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Gatekeeping Love and Law: Civil Rights for the Non-Conforming

SANJANA MEHTA¹

ABSTRACT

Without the grant of legal status to same-sex marriages in India, much has been left unsaid for other civil liberties that come with marital status. This paper breaks down the current legal frameworks supporting the institution of Marriage and Family laws in India. It presents the need for reform and analyses the roadblocks to such changes in legislative structures. While also marking the scope and grounds of inclusivity, the paper presents possible paths to reform. It further notes how these laws (or lack thereof) impact realms of civil liberties and other legal provisions such as regulation of inheritance and succession for such couples.

Keywords: LGBTQIA+, Law and Policy, Civil Rights.

I. INTRODUCTION

With a rise in recognition and awareness about gender nonconformity, there is a greater legal ambiguity about the laws that regulate these spaces. Until recently our laws did not even recognize or identify people not conforming to heterosexuality or those who identify outside the binary on the gender spectrum. This loss of identification and recognition translated to a lack of representation and regulation. Our legal structures heavily assume heterosexuality and binaries as not only the norm but also as the only possible identification. The problem of identification, recognition, and legal status was to some extent tackled by the landmark judgment *Navtej Singh Johar v UOI*² which read down section 377. The Supreme Court of India, exercised its interpretative power, in effect decriminalising homosexuality. The judgment cited that criminalization of homosexuality impinged on the rights to equality and right to life and personal liberty as guaranteed under Art. 14³ and 21⁴ of the Indian Constitution respectively. The court in this landmark case adjudged that the LGBTQIA+ community would be entitled to equal constitutional citizenship. They further also hinted at an expansion of civil rights and greater legal recognition in the future. This opened the doors for future legal reforms and structural legislative changes paving the way for more inclusive legal frameworks and

¹ Author is a student at Jindal Global Law School, India.

² *Navtej Singh Johar v. Union of India*, (2018) 10 SCC

³ The Indian Constitution, art. 14

⁴ The Indian Constitution, art. 21

regulatory systems.

Although recent attempts have been made to grant recognition to same-sex marriages in the law, we are far from an inclusive framework. A recent movement to grant legal status to same-sex marriages once again stirred the pot, bringing up demands for greater legal recognition and a step further from decriminalization. Efforts have been made to grant such recognition to the LGBTQIA+ community, and decriminalization on the grounds of sexuality or gender identity is constitutionally impermissible, but we have barely made progress in codifying inclusive and enforceable laws in other matters that are essential to cement the status of equal constitutional citizenship. The status and recognition will further pave the way for codifying other related legislations that govern personal laws and civil rights. In a family-centric country like India, the legal frameworks within which these families exist are rather constricting, which makes it imperative to codify more gender-inclusive and sensitive laws. In the current legislative structure of family laws in India, the idea of a 'family' is restrictive, and anyone who does not fit into this framework is cast out from remedies and repercussions offered under the law. To achieve true equality and recognition this must change. However, personal laws comprise a greatly complex category of laws and while recognition of same-sex marriage is a start, it will still leave much unsaid for other aspects that regulate familial issues, such as inheritance and succession, intimate partner violence, parenthood, and economic dependency amongst others. Inheritance and succession are rather important facets surrounding the 'family'. In India, the status of marriage is central to family law making it an important marker and entry point to such rights and civil liberties. In this paper, I explore the scope of inclusivity and the limitations of codifying and implementing such legislation. Keeping in mind the nuances of passing such legislation in a country that not only lacks political inclination and will but also one with far-stretched diversity in the population.

II. STATUS QUO

The current legislative framework regards heterosexuality as the norm. It is codified in a heterosexual, gender binary assuming framework, defining marriage as only possible between man and woman, and man and woman as the only possible archetypes. Family laws in India are also governed through religious and customary practices. Legislation for inter-faith marriages exists and is facilitated and regulated under the Special Marriages Act 1954.⁵ However, the SMA too fails to recognize marriage outside the heteronormative, gender binary view. The current provisions of marriage and inheritance under different religious regulations are

⁵ Special Marriage Act 1954

discussed further.

The Hindu Marriage Act ⁶ regulates the essentials of solemnizing marriage between Hindus under S. 5 of the HMA.⁷ Read strictly in a literal sense the Hindu Marriage Act only stipulates that the marriage be solemnized between any two Hindus withstanding the restriction on blood relations. However, this law is not interpreted in a literal sense. The presence of terms and labels like Wife, Husband, Bride, and Groom, in the Act, implies its application to only heteronormative couples. Further, the consummation of marriage as illustrated in S. 23 of the HMA⁸ is also in application interpreted as sexual intercourse between a man and a woman. Further, the succession and inheritance in Hindu families are regulated under the Hindu Succession Act 1956,⁹ which assumes heteronormative labels thus casting out from its provisions, whoever does not fit into their purview of a Hindu family as defined under the HMA.¹⁰

Muslims in India are governed under the Muslim Personal Law (Shariat) Application Act 1937.¹¹ This law overrides customary laws which were biased and exclusionary against women. However, this law excludes any such regulation on agricultural land, leaving much of the gender bias intact in those cases. Some states, including Tamil Nadu and Andhra Pradesh in the year 1949 and Kerala in 1963, read this down, now also bringing agricultural land into the ambit of the Act. However, the original law remains in regulation in other states. This was contested in a petition to the Prime Minister in 2005.¹² Who then refused to act on it citing a policy of non-intervention of the State in religious matters.

