

LEGAL & ETHICAL ASPECTS OF SAME SEX MARRIAGES AND LIVE-IN RELATIONSHIP

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ABSTRACT

In some cultures, a one man and one woman marriage is often augmented by the addition of additional wives or husbands who may or may not live with the primary family. Same-sex marriages, while certainly not common in most societies, have existed in many cultures. The idea of same-sex marriage in the twenty-first century is not such a revolutionary idea. The Indian society needs an overhaul; conservative beliefs and old baseless social norms are hampering our nation's founding principles of equality, justice and fair life for everyone, irrespective of sex, colour and religion. From a civilisation known for pluralism, liberty and equality, the nation is mocked by other nations for our antediluvian ideologies and our obsession for preserving a culture which is grossly misinterpreted.

To say that when two people who are not married still live together in a relationship, an emotional or sexual bonding is formed between them. Those people who are in live in relationship represents themselves in society as married couples. Often marriage is considered as sanction for couples to live together but with changing times this norm is not usually followed specially with the cosmopolitan population who are always eager to question the established social norms. Live in relationship is a new concept in India. With changing times and attitude of the people these relations have come to the main stream of the society. The number of such relations is increasing gradually.

This main purpose of writing this article is to establish social awareness in the minds of the people. The newly developed societal change needs special legislation because the present legislations are only in the form of court rulings and the current law is not very clear on homosexuals and their relationship ends in victimization as the rights, responsibilities and obligations of parties are not defined. Also, a proper framework regarding same-sex marriages and live-in relationship should be introduced and implemented.

Key Words: Same sex marriages, Live-in-relationships, Indian Penal Code

INTRODUCTION

Most people are attracted to members of the opposite sex. Most boys or men are attracted to girls and women, and vice versa. While heterosexual relationships are most common, there are many men and women who are attracted to someone of the same sex as themselves. Some people say that they knew that they were homosexual from a young age for others it is a realization that comes more gradually. For teenagers the sex hormones that cause puberty and an increase in sexual drive or urges can make it a confusing time. Many people find that they are attracted to members of the same sex for a while and this is perfectly normal. It doesn't mean they are homosexual, although it may look. No one knows what makes people heterosexual, homosexual or even bisexual. Whether someone finally realizes they are attracted to the same or to the opposite sex, they are experiencing a normal sexual orientation. When someone decides to tell other people that they are homosexual it is known as 'coming out.' Some people find coming out a positive experience, because they can finally express their true feelings. However, it can be difficult times for many others as a lot of people refuse to accept homosexuality. Many people who are of radical beliefs openly criticize homosexuals in for of bullying, for name-calling and the frequent use of words like gay being used as insult to the extent of physical abuse.

The issue of same-sex marriage is an argument that most of us have heard and have strong opinions about it. According to Dr. Martin Luther King Jr., "*marriage is a basic human right. You cannot tell people they cannot fall in love.*" While it was said in reference to marriage between races, the same can be said about homosexuals. In nature all men were born free and equal. Individual precedes society. Society is a web of social relationships. Social relationships include social processes and social interactions. A living arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage is no less than a social change. The definition of live in relationship is 'an arrangement of living in which the couples who are unmarried live together to conduct a long-going relationship similarly as in marriage.' Often marriage is considered as sanction for couples to live together but with changing times this norm is not usually followed specially with the cosmopolitan population

who are always eager to question the established social norms. The greatest question is whether the society would admit such change or not.

SAME-SEX MARRIAGES

Marriage has always been between one man and one woman. How can anyone imagine any kind of legal union called "marriage" between two women or two men? On its face it appears as an absurd idea. Anyone who has studied American history knows that it is not quite true that "marriage has always been between one man and one woman." In fact, one of the largest religious denominations in the United States, the Church of Jesus Christ of Latter-day Saints (the Mormon church), not only endorsed but also encouraged polygamous marriages of its members for more than half a century. Reflecting the importance of such marriages, the Church referred to them as "celestial marriages." And a careful study of human civilization shows that many other types of marriage are possible and often have the norm among various societies. In some cultures, a one man and one woman marriage is often augmented by the addition of additional wives or husbands who may or may not live with the primary family. Same-sex marriages, while certainly not common in most societies, have existed in many cultures.

