensual same-sex relationships. Couples who fought for their freedom were either put behind bars or placed as an obstinate target of violence. Even today, it is quite often that their rights are ignored, if not ostracised.

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² A.I.R. (2018) 10 S.C. 4321.

Undoubtedly, there has been a satiable growth in the Indian legal scenario as well as in social acceptance in terms of sexual orientation and gender identity in the past couple of years. With our society becoming permissive, more non-heterosexual people are beginning to embrace their eccentricity in gender and sex norms. However, the wave is higher in metropolitans to lukewarm or obscure in urban, semi-urban, and rural societies.

India's civil society is now grappling with the conversation of whether the route to rejecting the deep-rooted stigma and discrimination concomitant to homosexuality in India is the simultaneous acceptance of marriage rights. The problem with legalizing same-sex marriage however is that Indian traditional households are not prepared to accept changes in the personal laws in India since the society, values, and legal system are conditioned to acknowledge the union of a binary male and a female. In 2016, a resolution was passed by twenty-three nations at the aegis of the UN General Assembly to fight against violence based on gender identity and sexual orientation.³ India's abstention from voting was a categorical message to show that same-sex marriage is currently not a moot. The Central government raised the concern that recognizing marriage between non-heterosexual partners would dispute the sanctity attached to the institution of marriage and may have an inestimable bearing on social morality and ethnocentricity.

Nonetheless, many equal rights activists filed petitions at the Supreme Court pleading legal recognition under the Hindu Marriage Act of 1955, the Special Marriage Act of 1954, and the Foreign Marriage Act of 1969. It has sparked passionate debates across the country since the matter has been laid at the altar of the Supreme Court. The question is not merely about recognizing same-sex marriage, but rather to harmonize it with the culture and values of Indian society whilst doing so. There are apprehensions about the impact on religious freedom if the personal laws in India are to be reformed, and, not doing so at the same time, unfairly cast off individuals belonging to the LGBTQIA+ community.

While traversing through the international and domestic legal developments regarding the issue, a few questions come to the surface. Whether marriage equality is a human right and failing to recognize same-sex marriage validates prejudice on the ground of sexual orientation and gender identity. Whether legal sanction can be accorded to same-sex marriage in India? Whether it would be feasible to seek amendments to personal laws in India?

II. MARRIAGE AS A SOCIAL INSTITUTION IN INDIA

³Human Rights Council Resolution 32/2, *Protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/RES/32/2, (Jun. 30, 2016).

The dynamism and uniqueness in the customs and traditions are the distinguishing trait of India and its composite culture. However, culture does not operate in a vacuum, rather, culture is social. Social institutions are one of the fundamental components of a society and have a momentous influence on culture.

In India, marriage and family are two primary social institutions that have been prevailing from time immemorial. They are universally complimentary to each other irrespective of cultural dissimilarities. No other social entity in India appears more natural and realistic than family and the primary goal of marriage itself is the creation of a family. Over the decades, sociologists and social anthropologists have conducted numerous research across cultures to understand the intrinsic liaison that lies between marriage and family. There is a sense of generalization that, a family unit consists of a man, a woman, and their children. Marriage is the institutional arrangement that the society made, through which a family comes into existence. Procreation is one of the fundamental aims of marriage for which it naturally presupposes the unification of a biological man and a woman as husband and wife.⁴ It's therefore obvious that Indian culture is only committed to a union between two opposite sex per se. The Institution of marriage in India is therefore fundamentally extending to male and female relationships.

III. UNDERSTANDING GENDER AND SEXUAL ORIENTATION

The term Gender denotes the biological sex, either male or female to which a person is born. Gender is socially constructed. Whereas, Gender Identity is how a person perceives himself and identifies himself based on that perception. Gender Identity refers to the inherent, self-perceived notion of gender a person is born with. It is the term used to refer to each person's profoundly felt innermost and individual experience of gender, which may or may not conform to the sex assigned to them at birth. Gender Role, also may be termed as 'sex role' is what a cultural society expects from a person because of his biological sex. In society, people play roles as a boy or girl, a man or as a woman in respect of masculinity and femininity of one's self. Gender role varies from culture to culture at various times.

Sexual orientation is the propensity to grow intimate emotional and sexual relationships with other people. It is the persistent pattern of fascination, behaviour, and identity by which a person feels appeals to one or both genders. It determines the primary emotional, physical, and sexual attraction one may feel toward others. Sexual orientation identity on the other hand is what we

⁴ Soibam Rocky Singh, *Same-sex Marriage Will Cause Havoc, Centre Tells Delhi High Court*, THE HINDU (Feb. 25, 2021, 9:54 PM), <https://www.thehindu.com/news/national/same-sex-marriages-will-cause-havoc-says-govt/article33935252.ece>.

perceive as lesbian, gay and bisexual, transgender, and heterosexual.

