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CONSTITUTIONAL DIMENSIONS OF SAME-SEX MARRIAGE: PRIVACY, GENDER, AND EQUALITY

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INTRODUCTION

Right to marry is a foundational facet of human life, embodying responsibility and obligation, cultural recognition and is often associated with one of the essential need and stage of human life. The historical concept of marriage normalises only the hetero-sexual marriages. Yet, legal acknowledgment of same-sex marriage has been sought by people worldwide. This project delves into the constitutional aspect of same-sex marriage from the perspective of privacy, gender and equality, further examining how these have influenced the discussion and debated on same-sex marriage in the Courts of India particularly, while drawing a comparative analysis with other foreign states which have already implemented ruled in support of same-sex marriage.

The debate that has surrounded same-sex marriages in Courts of law is right to privacy, right to equality and no prejudices based on gender as guaranteed by the Constitution under fundamental rights. The landmark judgement of *Navtej Singh Johar v. Union of India*¹ for the first time decriminalized same-sex relationships, earlier punishable, further introducing new legal interpretations and reasonings to the issue. Legal marriage was legalized by few countries in the early 21st centuries. In *Obergefell v. Hodges*², a US landmark case law legalized same-sex marriage in U.S, and considered right to marriage as a part of fundamental rights.

A ever- evolving demand of legalizing same-sex marriage in India has been in the stage of denial by several governments of India³, raising the question of state's responsibility towards ensuring constitutional rights to citizens which have been granted by the Constitution of India.

¹ “*Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice*, (2018) 10 SC 947

² *Obergefell v. Hodges* is 576 U.S. 644 (2015)

³ *Vidushi Rastogi, Public Opinion on Same-Sex Marriage in India: An Assessment Post Supriyo Chakraborty & Abhay Dang v. Union of India Judgment*, III Indian J. Integrated Res. L. (2024)

This poses a doubt on the State on whether it is discriminating on sexual orientation of people, and how far the role of State extends in defining marriage⁴. This project's key issue is how these arguments are dealt with in context of constitutional principles of privacy, gender and equal protection before law.

The central objectives of this project is to draw an analysis of the arguments in respect to same-sex relationships and marriages and principles of privacy of intimacy in relationships and marriages, with two eligible decision makers or consenting adults⁵. To find out whether right to equality before law, in 'Article 14' of Indian Constitution is sufficiently applicable or not in cases of same-sex marriages, including Art. 15 and Art. 21 into assessment. Assessing the same-sex marriage concept's impact on Indian notions and if legalized will it be morally and socially accepted by the society of India. Also examining what kind of legal challenges are posed by the process of legalizing same-sex marriage. Moreover, how the gender roles in such a marriage will be treated.

The research methodology employed is that of Doctrinal research which includes a systemized evaluation of legal sources essentially primary legal sources and then analysing and arriving at a perspective. The primary sources referred herein is the golden triangle of fundamental rights of Indian Constitution including other relevant articles. Assessments of judicial precedents in case of *Navtej Singh Johar v. Union of India*⁶ which for the first time decriminalized same-sex marriage in India and *Shafin Jahan v. Ashokan KM*⁷, which further assessed religious freedom and provided a comprehension that dealt with freedom of personal liberties elementally the right to marry and changing traditional norms. 'Public opinion on same-sex marriage in India'⁸, a article by Vidushi Rastogi published in 2024 will give us an assessment of the Indian societies attitude towards the same-sex relationship issue.

RIGHT TO PRIVACY IN SAME-SEX MARRIAGE

The concept of right to privacy was not explicitly mentioned under the Indian Constitution from the beginning. It was only after judgements like the landmark judgement of *K.S*

⁴ Nitya Desai, *Critical Analysis of Legalization of Same-Sex Marriages in India*, II Indian J. Integrated Res. L. (2024)"

⁵ "Accepting the unacceptable: Same-sex marriage around the world, 1 Burnished L. J. 1 (2020)

⁶ *Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice*, (2018) 10 SC 947

⁷ *Shafin Jahan v. Asokan K.M. & Ors.*, (2018) 16 SCC 368

⁸ Vidushi Rastogi, *Public Opinion on Same-Sex Marriage in India: An Assessment Post Supriyo Chakraborty & Abhay Dang v. Union of India Judgment*, III Indian J. Integrated Res. L. (2024)

*Puttaswamy v. Union of India*⁹(2017), the Court of law gave the recognition to right to privacy as a fundamental right under Art. 21 of Indian Constitution overruling *M.P. Sharma v. Satish Chandra (1954)*¹⁰ and *Kharak Singh v State of Uttar Pradesh*¹¹. Supreme Court ruled in the case that Right to privacy is “intrinsic to life and personal liberty¹².”