So perhaps the idea of same-sex marriage in the twenty-first century is not such a revolutionary idea. Perhaps the question is whether nations of the world are now ready to acknowledge the right of two women or two men to join together in a social institution that bears the name marriage is a question which is not addressed properly. At the very least, they should be entitled to some type of legal union that bestows all or most of the rights associated with opposite-sex marriage. In Arthashastra, an ancient Indian treatise on statecraft tells us about a wide variety of non-vaginal sexual offences which if performed with a man or woman was punished with mild punishments. Homosexual intercourse was not a very grave offence; it was a very minor offence while there were severe punishments prescribed for heterosexual intercourse. The *Manusmriti* which tells us about the codes of conduct for a Hindu also mentions about homosexuality but as observed in Arthashastra the punishments were mild. For instance, sexual relation between an old woman (not a virgin) and a young virgin girl read as "a woman who pollutes a damsel (virgin) shall instantly have (her head) shaved or two fingers cut off, and be made to ride through the town on a donkey". However, for sexual relations between two virgins the punishment is comparatively milder and which reads "a damsel who pollutes (another)

damsel must be fined two hundred (panas), pay the double of her (nuptial) fee, and receive ten lashes.” But the punishment for a forced sexual act between a man and a woman states as “if any man through insolence forcibly contaminates a maiden, two of his fingers shall be instantly cut off, and he shall pay a fine of six hundred panas.” which obviously seems more severe than the punishment prescribed for two virgins. The discrepancy in this is because of the non-equal status of male and female in those times.

PRESENT LEGAL STATUS OF SAME SEX MARRIAGE IN INDIA

According to Section 377 of the Penal Code it is an offence for a person to voluntarily have carnal intercourse against the order of nature. While views for this section were rare until 2009 but due to a sudden increase in human right groups and an increasing number of LGBT groups, the law was taken as harassment for HIV/AIDS prevention activists, sex workers, gay men and other LGBT groups. The People Union for Civil Liberties has published two reports of the rights violations faced by sexual minorities in India. Even The Law Commission of India favoured the retention of this section but in its 172nd report, delivered in 2000 it recommended its repeal, as did the then Health Minister, Anbumani Ramadoss.

The Naz Foundation¹ a NGO is at the forefront of the campaign to decriminalise homosexuality. The organisation main aim is to make the society aware of HIV as well as to address the issue related to sexuality and sexual health. Section 377 criminalises same sex sexual behaviour irrespective of the age and consent of the people involved, posing one of the most significant challenges in effective HIV/AIDS interventions with sexual minorities. In the year 2001, a law suit was filed in the Delhi High Court, asking for a legislation of homosexual intercourse between consenting adults. The Court however refused to entertain their petition as it said the petitioner had no *locus standi*² in the matter. On further appeal to the Supreme Court, the SC held that Naz Foundation had the *locus standi* to file a Public Interest Litigation in this matter and the case was sent back to the Delhi High Court. and to “read down” section 377 to exclude adult consensual sex from within its purview.

In December 2002 Naz India filed public interest litigation (PIL) to challenge Section 377 IPC in the Delhi High Court. On 2-7-2009, the High Court of Delhi struck down much of Section

¹ *NAZ Foundation v. Govt. of NCT of Delhi*, (2009) 166 DLT 277

² The right or capacity to bring an action or to appear in a court

377 IPC as being unconstitutional. The Court held that to the extent Section 377 criminalised consensual non-vaginal sexual acts between adults; it violated an individual fundamental right to equality before the law, freedom from discrimination and to life and personal liberty under Articles 14, 15 and 21 of the Constitution of India. The High Court did not strike down Section 377 completely it held the section was valid to the extent it related to non-consensual non-vaginal intercourse or to intercourse with minors and it expressed the hope that Parliament would soon legislatively address the issue. But subsequently the Supreme Court on 11th December, 2013, reversed the decision and validated provisions of Section 377 which was taken as heavy blow to equal rights.

CRITICAL COMMENT

As we, the largest democracy in the world, are constantly debating for legalising gay marriages and same sex relationships, it is really necessary to introspect ourselves first before legalising same sex marriages. It's very unfortunate that we are still very far from legalising same sex marriages. The problem isn't with our judiciary, leaving few decisions (including Section 377) our judiciary, by far; India's most forward looking institution.

We as a society are simply, if not distressingly, far from ready to legalise gay marriage. Our judiciary is a very intellectual organisation. If it has passed a nationwide legislation for legalising same sex marriages, it knows it very well that there will be far more criticism than support. The Supreme Court also knows that Parliament will throw a tantrum like it always does on sensitive issues.