The YP+10 within its mandate defined sex characteristics as well as gender expression. The term Gender expression is used to mean the exhibition of one's gender through physical appearance which includes, dress, hairstyle, accessories, behavioural patterns, names, and personal reference. Sex characteristics on the other hand are the bodily aspects relating to sex, which include genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and additional attributes of a person evolving from puberty.⁵

LGBTQIA+ is an inclusive acronym for lesbian, gay, bisexual, transgender, queer, intersex, asexual, and numerous others who fall out of the conventional sexual and gender norms. The original LGBT is now an evolving abbreviation. With time and change in attitude, LGBT acronyms have a few extra letters added representing a cluster of ancillary terminology around it. Hence it is now used to represent a wide array of sexual identities by using a plus sign that is LGBTQIA+ for the sake of simplifying and efficiency in representation.

IV. MARRIAGE EQUALITY FROM INTERNATIONAL LEGAL PERSPECTIVE

In November 2006 a set of guidelines titled, the *Yogyakarta Principles on the Application of Human Rights in Relation to Sexual Orientation and Gender Identity (hereinafter Yogyakarta principles)* was adopted in Yogyakarta, Indonesia on matters concerned with sexuality, gender identity, and international human rights law by a group of human rights experts from 25 nations. Principle 24 specifically reflects on the right to marriage of same-sex couples. Through the principles in the guidelines, the right to find a family through adoption or assisted reproductive measures has been affirmed for those not defined by marriage. It says laws and policies of the state shall recognize the diversity in family forms and adopt necessary equitable administrative and legislative measures based on their sexual orientation and gender identity. Gender identity or sexual orientation of a child or any of their family member shall not be a consideration while adopting welfare measures for children. The states which recognized same-sex marriage or registered partnership shall ensure to make available all entitlements, obligations, privileged, and benefits available for different-sex couples.

To supplement the Yogyakarta Principles of 2006, an additional set of principles, the *Yogyakarta Principles Plus 10 – Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression, and Sex Characteristics to Complement the Yogyakarta Principles*, (hereinafter *YP+10*) was

⁵ International Commission of Jurists (ICJ), *The Yogyakarta Principles on the Application of Human Rights in Relation to Sexual Orientation and Gender Identity* (November 2006)

adopted in 2017 in Geneva. The YP+10 together with the Yogyakarta Principles provides an influential exposition of international human rights law in application to pressing issues of sexual orientation, gender identity, gender expression, and sex characteristics. The YP+10 affirms the obligation of the state to protect against violence and discrimination and to identify the customs and practices, attitudes, and beliefs that are discriminatory on account of sexual orientation, gender identity, gender expression, and sex characteristics of any person and also to adopt measures for eradication of such ridiculed treatments.

The *Universal Declaration of Human Rights, 1948* (hereinafter *UDHR*) at its outset ensures equality and freedom of every person in terms of rights and dignity. Whilst Article 16 specifically recognizes the right to marry and found a family, Article 2 prohibits discrimination based on race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, or other status. The term ‘other status’ rather has a broad interpretation. Precedents show that there are ample scopes to include ‘sexual orientation and gender identity’ as one of the protected grounds for non-discrimination. Regional human rights instruments including the African Charter, the American Convention, and the European Convention have interpreted the term many times to expand the list of protection within the ambit of ‘other status’.

Underpinning the grave concerns related to discrimination and violence against the LGBTQIA+ community, the UN Human Rights Council adopted Resolution 17/19 on *Human Rights, Sexual Orientation and Gender Identity* and Resolution 27/32 on *Discrimination and violence against individuals based on their sexual orientation and Gender identity* in 2011 and 2014 respectively.⁶ Conforming to the resolutions, a report of the Human Rights Council recognized that all human beings are unequivocally entitled to the enjoyment of human rights to life, security and privacy, freedom from torture, discrimination, and all other civil political, economic, cultural, and social rights, irrespective of sexual orientation and gender identity.⁷ The UNICEF, the Committee on the Rights of the Child, and the Inter-American Court of Human Rights affirm that Children of a same-sex couple may suffer grave misconduct if the relationships of their parents are not officially recognized. It was reiterated that unmarried same-sex couples shall be treated equally to unmarried heterosexual couples in matters relating to insurance and other benefits. The report also highlighted the fact that the Committee on Economic, Social and Cultural Rights (ECOSOC) has advised the state parties to legalize same-

⁶ COMBATING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY, (Council of Europe Standards ed., 2011).