Section 60 of the Christian Marriage Act, 1872,¹³ also provides that the age of ‘Man’ and ‘Woman’ should be ‘Twenty-one’ and ‘Eighteen’ respectively, for the purpose of marriage.

The Special Marriages Act,¹⁴ facilitating inter-faith marriages regulates and defines marriage under S. 4 of the Act. S. 4 of the Act states: “a marriage between any two persons may be solemnized under this Act”. However, subclause (c) under the same section states, “the male has completed the age of twenty-one years and the female at the age of eighteen years;” once

⁶ Hindu Marriage Act, 1955

⁷ Hindu Marriage Act, 1955, s. 5

⁸ Hindu Marriage Act, 1955, s. 23

⁹ Hindu Succession Act, 1956.

¹⁰ Hindu Marriage Act, 1955

¹¹ Muslim Personal Law (Shariat) Application Act, 1937

¹² Bina Agarwal / Updated: Sep 19 2017, “Can We Unify Inheritance Law?: India News - Times of India” (*The Times of India* September 19, 2017) <<https://timesofindia.indiatimes.com/india/can-we-unify-inheritance-law/articleshow/60740547.cms>> accessed July 1, 2021

¹³ Christian Marriage Act, 1872, s. 60

¹⁴ Special Marriage Act 1954

again implying the assumption of heteronormative communion.

All these acts, and regulations, amongst others, presume marriage to be that between a man and a woman. It thus excludes any communion that does not fit into this purview, from any and all other legal provisions that are granted with marital status.

III. WHAT IS NEEDED?

The next logical step in inclusion will be provisions for legal marital status for same-sex couples. However, this will not be nearly enough. A comprehensive, inclusive, and uniform legislation regulating other aspects of personal law is imperative to ensure true inclusivity, recognition, and equality. It could be said that marriage rights can pave a path for both legal and social recognition, further ensuring social security for the people of the LGBTQIA+ community. However, according to some research scholars, one alternative to grant such legal and social recognition to LGBTQIA+ people, is not through 'Marriage Rights' but through 'Civil Unions, as done by many European and other countries such as; the United States of America, Australia, New Zealand, etc.¹⁵ However, the applicability of such unions in India is questionable as was also theorized by Markandey Katju when comparing the U.S. supreme court judgment in the case of Obergefell V. Hodges, Director, Ohio Department Of Health, and its applicability in the Indian context.¹⁶

IV. WHAT STANDS IN THE WAY?

In the current legal structure, civil rights are restricted to marriage. Rights to maintenance, to adopt, protection against intimate partner violence, and provisions facilitating inheritance and succession are only granted to married couples. Thus access to these rights is also available to those with legal marital status, thereby casting out others from such protection. Lately, these rights in a limited capacity have been extended to those in live-in relationships. However couples similar rights are not extended to same-sex couples. Although anyone is free to form a will and distribute their property according to their will upon their death. Issues arise in matters of intestate death. Since same-sex marriages remain unrecognized questions of inheritance and succession thus too remain unanswered.

¹⁵Nyantara Ravichandran, *Legal Recognition of Same-sex Relationships in India*, 5 ILS 95, 100-101 (2014).

¹⁶"Section 377 Verdict: Gay Marriage, Inheritance, Adoption Laws Unlikely; 'Majoritarian' View Will Keep State, SC Away-India News , Firstpost" (FirstpostSeptember 7, 2018) <<https://www.firstpost.com/india/section-377-verdict-gay-marriage-inheritance-adoption-legislation-unlikely-majoritarian-view-will-keep-state-sc-away-5134701.html>> accessed July 1, 2021

In reference to the case: OBERGEFELL ET AL. v. HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.

Further, personal laws in India function largely on religious customs; this presents two threats to the culmination of inclusive family laws. The first is the inconsistency in the laws. Customs and traditions not only vary between different religions but also between the same religion. This manifests a complex legal labyrinth of legislative provisions that become increasingly hard to navigate and even more difficult to reform. This is notwithstanding the potential public backlash and opposition such reform might induce. Any such reform will require a drastic systematic overhaul which is bound to face resistance from the more orthodox population. As was seen after the 2005 amendment to the HSA¹⁷ which declared daughters as equal coparceners on their father's property. Further, the state's policy of non-intervention in religious matters citing the spirit of secularism will present a roadblock in reformatory legislation of personal laws.

This is not to say that the legislative and judicial structures of the country are inclined to bring in these reforms. As illustrated before the laws in this country presume heteronormativity to be not only the norm but the only way of existence. The legislation is drafted from a heteronormative lens, and the judiciary also interprets it as such.

There is an inherent gender division in our succession laws. Division of property is partly determined by gender. This gender bias in and of itself is immoral. But also the regulations functioning on assumptions of male and female set rigid provisions that exclude the non-conforming.