The fierce resistance from so called "conservative" states like Bihar and Uttar Pradesh, whose mismanagement is nationwide famous also cannot be ignored. Furthermore, the rule of BJP- A party which has openly rejected LGBT rights on many occasions does not help in the slightest way possible. But if we leave the political implications, The Supreme Court knows it very well why it won't legalise same sex marriages- **Indian society won't digest it.**

Our society needs an overhaul; conservative beliefs and old baseless social norms are hampering our nation's founding principles of equality, justice and fair life for everyone, irrespective of sex, colour and religion. From a civilisation known for pluralism, liberty and

equality, we have fallen to a nation that is mocked by other nations for our antediluvian ideologies and our obsession for preserving a culture which is grossly misinterpreted.

And that is why we don't have same sex marriages soon, we don't want to leave the cover of our old beliefs which we don't even understand and this is the saddest part of the current scenario.

LIVE IN RELATIONSHIPS

Live in relationship is a new concept in India. With changing times and attitude of the people these relations have come to the main stream of the society. The number of such relations is increasing gradually. India is a country where marriage is treated as a sacramental bonding between two people. The concept of husband, wife and family is still given utmost importance in many communities of the country. Live-in-relationships in India are not illegal but the society is not accepting and it is considered as immoral, "When two adult people want to live together what is the offence. Does it amount to an offence? Living together is not an offence. It cannot be an offence, a three judge bench of Hon'ble Supreme court of India said that there is no special law in India to deal with the concept of live-in relationships and its legality.³ But the Indian courts through various decisions, have laid down the law in respect of such relationships in certain aspects.

LEGAL PROVISIONS AND CONSEQUENCES

The law traditionally has been biased in favor of marriage. Public policy supports marriage as necessary for the establishment of a family, the basic societal unit. To preserve and encourage marriage, the law reserves many rights and privileges to married persons. Cohabitation carries none of those rights and privileges. The Privy Council laid down the principle that "*Where a man and a woman are proved to have lived together as a man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of adultery.*"⁴

³ *S. Khushboo v. Kanniammal & Anr.*, (2010) 5 SCC 600

⁴ *Dinohamy v. WL Blahamyfoot*, AIR 1927 P.C. 185

The Hindu Marriage Act, 1955 and The Criminal Procedure Code, 1973 do not recognize 'live-in-relationship' but on the other hand, Protection of Women from Domestic Violence Act, 2005 says that an aggrieved live-in partner may be granted alimony under the act which ensures protection and maintenance to women. The status of the female partner remains vulnerable in a live on relationship given the fact she is exploited emotionally and physically during the relationship. In Hindu law marriage is considered as holy union for performing religious duties. Hindu marriages protects a woman, giving them the legal rights for restitution of conjugal rights in case of desertion⁵, legitimacy of the children, relief in case of cruelty⁶, adultery⁷, impotency⁸, claim of maintenance and alimony etc. Live-in relationships in India are often seen as a taboo and a sin. In *Revanasiddappa & other v. Mallikarjun & others*⁹ Hon'ble Justice A.K.Ganguly & G.S. Singhvi has said that "*Law takes its own time to articulate such social changes through a process of amendment. That is why in a changing society law cannot afford to remain static. If one looks at the history of development of Hindu Law, it will be clear that it was never static and has changed from time to time to meet the challenges of the changing social pattern in different time.*" In India currently marriage is considered as a lifelong social bond is being questioned. There is a rising tendency to enter into live-in-relationship instead of marriage which leads to conjugal disloyalty and disquiet. The Prevention of women from domestic violence Act of 2005 provides protection to the woman if the relationship is "in the nature of marriage". On October 21, 2010 a bench of Supreme Court held that, a "relationship in the nature of marriage" under the Act must also fulfill some basic criteria not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the act.¹⁰

MAINTENANCE

Section 125 of Criminal Procedure Code provides for giving maintenance to the wife and some other relatives. The word 'wife' has been defined as- wife include; a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.¹¹ In *Savitaben*

⁵ Hindu Marriage Act, Sec.9, 1955

⁶ Hindu Marriage Act, 1955, Sec.13 (1) (i)(a) deals with the cruelty as a ground for divorce

⁷ Hindu Marriage Act, 1955, Section 13(1)(i) describe Adultery as a ground of divorce