⁷ REBECCA KARLSSON, LGBT AND THE UNIVERSAL ENJOYMENT OF HUMAN RIGHTS, 18-19 (Faculty of Law ed., Stockholm University, 2015).

sex marriage.⁸

The guiding authority for marriage as a human right is found in *The International Covenant on Civil and Political Rights, 1966* (hereinafter *ICCPR*). Here, the right to marry has been recognized as a fundamental human right. Article 23 of the ICCPR recognizes the family as a natural and fundamental unit of society. It affirms that the state has to ensure that spouses have equal rights and responsibilities to and during the marriage, as well as on dissolution of marriage. It also recognizes the right of every man and woman to marry and found a family as soon they attain marriageable age. Article 26 ensures equality in treatment and non-discrimination irrespective of race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, or other status.

Notwithstanding the ambiguity in the interpretation of the term ‘men and women’ and ‘spouse’, the Human Rights Committee stated that Article 23 is broader in scope.⁹ The facet of equality found in clause 4 of Article 23 is gender-neutral and does not specify any explicit characteristics. The prerequisites conditions for non-discrimination, in the absence of an elaborative list, can be discerned in light of Article 26 which states that all persons are equal before the law and are entitled to equal protection of the law without discrimination. The Committee suggested that the state must not endorse sex-based discrimination and other discriminatory treatment.¹⁰

In *Toonen v. Australia*, the Human Rights Committee in 1994 stated that prohibition of sex discrimination essentially means prohibition of discrimination on the ground of sexual orientation.¹¹ In *Young v Australia*, a similar approach was adopted as it was reiterated that Article 26 of the ICCPR protects people from discrimination based on sexual orientation.¹² However, in *Joslin v. New Zealand*, the Human Rights Committee adopted a conservative interpretation of Article 23 of the ICCPR. It was held that the term marriage is a definitional construct and it speaks of marriage of only opposite-sex couples.¹³ Nonetheless, citing the judgments in *Toonen* and *Young*, and by the reasoning, it is safe to assert that the language of

⁸ *Id.*

⁹ UNHRC, *General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 39th Sess, Jul. 27 1990, UN doc. HRI/gen/1/rev.1 at 28 (1994) <https://www.refworld.org/docid/45139bd74.html>.

¹⁰ *Id.*

¹¹ *Supra* 10.

¹² Australian Human Rights Commission, *Human rights protection for same-sex couples and their children*, 33-58, https://humanrights.gov.au/sites/default/files/content/human_rights/samesex/report/pdf/report_ch3.pdf.

¹³ Mark Fowler, *Same-Sex Marriage: What Does Human Rights Law Say About Claims Of Equality?* ABC NEWS, Sep. 1, 2017, 12:25 AM), <https://www.abc.net.au/news/2017-09-01/what-does-human-rights-law-say-about-marriage-and-equality/8856552>.

the ICCPR does not bar the state from legally recognizing same-sex marriage.¹⁴ Furthermore, the term ‘spouse’ in clause 3 of Article 23 is a gender-neutral term and it would be wrong to construe the provision to prohibit recognition of same-sex marriage as an equal right, especially when the provision itself outlines equality of rights of individuals who enter into marriage.

The *Convention for the Protection of Human Rights and Fundamental Freedoms, 1950* (hereinafter, *European Convention*) was adopted to protect human rights and political freedom in Europe. Article 12 of the Convention guarantees the right to marry. It states that, subject to limitations by national laws, men and women have the right to marry and establish a family upon attaining the marriageable age.¹⁵ The foundation of Article 12 was argued to be based on a strict heteronormative conception of marriage at that time. However, the European Court of Human Rights and the European Commission have gradually adopted dynamic interpretations on matters concerning the marriage equality of homosexuals. In *Christine Goodwin v. The United Kingdom*¹⁶, the Court by adopting a progressive approach held that the definition of men and women mentioned in Article 12 goes beyond just identifying gender on biological criteria.¹⁷ In 2002, the court for the first time discussed the prospective criteria of same-sex marriage under Article 12 in *Schalk and Kopf v. Austria*.¹⁸ In this case, although the court denied marriage equality for same-sex couples, it acknowledged that same-sex couples who are cohabiting and are living in a de-facto partnership fall within the notion of ‘family life’.¹⁹

V. DEMYSTIFYING THE STATUS OF MARRIAGE EQUALITY IN INDIA

In India, discussions on sexual orientation are despicable to many for several reasons. One of the prime causes is, it involves contrasting values, competing beliefs, and diverse opinions. Truth is, dialectics of this kind make people uncomfortable, especially in societies where people value culture and beliefs more.

Although homosexuality in India has been awarded legal recognition, it did not and has failed to recognize collateral conduct associated with it. Needless to say, certainly no such progressive change has taken place in the attitudes of the majority of Indians regarding homosexual partnership so far. Responses concerning morality, desirability, and administrative prerequisites of civil unions have been equally diverse.

¹⁴ *Joslin v. New Zealand*, U.N. Doc., 214 (2002).

¹⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, Sep. 21, 1950, <https://www.refworld.org/docid/3ae6b3b04.html>.

¹⁶ *Christine Goodwin v. The United Kingdom*, 35 EHRR 447 (2002).

