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Same Sex Marriage: A New Constitutional Paradigm

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ABSTRACT

Same sex marriage is a new dimension of social change in the Indian society which requires the attention of the public at large. Homosexuality is a concept which is continued right from the Vedic period and was having a social acceptance until Section 377 of the Indian Penal Code was introduced which made the situation worse for the LGBTQ, resulting in persecution of the entire community. Section 377 led to ostracizing the entire community by the majoritarian policies which led to the decline of the basic human rights. The verdict of Supreme Court in Navtej Singh Johar v. Union of India in the year 2018, finally led to the guarantee of privacy and dignity to the homosexuals. Same sex couples faced multiple problems as the judgement was only half-way ticket to the destination, which allowed them to stay together but never provided for a recognition to their relationship. Multiple problems are faced by these couples in the society resulting in violations of many fundamental rights and legal rights as well. Majority of these couples face social exclusion due to the existence of homophobia even today. It is now the time to provide for better protection to the rights of same sex couples by recognizing their marriage and keeping aside the Indian Ethos and the doomed customary beliefs which has left the entire society in the hands of majoritarianism and intolerance.

Keywords: Same Sex Marriage; Indian Ethos; Ostracize; Homosexual; Section 377.

I. INTRODUCTION

It is a famous saying that “*marriages are made in heaven*” and thus is regarded as the most beautiful bond between the two individuals. It sets an obligation on both the individuals towards each other and also provides a social acceptance.

Marriage is considered to be the most sacred institution in any society, it involves a marital wedlock of two persons who have a mutual understanding towards each other and have each other's back in the hardships. It provides for a recognition to the couple in the society and is associated with the respect and dignity.

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With the change in time the concept of marriage as an institution also evolved with the change in time, as the major hurdles in this direction were removed with time. In the modern day, marriage is associated with the term ‘**cohabitation**’, i.e., if there is cohabitation between a couple then such ground is sufficient enough to give a marital status. However, such modern-day concept even after having such a dynamic character lies stagnant when the concept of equality is applied. Same Sex Marriage remains to be a major concern of the LGBTQ, and the entire community strives for the equal rights w.r.t. marriage.

II. HISTORICAL BACKGROUND OF SAME SEX MARRIAGE

The historical background of same sex marriage can be discussed on two parameters which are: -

[a] International Perspective

[b] Indian Perspective

(A) International Perspective

Western culture accounts for the majority of the development in case of same sex marriage and thus is essentially linked with the evolution. Earlier, the marriage was considered to be vesting of the property in one person where in the cases of heterosexual marriages the wife was regarded as a chattel.

The marriage was regarded as an institution of procreation and not of love and compassion and thus was restricted to the heterosexuals only.³ The evidence of homosexuality was there right from the ancient times yet; the couples of same sex were never given respect in the society as they failed to procreate.

Later in the Middle age, the procreation gained its importance in the society with the advent of Judeo-Christian philosophy, putting a halt on any kind of unnatural relationship or sodomy either between the same sex and the opposite sex.⁴ The Buggery Act of the 16th Century was the most devastating law criminalizing Homosexuality or sodomy with death penalty and later on imposition of similar sanctions were seen in all the British Colonies which led to a global sanction of homosexuality.

After the Second World War the United Nations got established and the new morning for the global human rights took place. The Universal Declaration of Human Rights was adopted

³ *History of Same Sex Marriage* UNIVERSAL LIFE CHURCH MONASTRY (July 3, 2021 4:17 PM), <https://www.themonastery.org/history-same-sex-marriage> (last visited 16/04/21)

⁴ Id.

worldwide in the year 1948. By this time many countries started moving towards an egalitarian society where equal rights were claimed.

Such changes also were responsible for the development of new age marital relations where the couples were not merely having the marital bond for the need of procreation, but the institution was then seen as wedlock of compassion, love and understanding and within this ambit the right was then not restricted to the heterosexuals only but was open to homosexuals as well.

Many movements of LGBTQ started catching attention of the people across the globe and in 1984 in Berkeley an Ordinance was passed giving some rights to the same sex couples.