⁸ Hindu Marriage Act, 1955, Sec.12(1)(a) deals with Voidable marriages

⁹ On 31st March 31, 2011, Arising out of Special Leave Petition (C) No.12639/09, Para27

¹⁰ *D. Velusamy v. D. Patchaiammal*, (2010) SCC 469

¹¹ The Code of Criminal Procedure, 1973, Section 125(1)(b)

*Sonlablat Bhatiya v. State of Gujarat & others*¹², held that however desirable it may be to take note of the plight of an unfortunate woman, who unwittingly enters into wedlock with a married man, there is no scope to include a woman not lawfully married within the expression of wife. The Bench held that this inadequacy in law can be amended only by the Legislature. It is not necessary for woman to strictly establish the marriage to claim maintenance under sec. 125 Of Cr.P.C. A woman living in relationship may also claim maintenance under this section.¹³ If a man and woman are involved in live in relationship for a long period, they will treat as a married couple and their child will be called as legitimate.¹⁴ The child born out of a live-in relationship is not entitled to claim inheritance in Hindu ancestral coparcenaries property and can only claim a share in the parent's has self-acquired property.¹⁵ It can be clarified that 'live in relationship' is permissible in unmarried heterosexual's case. If one of the said people is married, the man may be guilty of adultery and it would amount to an offence under section 497 of the Indian Penal Code.

PENAL OFFENCE AND VICTIMIZATION

Section 375 of the Indian Penal Code lays down six circumstances to qualify for a rape. Of this, three are about consent; two about 'misconception' and one is about the statutory age limit. Police invoke Section 417 along with Section 376 while a man is arrested for rape. Section 417 deals with punishment for cheating and it prescribe a maximum imprisonment of one year with or without fine. If the alleged rape continued for days or together weeks or months at most it could be a case of cheating or breach of trust. At the same time the above complaints out of live in relationship leads to complaint on false grounds sometime when the relationship gone sour, break-ups and failed live-in relationships are being taken to police by women, who charge their ex-companions with rape.

CRITICAL COMMENT

We all want to adopt the concept of live in relationship from the west but still our people with strong social customs are not ready to accept it in a general way. Our society makes marriage as a primary requisite for a couple to live together. Even our law too provides many rights and

¹² AIR 2005 SC 1809

¹³ *Abhijit Bhikaseth Auti v. State of Maharashtra & Ors.*, MANU/MH/1432/2008

¹⁴ *Radhika v. State of Madhya Pradesh*, 2011 (10) SCC 705

¹⁵ *Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors.*, (2010) 11 SCC 483

privileges to married persons. But there are many reasons why a couple wants to be in a live-in before reaching the ultimate pinnacle of marriage. The very fact that the couple wants to check their compatibility for each other can't be ignored or they may wish to uphold their single status for any reasons. In Indian context there is a much need to validate such relationship through legislation which would then help the parties with rights and obligations thereby demarcating the legal status of such relationship. The newly developed societal change needs special legislation because the present legislations are only in the form of court rulings and the current law is not very clear on maintenance, succession, rights of child and custody. There is no legal provision to secure the future of a child born from relationship which has not been the shape of marriage. The sour relationship ends in victimization as the rights, responsibilities and obligations of parties are not defined.

CONCLUSION

In terms of morality, a statute should have aim to provide sanctions for rape and sexual assault. Our legislators should be quite clear in their minds that the law's proper function in this country is not to enforce a pattern of morality, but to protect vulnerable members of the society. Fundamental right under Article 21 of the Constitution of India grants to all its citizens "right to life and personal liberty" which means that one is free to live the way one wants without infringing others right. There is no law at present which clearly deals with the concept of live-in- relationships and moreover it penalizes same-sex marriages. Still even in the absence of a specific legislation, thanks to our judicial system, the courts have recognized live-in relationship but in case of same sex marriages we all have to go a very long way. The court does not want to have all the blame because if the court quashes Section 377 of IPC, there will be many social institutions that will come against it and the sentiments of some sections of the society will be severely harmed. Abrogation of Section 377 is just one step towards decriminalization which is not enough. The only way to fully decriminalize homosexuality is to provide homosexuals a legal sanctity. Homosexuality can be legalized in its true sense through the institution of marriage. So it's the duty of the legislature and not of the courts to come up with a more radical legislation so that it's a balance between social interest of the majority people and the interest of the minority people whose voices can't be suppressed always.

As stated by Aristotle "Man perfected by society is the best of all animals; he is the most terrible of all when he lives without law and without justice"