¹⁷ PAUL JOHNSON & SILVIA FALCETTA, *SAME-SEX MARRIAGE AND ARTICLE 12 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Edward Elgar Publishing ed., 2018).

¹⁸ *Schalk and Kopf v. Austria*, No. 30141/04, 24 June, 2010.

¹⁹ Morgana Klein, et al., *the Role of European Courts in developing same sex couples' rights*, E.J.T.N. (2018).

The LGBTQIA+ community is strongly growing across the Indian subcontinent. From scattered populations in the countryside, a large concentration resides in big cities where they feel heard and confident as they get a platform to express and embrace themselves and voice for their rights and dignity. Pride parades to celebrate acceptance and legal rights of the LGBTQIA+ communities across the country are emerging, again, largely seen in big cities. Today, homosexuality may have gained more momentous acceptance among the youths in India than ever before, but in the cloister of the home and family boundary, acceptance and freedom to express their choices have remained a constant struggle. In rural areas, gays and lesbians are subjected to honour killing, family-sanctioned corrective rapes, disowned by their families, and forced sex reassignment surgeries.

Transgender persons had been a part of Indian society for centuries now. There is evidence of historical recognition of a 'third gender' independent of the binary genders. Hindu mythology, folklore, *Vedas*, and *Puranas* had a great reference to the concept of '*napumsaka*', or '*tritiyaprakriti*' which was used to refer to a person with the absence of procreative ability, presented by significant defiance from masculinity and feminine markers. The Mahabharata tells the story of *Shikhandi* who was born with female genitalia but raised as a son. Many ancient temple arts have significant references to homosexuality. Today, the transgender community in India has its many folds including *Hijras*, *eunuchs*, *Kothis*, *Aravanis*, *Jogappas*, *Shiv Shakti*, etc.²⁰

In *Naz Foundation v. Government of NCT of Delhi and others*,²¹ it was decided that the right to life and personal liberty under Article 21, guarantees the right to live with dignity, autonomy, and privacy. Therefore, Section 377 not only transgresses such rights by criminalizing the core identity of the person on account of his sexuality, but it also denies a gay person's right to full personhood implicit in the right to life.

The Division Bench of Delhi High Court in this case, referring to the *Yogyakarta Principles* asserted that every person has the right to equal enjoyment of rights regardless of their sexual orientation. Discussing the question of whether morality can be a ground for restricting fundamental rights, the Court reiterated the European Court of Human Rights jurisprudence in *Dudgeon v. the United Kingdom*²² and *Norris v. Republic of Ireland*²³ and asserted that, mere public disapproval and public morality is not sufficient ground for restricting fundamental rights

²⁰ M. Michelraj, *Historical Evolution of Transgender Community in India* 4 A.R.S.S., 17 (2015).

²¹ A.I.R. 2009.

²² *Dudgeon v. the United Kingdom*, ECHR (1981).

²³ *Norris v. Republic of Ireland*, ECHR (1988).

of the individual. Constitutional morality based on constitutional values is discrete from public morality, and the interest of the state must be based on constitutional morality and not public morality.²⁴

In this case, the court referring to *Toonen v Australia*,²⁵ observed that ‘sex’ in Article 15 of the Constitution of India is analogous to sexual orientation, and hence discrimination on account of sexual orientation is impermissible even on the horizontal application of the right enshrined in Article 15.²⁶

In the landmark *National Legal Service Authority v. Union of India*²⁷, the Supreme Court awarded ‘third gender’ status to transgender in India. The apex court observed that non-recognition of the identity and rights of transgender people is a violation of Articles 14, 15, 16, and 21 of the Constitution.

*K.S. Puttaswami v. Union of India*²⁸ was a breakthrough where the Supreme Court declared the right to privacy as an intrinsic part of the right to life and personal liberty. Chandrachud, J. observed that sexual orientation is an essential attribute of privacy that falls within the wide ambit of Article 21. Privacy ensures the autonomy they exercise in their choice of intimate relationships, marriage, and dignity in family life.

The Apex Court in the historic *Navtej Singh Johar* case invoked numerous international human rights treaties including UDHR, ICCPR, ICESCR, and Yogyakarta Principles, and observed that states are required by international human rights law to defend all people from abuse of their human rights irrespective of their sexual orientation. The international human rights jurisprudence prohibits the states from imposing limitations on private consensual conduct between same-sex couples as it violates the right to equality, privacy, and freedom from discrimination. Relying upon the judgments in *Shakti Vahini v. Union of India*²⁹ and *Shafin Jahan v. Asokan K.M.*³⁰, the apex court observed that, the right to choose a life partner of one’s choice is a facet of individual liberty and is protected under Articles 19 and 21 of the Constitution of India. In the case of *Shakti Vahini* the Hon’ble Supreme Court acknowledged the right to find a life partner of one’s choice. The Court in *Shafin Jahan* whilst recognizing

²⁴ Naz Foundation v. Government of NCT of Delhi and others, (2009)160 Delhi Law Times 277.