In the year 2001 Netherlands became the first country to legalize the same sex marriage, and the same was followed by 29 countries went on legalizing the same sex marriage which included Belgium, Canada, Norway, South Africa Argentina, New Zealand, England and Wales, France etc.

In the year 2006, a new global trend was seen when the Yogyakarta Principles were passed which were centered on Human Rights based on gender identity and sexual orientation.⁵ This change was crucial in recognizing the right of same sex couples worldwide.

The legalizing of the same sex marriage in Brazil in 2013 and over 3,700 marriage got solemnized which led to the encouragement in the same sex couple marriage.

In the year 2015 the US Supreme Court in *Obergefell v. Hodges*⁶ ruled in favor of same sex marriage and granted the marriage equality to the same sex marriage. This judgement was responsible for the recognition of gay marriage in USA.

Thereafter, major developments happened in many countries with respect to the same sex marriage and the latest development took place in Costa Rica in 2020 where the same sex marriage got recognized.

(B) Indian Perspective

Same sex marriage in India primarily gained its importance in 2018 when the homosexuality was recognized, and Section 377 got decriminalized. However, the traces of same sex couples were found right from the time of Rig Vedic period where the famous couple of Varun and Mitra was seen. Indian Society throughout the centuries remained tolerant and liberal with

⁵ <http://data.unaids.org> › manual PDF-The Yogyakarta Principles – UNAIDS (Last Visited 16/04/21)

⁶ 576 U.S. 644(2015).

respect to the status of homosexuals and same sex couples. However, the English laws set some ill precedent and thereafter the things got spoiled and intolerance developed among the society.

Right from the time of 1980s the same sex couples started committing suicide in order to protest against the laws which does not permit same sex marriage, a couple named Lalitha and Mallika Committed suicide for not being able to stay together.⁷ The reports of suicide committed by same sex couple was seen more frequent in the first decade of the 21st Century⁸ which is caused due to non-recognition of the same sex marriage.

The judgment in the Koushal's case⁹ made the situation worse as presumption of constitutionality of Section 377 was there. In the year 2014 the Supreme Court took a deflected view on the sexual orientation of a person, it was held that "*each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.*"¹⁰ The judgement in Navtej Singh Johar¹¹ for the first time discussed about the love and marriage between the same sex couple.

After this judgement, many cases were seen where the Same Sex Couples approached to the Court for the legal recognition of the bond they share.

III. SAME SEX MARRIAGE AND THE CONSTITUTION

Article 16 of the Universal Declaration of human rights talk about the right of men and women who have attained majority have the right to marry a person of his or her own choice regardless of religion, caste, and nationality.

Constitution of India never finds mention of right to marry as a fundamental right expressly but, this right also has evolved over time with the help of judicial pronouncements.

Hon'ble Supreme Court in the case of *Lata Singh v. State of Uttar Pradesh*¹² held right to marry as an important component fundamental rights under Article 19 and 21. Thus, freedom of a person to marry another person of his own choice is a fundamental right and thus cannot be taken away due to the societal pressure. The Supreme Court also held that the freedom of choice is a fundamental and the only parameter to fulfill to marry a person of his/her own choice is to attain the age of majority. If the marriage is taking place without the consent of parents due to any reason, then in such a case the parents have all the rights to distance

⁷ Ruth Vanita Love's Rite: Same Sex Marriage in India and the West p. 6, 2005.

⁸ *Id.*

⁹ Suresh Kumar Kaushal v. Naz Foundation, (2014) 1 SCC 1.

¹⁰ National Legal Services Authority v. Union of India (2014) 5 SCC 438.

¹¹ *Infra* Note 29.

¹² AIR 2006 SC 2522.

themselves from the boy or girl but have no rights whatsoever to instigate, abuse or threaten them.¹³

Similar to these observations the rights of the same sex couple to be given recognition of their bond by the way of marriage can be debated upon. As discussed earlier, the marriage is considered no longer a matter of procreation but a bond of love and affection. Therefore, it is now the right time to move beyond the gender specific laws and to bring about neutrality in the laws and give a respectful place to the sexual orientation. The recognition of the same sex marriage revolved primarily around three fundamental rights which are as under: -

a. Article 14 Right to Equality-

Article 14 of the Constitution guarantees '*Equality before law*' which can be further classified into two groups i.e., '*Equality before Law*' and '*Equal Protection of Law*'.