Although some progress has been made in the realm of trans rights, this progress is limited to those who ascribe to the gender binary and marry as such. The Madras HC in the case of *Arunkumar v. Inspector General of Registration*,¹⁸ granted legal recognition to a marriage between a trans woman and a man. They decreed that the trans woman was legally a woman and thus the marriage could be solemnized. However, this does little for same-sex couples or for those who situate otherwise on the gender spectrum.

The Special Marriage Act¹⁹ circumvents the problems posed by religion and custom-driven personal laws, however, it still excludes same-sex couples from its ambit. This could be attributed to both, in part the inability on part of the legislators to draft inclusive laws and in part their lack of inclination to do so.

V. WHAT IS THE SCOPE?

The decriminalization of homosexuality was sought on grounds that it violates Art. 14 and 21

¹⁷ The Hindu Succession (Amendment) Act, 2005 (39 of 2005)

¹⁸ *Arunkumar v. Inspector General of Registration*, WP(MD) No. 4125 of 2019, dated 22-04-2019

¹⁹ Special Marriage Act 1954

of the Indian Constitution. However, blocking same-sex couples from accessing other civil liberties also infringes on their right to equality and right to life and personal liberties. Not only this, state-sanctioned legislations functioning on exclusionary schemas also violate the spirit of Art. 15²⁰ of The Indian Constitution, which protects the citizens of India against discrimination from the state. This places the prerogative on the state, to bring in inclusive reforms and gives them grounds to do so.

Society and its idea of morality are in a constant state of metamorphosis. Morals are in a constant state of flux. The ideas of right and wrong that we once held, have, and will keep changing and the country's legal structures must also change to keep pace. In a society existing within the ideals of the 21st century, our laws reflect the ideals of centuries past. Reform will and always has been met with resistance but it is upon the state to uphold public morality in consensus and accordance with contemporary ideals of morality. Several attempts have been made to canonize change, it then falls upon the state to acknowledge these voices that demand nothing more than equality, nothing more than what should be their right. In a world where a large section of society ascribes to norms that fall out of the ambit of legal regulation and schemas, it is the state's duty to ensure their inclusion.

The state has failed to do so, often citing policies of secularism as an easy scapegoat to avoid accountability. However, the Indian model of secularism is not unconditional or non-intervening in nature. Art. 25²¹ and 26²² place certain restrictions on the right to practice religion. The restrictions clearly state that practice of religion must not infringe on public good or morality. Making civil liberties inaccessible to a large section of the population thus goes against the spirit of this right conferred in the constitution. Further, the formation of an alternate regulatory system that exists beyond the ambit of customary laws can circumvent the complexities of reforming personal laws based on religious scriptures. Norms regulating personal spaces must evolve, to keep pace with societal changes.

VI. WHAT CAN BE DONE?

Such drastic reform in the legal system is complex and time taking, more so when dealing with a complex structure such as that of personal laws in India. There are multiple facets and areas of life that need to be accounted for in doing so. In the short term, however, the legislature can take some remedial steps to provide relief in a limited capacity. Accepting same-sex marriages under the ambit of live-in relationships can be a start. Live-in relationships in India have been

²⁰ The Indian Constitution, art. 15

²¹ The Indian Constitution, art. 25

²² The Indian Constitution, art. 26

subject to increased legitimacy and protection under the law, and extending such provision to same-sex couples will provide some degree of restitution. However, matters such as inheritance and succession are heavily gender driven and to tackle this, comprehensive legislation must be codified. The judiciary must interpret laws liberally and grant protection where necessary. As was seen in a recent case in the Punjab and Haryana High Court, where the court granted protection to a same-sex couple who sought refuge under the law.²³

In the long term the legislature must work to draft and enforce laws that not only legitimize such communions but also are inclusive and equitable. Gender-inclusive and gender-sensitive reforms are imperative to an inclusionary system. Such legislation should work outside the ambit of and override customary personal law at the option of the citizen availing them. Further, the community must be protected from bias in the social and professional sphere to uphold the true spirit of social justice.

Gender-neutral succession laws must be codified, excluding the bias of gender and basing succession purely on the relation. Words like husband and wife must be replaced with 'living spouse' or 'partner'. Only through the exclusion of such bias can we invite the inclusion of every sect of society on an equal footing.

VII. CONCLUSION

In light of the arguments presented above, it can be assessed that the codification of comprehensive laws for same-sex couples poses certain threats, but it also presents an opportunity for a systematic overhaul of a more inclusive and contemporary legal structure that will bring our legal systems in the 21st century. We need to let go of the norms which assume heteronormativity as the only accepted normal. This change is however the prerogative of the legislature, and the lack of political inclination and will stands as a major roadblock in the materialization of reform. That in light of the still prevalent social stigma assures this to be a difficult endeavor. However, it is still one that is imperative in pursuit of true equality, recognition, and justice. Short-term immediate action in combination with long-term systematic reform is needed. There needs to exist a gender-neutral framework exclusive of only bias and not people.

²³ Paramjit kaur and Anr. v. State of Punjab and ors. (2020) CRWP No. 5024 of 2020 (O&M)