²⁵ Toonen v Australia, U.N. Doc CCPR (1994).

²⁶ Anant Prakash Mishra, *Why Same-Sex Marriages Must be Judged at the Constitutional Altar*, THE LEAFLET, (Mar. 12, 2021), <https://theleaflet.in/why-same-sex-marriages-must-be-judged-at-the-constitutional-altar/#:~:text=The%20issue%20here%20is%20the,the%20state%20among%20other%20things>.

²⁷ A.I.R. (2014) 5 S.C. 1863.

²⁸ A.I.R. (2017) 10 S.C.C. 1.

²⁹ A.I.R. (2018) 7 S.C.C. 192.

³⁰ A.I.R. 2018 (5) S.C. 422.

autonomy in the intimate sphere of a person's life, reiterated that social values and morals do not supersede the freedom that the Constitution guarantees. In the *Puttaswami* judgment too, the apex court recognized the right to choose a life partner as one of the important facets of autonomy, whether within or outside marriage which should not be affected by matters of faith and social approval.

Reflecting on the Rawlsian theory of self-respect Chandrachud J. opined that social institutions must be designed in a way that people are allowed to get into a partnership without the constraints of binary sex and gender and at the same time receives the required institutional recognition. Reiterating the doctrines of transformative constitutionalism and progressive realization of rights, Justice Mishra stated that the Constitution must not only shield the basic rights of its people but also lead the transition of an archaic society to pragmatism.³¹

In *Arun Kumar and Sreeja v. Inspector General of Registration, Tamil Nadu*³², the Madras High Court whilst discussing the question of whether a marriage solemnly carried out between a man and trans woman can be registered under the Hindu Marriage Act, 1955, asserted that the expression bride under section 5 of Hindu Marriage Act, 1955 shall include in its ambit trans women too, and shall also be inclusive of an intersex or a transgender person who wish to identifies themselves as a woman.

In April 2023 a five judges bench was constituted headed by Chief Justice D.Y. Chandrachud to hear petitions seeking legal recognition for same-sex marriage. The apex court firmly nodded to hear the matters within the ambit of the Special Marriage Act and indicated that personal laws will not be discussed. The petitioners stated that legal recognition of the right to marry is crucial to dismiss the stigma against the LGBTQIA+ community, failure of which will lead to lavender marriages. The Chief Justice emphasised that the matter should be dealt with by the parliament since it has the power to legislate on marriage matters under entry five of the concurrent list.

VI. MARRIAGE EQUALITY THROUGH THE PRISM OF PERSONAL LAWS

(A) Same-sex Marriage under the Hindu Marriage Act, 1955

For the Hindus, marriage is a sacrament binding with socio-religious duty. The Rig Veda itself reflects on the sanctity of the Institution of marriage. According to Hindu societal heritage, marriage is a socially approved union of man and woman aiming at procreation, pleasure, and observance of certain social obligations. Ancient Hindu texts talk about three cardinal purposes

³¹ *Navtej Singh Johar v. Union of India*, AIR (2018) 10 SCC 1.

³² W.P. (MD) No. 4125 OF 2019 and W.M.P. (MD) No. 3220 (2019).

of marriage, *Dharma* (righteousness), *Praja* (Progeny), and *Rati* (Pleasure). Dharma is considered the supreme aim of Hindu marriage. Marriage inculcates legitimacy to procreation as progeny is one of the sacred purposes of marriage. Among the three, sexual pleasure is given the least prominence. Therefore, marriage for Hindus is not only a vessel for sexual gratification but also a device having cultural endorsement to ensure the continuation of the line of progeny or in particular, family. For centuries marriage has been a heterosexual monogamous relationship that has been a more prominent form of procreation and family structure. Cultural and societal practices have a significant role to play in the solemnization of Hindu marriages. For at least eight conventional forms of marriage, none talks about marriage between a man and a man or a woman and a woman.

The Hindu Marriage Act 1955 which governs the institution of marriage for Hindus in India in its wide ambit encompasses Buddhists, Jain, and Sikhs including *Virashaiva*, *Lingayat*, and the followers of *Brahmo*, *Prathana*, or *Arya Samaj*. It wouldn't be wrong to say that, the Hindu Marriage Act 1955 is to an extent gender neutral except for the use of the words 'bride' and 'bridegroom'.

Section 2 provides for the applicability of the Act. The section states that any person who is a Hindu by religion in any of its forms and developments can get married under this Act.³³ Interpreting the term 'any person' in layman's words, it means anyone who is recognized by law as being capable of possessing legal rights and duties. The General Clauses Act 1955 too, uses a gender-neutral approach to define the term 'person' which includes a company, association or body of individuals.