Article 14 of the constitution forbids class legislation; it does not forbid reasonable classification for the purpose of legislation. In considering reasonableness from the point view of article 14, the objective for such classification is to be considered. If the objective be illogical unfair and unjust necessarily the classification will have to be held as unreasonable.¹⁴ Whenever we find unreasonableness, there is a denial of rule of law. The exclusion of same sex couple under the Marriage legislation was justified to be reasonable classification until the judgment in the Navtej Singh Johar's case, where the dignity and privacy was guaranteed as a fundamental right and Section 377 was decriminalized. Such an exclusion under the personal laws and the Special Marriage Act is antithetical to the constitutional morality and should no longer fall under reasonable classification. Rule of Law requires that no person shall be subjected to harsh, uncivilized, or discriminatory treatment even when the object is securing of paramount exigencies of law and order.¹⁵ Thus, even the non-existence of a law for the protection of the rights of a miniscule fraction of the society itself results into inequality before the law as there is a need of special legislation for that special community.

b. Article 19 Freedom of Expression-

Article 19 of the Constitution is the fundamental rights which is granted to the citizens of the country. It is well established principle under constitutional law that fundamental rights are the bundle of rights which gives humans a life, more than a mere animal existence. Article 19 is one such right which guarantees the citizens a proper way of living together. Non recognition

¹³ *Id.*

¹⁴ Deepak Sibal v. Punjab University (1989) 2 SCC 145

¹⁵ Rubinder Singh v. Union of India, AIR 1983 SC 65

of the same sex marriage also violates these fundamental freedoms guaranteed under Article 19 of the constitution. The primary rights which are violated is Article 19(1)(a) i.e., “*right to freedom of speech and expression*” the bond which the same sex couple’s shares is also a bond of love and compassion, but they are unable to express the same in front of the public at large as the non-recognition of marriage remains to be a curse for the social acceptance. Considering the psychological dimensions of the same sex couples and heterosexual couples, we can draw that the bond of love, compassion and responsibility is shared in common which will also help them to achieve the common goals and benefits such as health, psychological benefits, and other benefits once the legal recognition is granted to them by the state.¹⁶

The Fundamental right under Article 19(1)(e) i.e., “*right to reside and settle in any part of the territory of India.*” The majority LGBTQ Community which has revealed their identity to the public at large faces the problem of residing in the society due to homophobia and social unacceptance and the situation is even worse for the same sex couples who are citizens of India and even then, they are not guaranteed the fundamental rights guaranteed under Article 19 of the Constitution.

c. **Article 21 Right to life and personal liberty**

Article 21 guarantees right to life and personal liberty to every individual, where the right to marry is also covered as a fundamental right. When we see the right to marry in light of the petition moved by the same sex couples then in such a case, we can draw that the same sex marriage also falls well within the ambit of the fundamental rights under Article 21. However, the Centre had an opposing view to this and stated that that fundamental freedoms guaranteed under Article 21 is assured “*except according to the procedure established by law.*” The word ‘**law**’ and ‘**procedure**’ is of utmost importance to lay down a faultless ground for the same sex marriage. Law means any law enacted by the Parliament or any ordinance or any other law which falls within the ambit of Article 13 of the Constitution. In this regard we can say that the law covers all the important legislations such as Special Marriage Act, 1954, the Hindu Marriage Act 1955, the Foreign Marriage Act 1969 etc.

The word procedure is important as it relates with the application of these laws, the Supreme Court in the case of *Kartar Singh v. State of Punjab* held that the term procedure mentioned under Article 21 must be “*right, just and fair*” and should not be of an afflicting character.¹⁷ The similar view was held by the Supreme Court in the case *Olga Tellis v. Bombay Municipal*

¹⁶ Gregory M. Herek, Legal Recognition of Same Sex Relationships in the United States: A Social Science Perspective, 61(6) AMER. PSYCHO. 607-621.

¹⁷ (1994) 3 SCC 569.

Corporation,¹⁸ that “the procedure prescribed by law for the deprivation of the right conferred by Article 21 must be fair just and reasonable.” The legislations named above are of an unreasonable character as it discriminates on the grounds of sexual orientation with the respect to the right to marry each other and such laws shall be thus amended in such ways so that they become permissible towards allowing the same sex marriage.

The seeds of transformation are always to be sown from time to time in order to make a democracy more vibrant and a majoritarian ethos must not be an acceptable as a constructive argument while adjudicating the rights of the minority.

*“Procedure which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that a procedure and, consequently, the actions taken under it.”*¹⁹

The heterosexual bias is commonly seen in the Indian context and the express recognition of the same sex marriage is still awaited for the nod of the legislature which is unlikely to happen in the near future. Thus, the same sex couple have no other choice but to knock the door of the Supreme Court to preserve their fundamental rights.

Bombay High Court in case of *State of Bombay v. Narasu Appa Mali*²⁰, held that the “personal laws cannot be tested against the touchstone of fundamental right.” Therefore, the Constitution is the grundnorm and any the personal law must not act as an interruption in any social change which is beneficial for the society.

As per the Indian ethos, the marriage revolves around the term procreation and a sacred institution and in some cases a contractual relation to procreate. However, in the modern-day concept we have left behind the procreation as the only purpose of marriage. In the case of *Suchita Srivastava v. Chandigarh Administration*,²¹ the “right to reproductive choice” was held has a fundamental right under Article 21 of the Constitution and falls within the scope of personal liberty.

Thus, mere procreation cannot be a ground of rejection of the recognition of same sex marriage. The curse of homosexuality in India was primarily due to the impact of English laws which also made same sex marriage impossible. The present England and Wales also recognizes the same sex marriage by a legislation of 2013²² which showcases the dynamic character of the

¹⁸ AIR 1986 SC 180, AT 196-197.

¹⁹ *Id.*

²⁰ AIR 1952 Bom. 84.

²¹ (2009)9 SCC 1.

²² *Gay Marriage Is Now Legal In England And Wales After 'Historic' Bill Gets Royal Assent*, HUFFINGTON POST (JULY 3, 2021, 4:20 PM), https://www.huffingtonpost.co.uk/2013/07/17/gay-marriage-is-now-legal-in-the-uk_n_

society at large as the impact of Judeo-Christian philosophy was absolutely bigoted towards homosexuality and sodomy.

India has always been a tolerant society and also has been seen as a protector of the fundamental rights worldwide and thus, non-recognition of the rights of a community and having oppressive law and order creates a blot on the global image of the country.

In the case of *Saurabh Chaduri v. Union of India and Others*,²³ it was observed by the Hon'ble Supreme Court that, "*Our Constitution is organic in nature, being a living organ, it is ongoing and with the passage of time, law must change its course as the horizons of constitutional law are expanding with time.*"

Another component of same-sex marriage is the sanctity of the marital bond which the culture provides as the marital bond is regarded as a sacred and pious bond and thus it gives a better social positioning to a couple and assures them a dignified life. Thus, being ignorant to the assurance of rights to one section of citizen will be equivalent to ostracizing their dignity.²⁴

The Status of LGBTQ has now been widely accepted worldwide where around 124 countries does not castigate homosexuality and around 24 countries gave recognition to same sex marriage either through legislative measures or through the way of supreme court judgments.²⁵

This number has now increased to 30 countries which now recognizes the same sex marriage. These developments also account for the adoption of an anti-discrimination code to protect the rights of LGBTQ such as the housing facilities, medical facilities, education etc.,²⁶

IV. SAME SEX MARRIAGE UNDER THE SPECIAL MARRIAGE ACT, 1954: A HARMONIOUS SOLUTION

The recognition of same sex marriage is just one step ahead provided we forget the old customs which acts like trammel in the way of an emerging egalitarian society. Rudimentary approaches to the society always will be antithetical to the democratic and social ethos. LGBTQ today faces the problem in the diversified country like India due to these rudimentary and adamant conduct of the majoritarian philosophy. The Hon'ble Supreme Court in the case of *State of Kerala and another v. N.M. Thomas and Others*²⁷ rightly observed that the constitution is

3610453.html

²³ (2003)11 SCC 146.