Whilst traditional interpretation of the Act envisaged that the Act is only applicable to heterosexual couples, notably, section 5 which provides for conditions of marriage, within its mandate, chose to use terms like 'any party', 'neither party', and 'spouse' rather than 'male' or 'female'. It can be speculated that the legislatures in their honour, carefully used gender-neutral terms. Meanwhile, the use of the terms 'bride' and 'bridegroom' in Section 5(iii) is conflicting. Although under the mandate of Sections 5(iv) and 5(v) marriage between parties within the degree of prohibited relationship and *Sapinda* relationships are restricted. The prohibited relationships do not include LGBTQIA+. This means, nowhere in the Act mentions that same-sex marriage is not permitted in India. Therefore it can be conceded that the Act does not strictly discriminate against marriage on the ground of sexual orientation and gender identity.

(B) Same-sex Marriage under Muslim Personal Laws

³³ The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955.

Nikah or marriage under Muslim personal laws fundamentally means different forms of sexual relationships between a man and a woman. The Quran explicitly refers to marriage as ‘*mithaqum ghalithun*’ which means a strong agreement. According to Hedaya, *Nikah* or marriage means carnal conjunction.³⁴ For Muslims, marriage is a contract used to legalize generations.

There are two sects of Islam in India, Shia, and Sunni. Marriage in both sects is conducted diversely with distinct customs and traditions and for this reason, there are several forms of marriage under Mohammedan law. The primary purpose of marriage is pleasure and procreation for Islam. According to the definition of *Fiqh*, marriage is a contract that results in the two parties physically enjoying each other in the manner permitted by Shariah. One may argue that, if the primary goal of marriage is pleasure, same-sex marriage can also be allowed. A mere statement of this kind may however suffer from indolence. Furthermore, interpreting the obligations and rights, and duties of both parties before entering and after marriage indicates heteronormative conservatism. Even the obligations of a wife after divorce reflects that the general idea of a marriage is between heterosexuals and binary. The amendment seems unrealistic provided that Muslim personal law is uncodified and again codification is a matter of concern because of the varying practices between the two sects. However, reforms to the extent to allow same-sex marriage is not impossible at all since the Constitution itself provides for the power of the legislature to pass laws relating to personal laws.

(C) Same-sex Marriage under the Indian Christian Marriage Act, 1872

The preamble of the Indian- Christian Marriage Act of 1872 states the aims to solemnize the marriage of persons professing the Christian religion in India. Section 4 of the Act provides that marriage be solemnised according to the Act and the sole requirement is that one or both the parties to the marriage must be Christian.³⁵ However, the Act throughout its provisions frequently uses terms like ‘husband’ and ‘wife’, and ‘bride’. Section 60 provides for conditions to grant a certificate of marriage, and asserting the statements of the provisions, it can be speculated that, the Act is slanting toward a heteronormative approach, even though not directly, yet distinguishes between homosexuals and heterosexuals.

(D) Same-sex Marriage under the Special Marriage Act, 1954

The Special Marriage Act, of 1954 was enacted by the Parliament of India to solemnize and registration of marriage under certain special circumstances. The legislation emanates the core

³⁴ AQUIL AHMAD, MOHAMMEDAN LAW (Central Law agency ed., 2016).

³⁵ The Indian Christian Marriage Act, 1872, No. 15, Acts of Parliament, 1872.

facet of secularism and purports to bind two people together who hail from two diverse religious backgrounds and allows them to come together in the bond of marriage.

Amendment in personal laws to the extent of legitimizing same-sex relationships is a herculean task, but the Special Marriage Act is one where it is less likely to cause religious chaos when it comes to the amendment. Section 4 of the Act provides preconditions relating to the solemnization of a marriage under its mandate. This section under clause (c), provides for an age limitation that 'male' should have attained the age of twenty-one years and for the 'female', the age should be eighteen years.³⁶ At the same time, the Act through various provisions and in Schedule II to the Schedule IV of the Act, deploys words including 'bride' and 'bridegroom', 'husband' and 'wife' which in general parlance are gender-specific words. The conjecture is therefore simple that, the Special Marriage Act 1954 seems to apply to heterosexual or binary couples.

Interestingly, the statement of object and reasons of the Act mentioned that it provides for registration of a 'special form of marriage in certain cases'. Interpreting this statement it may be conceded that, same-sex marriage on account of its special nature, may be drawn under the purview of the Act. Furthermore, Section 4 begins with a non-obstante clause that, 'notwithstanding anything contained in any other law' which necessarily overrides anything contained in any other law for the time being in force. This section also writes of marriage between 'any two person' and clause (c) of the same section a gender-neutral term, i.e. 'spouse' have been used to represent the party to the marriage. Based on the reasoning, it can be asserted that legislatures through these provisions purposefully chose to use gender-neutral terms rather than binary or gender-specific words.³⁷ In similar relics, section 5 used the words 'the parties' and also 'either of the parties' in section 6, rather than 'man and woman' in specific terms.