²⁴ Martha Nussbaum, A Right to Marry? Same Sex Marriage and Constitutional Law. Dissent Magazine (2009).

²⁵ Aengus Carroll and Lucas Ramon, *Ilga Annual State Sponsored Homophobia Report 2017: Aw=World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition (12th Edition,2017)*, at pp. 26-36.

²⁶ *Id.*

²⁷ AIR 1976 SC 490.

drafted by its farmers as social document which is aimed at achieving transformative milestones in the society and is there to outcast the long trodden stagnant laws and customs shackled with the idea of traditionalism.

Let us consider the case of the same sex couples which recently approached the Hon'ble Delhi High Court to seek relief for the recognition of their marriage under different legislations to which the Centre has an inelastic stand. Indian Ethos, which the Centre claims to have been disturbed is the founding stone of dynamism in our culture which has always embraced the changing trends of the society in a joyful and a progressive manner. Special Marriage Act is one such legislation which is based on the aforesaid argument, as it places itself on the principles of secularism and non-discrimination and thus, such a law is very well within the ambit of the accommodating the same sex marriage without disturbing its objectives and purpose. Therefore, these legislations require a dynamic, vivacious, and pragmatic interpretation in order to be prevented from becoming a dead letter towards a small fraction of the Society.

The condition to get the marriage registered under the Special Marriage Act is the attainment of the age of the male and the female and no such major restrictions are there.²⁸ Special Marriage Act is not a barrier but a medium through which the recognition of the same sex marriage can be done merely by adding an amended clause allowing the same sex couples to marry under the Act. Special Marriage Act, 1954 being a secular or a uniform legislation will also allow for same sex couples belonging from different religion to marry each other which any constraints.

V. LOVE AND JURISPRUDENCE

In the Navtej Singh Johar's case a special emphasis was made on the love and its jurisprudential aspect where Justice Indu Malhotra issued an apology in favour of LGBTQI community. It was observed that: -

*"History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries."*²⁹

The members of the LGBTQ Community always had their love faded away with the draconian laws due to which they were subjected to immense discrimination and persecution. Even

²⁸ The Special Marriage Act, 1954, S. 4(c): - *"the male has completed the age of twenty-one years and the female the age of eighteen years"*.

²⁹ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

though, love has no relation in determining the constitutionality of any law, yet the Supreme Court was decisive to consider love and affection as a valid ground of doing away with Section 377. The most practical argument was presented before the Supreme Court by Menaka Guruswamy where she argued:- *“How strongly must we love knowing we are unconvicted felons of Section 377”* ? This argument was based on the statement that while deciding on the question of constitutionality of Section 377, the sexual intimacy should not be seen and what should be considered, is the love and affection which the community has.³⁰ On the basis of these arguments, the Supreme Court recognized the importance of love and its role in the homosexual relations and that love is inseparable from their individual’s autonomy, dignity, and privacy.³¹

The jurisprudential aspect of love and marriage was adopted by the Madras High Court in the case of *Arun Kumar v. The Inspector General of Registration*,³² where the marriage between a man and a transwoman was held as valid and lawful under the provisions of Hindu Marriage Act, 1955.³³ It was held that *“By holding so, this Court is not breaking any new ground. It is merely stating the obvious. Sometimes to see the obvious, one needs not only physical vision in the eye but also love in the heart.”*³⁴

These developments must be considered with respect to the recognition of same sex marriage and the Court must take a step ahead of the constitutional idealism.

VI. SAME SEX MARRIAGE: AN ASSORTED APPROACH

The recognition of same sex marriage will benefit the LGBTQ couples in multi-dimensional manner. Some of these benefits are enumerated hereunder: -

³⁰ Coreena Soares, *Constitution Must recognize Love, Not Just Sexual Acts: Menaka Guruswamy on Section 377*, Deccan Chronicle, July 13, 2018.

³¹ Chandrachud J. Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, P 67.

³² 2019 SCC Online Mad 8779.