The Act nowhere within its mandate prohibits same-sex marriage. And hence there is ample scope to amend the provisions of the Act, to include in its ambit legal accord to register and solemnize marriage between homosexual couples belonging to diverse religions.

In India, the institution of marriage has strong cultural and religious significance and social implications. For Hindus, marriage is a sacrament and the primary goal of marriage are Dharma, procreation and pleasure. Unlike Hindus, marriage for Muslims is a solemn contract between the parties. In the institution of marriage in India, religious ceremonies are an essential part of

³⁶ The Special Marriage Act, 1954, No. 43, Acts of Parliament, 1954.

³⁷ Dormaan Dalal, *Scope of Same-Sex Marriage and Gender Neutrality of Special Marriage Act*, THE LEAFLET, (Nov. 10, 2020) <https://www.theleaflet.in/scope-of-same-sex-marriages-and-gender-neutrality-of-the-special-marriage-act-part-i/>.

marriage for all religions. Recognition of same-sex marriage in India may be obtained by amendments in the personal laws governing marriage and by interpreting the existing laws to include in its ambit, marriage rights for same-sex marriage.

VII. CONCLUSION AND RECOMMENDATIONS

The tussle between marriage equality and the cultural and fundamental societal value associated with the institution of marriage is quite intense considering the conservatism and ethnocentricity of Indian society. In India, the institution of marriage has a great role to play in the social system and is almost obligatory and unavoidable. C.B Mamoria rightly stated, “The Indian society is a marriage society. People in India marry early and in a large number.”³⁸ Societal obligations associated with marriage cannot be ignored. The primary goal is to establish a family through procreation sanctioned by the common conscience of society. The institution of marriage among Hindus has been idealized in such a way that, even in Rig Veda and Manusmriti, marriage is a sacrament with associated religious and societal duties of the husband and the wife. Indian society is heavily heteronormative and the same is mirrored on the institution of marriage. The personal and codified law that regulates marriage, although do not oppose same-sex marriage in explicit terms yet understandably endorses heterosexuality which means marriage between binary couples only.

In a country like India, cultural norms are the decisive factor of fundamental sex categories and the society follows as such. It is the cultural norms that tell a society how to treat, judge and interpret sexual acts and desires. The sexuality of a person is highly controlled by historically and culturally specific ideas about sex prevalent in society. It can be therefore speculated why an ancient civilization like India where culture and values play a colossal role in everyday lives, quite obviously stigmatize and stereotyped non-conforming sexuality. Stigma lingers and systematically dominates social morality in the majority of Indians despite judicial victories.

Meanwhile, we must discuss whether social acceptance is more important than legal recognition. Whether social acceptance comes before legal acceptance, or vice versa? One good argument in favour of social acceptance is that the parliamentarians make the legislation on social issues once there are calls from the mass, which are taken to the parliament either due to popular pressure or through the manifestos which the ruling government considers having common consensus since parliament reflects the will of the people and people elect their representatives. On the contrary, we must not ignore legislations like sati prevention and dowry prohibition that were ahead of their time and progressively started a domino effect in

³⁸ C.B. MAMORIA, SOCIAL PROBLEM AND SOCIAL DISORGANIZATION IN INDIA (1980).

terms of popular acceptance and eventual societal change.

Here, the Hart- Devlin debate must be highlighted. Lord Devlin believed that on matters concerning morality in both the public and private spheres, society has the right to pass judgement. Enforcement of law in a particular society, therefore, depends on the collective judgments of the member of the society. Devlin further argued that when conduct exceeds the limit of intolerance, resentment and abhorrence only then the intervention of legislation is necessary.³⁹ The question is, what should be the limit for the degree of intolerance and who would decide that? Supporting Devlin's philosophy of legal moralism, if one has to ensure cultural dominance in social practices, one must obnoxiously ignore the plights of sexual minorities, like the majority of the people in India deny the existence of homogeneity in sexual orientation claiming it to be a western and upper-class prodigy. Even then the reality is that the LGBTQIA+ community in India continue to suffer categorical invalidations politically, socially, economically, culturally and so on. Equal rights activists and advocates of the LGBTQIA+ community firmly believe that the right to marriage is the key to breaking the preconceived notion of gender identity and sexual orientation and bringing justice to the community. In the absence of legal recognition of such a crucial fundamental right, these people will continue to be stigmatized, ostracised and exploited by society.

H.L.A Hart countered Lord Devlin's idea of morality by resorting to J.S. Mill's Harm Principle. He argued that law should not only be based on popular morality, for law is not morally conclusive. Therefore it is safe to argue that, homogeneity in sexuality and layers of rights stemming from one's alternative sexuality need legal protection, so long it does not cause any harm. It is beyond doubt that, there is no evidence of homosexuality causing harm to anybody, but it is the extreme conservatism and orthodoxy rooted in popular morality which is now a serious concern.