³³ Hindu Marriage Act, 1955, Section 5- “A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely: –

(i) neither party has a spouse living at the time of marriage;
(ii) None of the party should be suffering from any mental disorder or should be unfit for the marriage and procreation of children or no party should be subjected to recurrent attacks of insanity and also during the time of the consent for marriage no party should be unsound of mind.
(iii) the bridegroom has completed the age of twenty – one years and the bride the age of eighteen years at the time of the marriage;
(iv) *If the party is within a degree of prohibited relationship, it can be considered as void;*
(v) the parties are not sapindas of each other unless the custom or usage governing each of them permits of a marriage between the two.”

³⁴ *Supra* Note. at 26.

(i) **Maintenance as a right-** the laws associated to maintenance in case of marriage applies only to the heterosexual couples only, which does not satisfy the needs of the same sex couples staying together.

The provisions of maintenance under Code of Criminal Procedure³⁵ will also be applicable then to the same sex couples cohabiting together and the primary object of maintenance laws under the code is to prevent a person from being left in a helpless state by providing them sufficient means.³⁶

In the present context after the deriminalisation of Section 377 the same sex couples also fall within the judgment given by Supreme Court in regards with live-in relationship and, the apex court also upheld the right to maintenance in case of a couple cohabiting together in a live-in relationship.³⁷ The Supreme Court held that a live-in relationship which is for a prolonged period should not be considered as a “*walk in and walk out relationship*” and there will be a presumption of marriage between the parties.³⁸ Recognition of same sex marriage will provide for a sustainable life to the same sex couples as there will be a neutrality in the personal laws and also same sex couples will be benefited by the precedents set by the court. Therefore, maintenance will be acting as security measure for those homosexual couples living together.

(ii) **Adoption will be made easy-** the purpose of marriage is no longer limited to procreation but with the evolution of time it has welcomed many other dimensions. Adoption is one such dimension in marriage where a couple who is not able to procreate or willingly do not want to procreate can adopt a child which will provide the couple a golden chance of parenting. As per the directions issued by Central Adoption Resource Authority (CARA), the adoption laws have now become very difficult for singles and unmarried couples.³⁹ Thus, recognition of same sex marriage will make the rules of adoption diluted which will bring about a positive change in the society.

(iii) **Miscellaneous Benefits-** same sex marriage will provide for a variety of benefits to the same sex couples in the day to life which will promote a sustainable life for the couples. Some of the problems faced today are, the absence of relation column between the couple in all government documents; no life insurance policies for the same sex couples; laws related to transfer of property are rigid and thus, does not allow the couple to transfer the property.

³⁵ Code of Criminal Procedure, 1973. Section 125.

³⁶ *Kirtikant D. Vadodaria v. State of Gujarat*, (1996) 4 SCC 479

³⁷ (2010) 5 SCC 600.

³⁸ *Madan Mohan Singh v. Rajni Kant*, (2010) 9 SCC 209.

³⁹ Brenden O' Neil, *Why Gay Marriage is a very bad idea*, SPIKED http://www.spikedonline.com/newsite/article/12273#.Ulkj_BZpt2E.

The right to life including privacy and dignity is guaranteed as a fundamental right even to the LGBTQ community but, is not guaranteed in its true sense a major reason is the non-recognition of the same sex marriage.

(iv) **Registration under the Foreign Marriage Act-** the couples who are married abroad and come to India for the purpose of marriage have to get their marriage registered under the provisions of the Foreign Marriage Act. So far, the same sex couples due to non-recognition of same sex marriage faces issues associated with the registration under the said Act. With the recognition of their marriage the process of the registration will be made easy.

VII. CONCLUSION

In the present-day context, proved cohabitation must be the strongest proof of marriage, regardless of the gender. Right to choose is a fundamental right and is well within the meaning and scope of privacy and dignity and thus, should be left unfettered. Non-recognition of the marriage becomes a hurdle in fulfilling these bundles of rights. The Supreme Court declared in one of its verdicts, that the right to choose life partner is a fundamental right to which the parents or the relatives cannot object and the most they could do is to finish all relations with them.⁴⁰

In order to secure the fundamental rights in its full capacity for the same sex couples, it is important that the same sex marriage gets recognized under the Special Marriage Act, 1954 and to make changes in other important personal legislations by making them accommodative.

⁴⁰ *Supra Note* at 8.