Quoting the celebrated German thinker Von Goethe in the landmark judgement of *Navtej Singh Johar v. Union of India*, Dipak Mishra CJ stated, "I am what I am. So take me as I am"⁴⁰ It wasn't just some fancy buzzwords but a conjecture in honour of a decade-long battle fought by every gay, lesbian, transgender and bisexual not only against society but also battle for self-acceptance and to be approved by society. From this statement ideology of the Indian judiciary towards the LGBTQ community can be presumed. The equal rights advocates like to address that, marriage is not only about sexual pleasure and procreation, it is rather a companionship or

³⁹ Chong Jun Min, *Relevance of Hart-Devlin Debate in Relation to the International Criminal Court*, 34 L.E.L.T.S.E. (2020).

⁴⁰ *Navtej Singh Johar v. Union of India*, A.I.R. (2018) 10 S.C.C. 1.

partnership followed by a wide array of associated rights.

In the judgement pronounced by Chief Justice Mishra in the historic *Navtej Singh Johar* case, constitutional morality finds prominence over social morality. Justice Mishra resorting to the tenet of transformative constitutionalism, asserts that it is the transformative nature of the Constitution of India which makes it a living and breathing document. The ability of the Constitution to transform the lives of citizens plays an intrinsic role in a progressive society and gives meaning to the principles of justice, liberty, equality and fraternity enshrined in the preamble. Chandrachud J.'s statement must be highlighted in this purview. Hon'ble Justice asserted popular notions of society must not be detrimental to the rights of individuals. He further stated that at any time and in any event constitutional morality will supersede any culture or tradition and that, decisions of the court ought not to be affected by public morality.⁴¹

Furthermore, the core international human rights doctrines are founded upon the facet of equality and fundamental freedom for all. The state is obligated to protect every person from the abuse of human rights irrespective of sexual orientation and gender identity. Many nations have now extended their jurisprudence to include marriage equality for non-heterosexual partners. The hon'ble court in India itself through various judgements emphasized the decisions of the foreign courts in the narrative.

Based on the above reasoning and arguments, it is to be conceded that sexual orientation constitutes an intrinsic element of dignity, equality, freedom, individual autonomy and liberty. By this virtue, the right to find a partner of one's choice is also an essential element of basic rights entitled to an individual. Drawing inspiration from Devlin- Hart debate, the contention that legally recognizing same-sex marriage would disintegrate society or loosen the moral fibre stemming from culture and tradition suffers from faulty analogy. It is therefore safe to state that, in two ways same-sex marriage in India may be legally recognized, *first*, reading down the provisions of the statute books governing the institution of marriage, in such way that same-sex marriage is legally recognized. *Second*, amending the personal and codified laws regulating marriage to legally recognize same-sex marriage. Although in both processes, the risk of repercussions is intense, altering the personal laws seems precarious at the moment. It is however true that amendment of the Special Marriage Act 1954 to insert in its scope same-sex marriage seems much more realistic.

At this juncture, alongside the discussions on marriage equality, there is a dire need for deliberations on laws relating to divorce, inheritance, and adoption-related issues. Most

⁴¹ *Id.*

importantly, the diminishing fertility rate among women in India and the consequent decline birth rate must not be ignored. As per the report, the fertility rate has fallen below the replacement level which might cause population destabilisation in the coming times.⁴²

Truth be told, India is yet not ready to open its arms to accept such a change. Marriage is a social institution, individualizing it without measuring the possible repercussions may cost the disintegration of the society. However one must not forget that, mere difficulty in validations does not justify endorsing intolerance and abuse of basic human rights to a particular group of people on account of their sexual orientation and gender identity. Let the academicians, lawyers, parliamentarians and right-conscious population talk more about equal rights for the LGBTQIA+ community and dig deeper into the issue.

Before legally recognizing same-sex marriage, certain things we must do. The state must adopt necessary measures to sensitize against trans-phobic and homophobic violence including verbal abuse, psychological torture, and cruel and degrading treatment towards the LGBTQIA+ community. Adopt measures to safeguard freedom of speech and expression, and freedom of association to encourage deliberation and create awareness. Here, extensive education programmes play a significant role in teaching people about intersectionality in gender identity and sexual orientation, equal rights and most importantly that, homosexuality is not a disease.

⁴² *World Population Day: India's drastic fall in TFR reveals population boom 'thing of past'*, TIMES OF INDIA, (Jul. 11, 2023, 2:29 PM), <https://timesofindia.indiatimes.com/india/world-population-day-indias-drastic-fall-in-tfr-reveals-population-boom-thing-of-past/articleshow/101664334.cms?from=mdr>

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