In relevance to same-sex marriage, right to privacy give rise to questions such as extension of individual’s autonomy to choose their life partners, and is state eligible to interfere between intimate relationships between two consenting eligible adults and isn’t that breach of state’s power. It is evident from this perspective that marriage has been treated as a part of personal life of people in India especially, where contract marriages are banned¹³, upholding the institution of marriage as sacred and a important part of life.

Determining the extent of State’s power in concept of marriage is a complex matter. State holds enough legislative interest to interfere in the concept of marriage as property rights, child welfare matters, public health policies¹⁴ are regulated and determined by State and these policies are well influenced with marriage in India, for example property generally passes to the wife of the husband after his death in absence of a will¹⁵but which would be typical to determine in case of same-sex marriages. Also, making bigamy¹⁶ and relationships other than monogamy as offences in India¹⁷ with exceptions in Muslim law, it is well proved that consent of eligible adults is not the only ground for holding relationships or marriages as eligible. Yet same-sex marriages can be seen as State discriminating rights to citizens based on gender. But it is to say that State holds powers in terms of determining marital rights.

But this extent should be assessed strictly otherwise State will have over say in the personal lives of citizens. Proponents of the same-sex marriage have argued that denying the legal validity of the same is equivalent to restricting the rights of individuals in making intimate choices about their lives¹⁸. By denying the legal validity the State is not only infringing upon the rights of the individuals but as well discriminating based on gender which is in violation of

⁹ *Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1*

¹⁰ *M.P. Sharma & Ors. v. Satish Chandra, District Magistrate, Delhi & Ors., (1954) 1 SCR 1077*”

¹¹ “*Kharak Singh v. State of U.P. & Ors., (1962) 3 SCR 395*

¹² *Kush Kalra, Right to Privacy Under Indian Constitution, 2 GIBS L. J. 1 (n.d.)*

¹³ *Section 26, Indian Contract Act, 1872*

¹⁴ *Brian H. Bix, State Interest and Marriage--The Theoretical Perspective, 32 HOFSTRA L. REV. 93 (2003)*

¹⁵ *Section 8, Hindu Succession Act, 2005*

¹⁶ *Section 82(2), Bharatiya Nyaya Sanhita, 2024*

¹⁷ *Section 11 and Section 17 of Hindu Marriage Act, 1955*

¹⁸ *Srija Singh, Shedding Light on Same-Sex Love: The Homosexuality Discussion (Manupatra, accessed Feb 16, 2024)”*

Art. 15 which states that the State is not allowed to discriminate the citizens based on the grounds of religion, caste, race, caste, sex, place, birth or any of them¹⁹. Additionally in the case of *Shafin Jahan v. K.M Asokan*²⁰, the Apex court laid down that the right to marry the person of one's choice is a fundamental component of Article 21.

The 'Article 14' of the Indian Constitution states that everyone is equal before the law and equal protection of law is guaranteed to them²¹, in furtherance of which Art. 15 prohibits discrimination on grounds like race, sex, caste etc.

The society was inherently against the concept of inter-caste and inter-religion marriages yet the legislative framework recognized the marriages as valid and made a Special Marriage Act, 1954 for such marriages to be performed legally²². So, our Constitution did uphold the right to choose your own partner as a part of personal choice and life not influenced by the traditional notions.

GENDER ROLES IN MARRIAGE RIGHTS: A CRITICAL QUESTION

The biggest concern of the marriages as debated is the definition of the roles of two individuals of same-sex involved in a marriage. Who will be regarded as the husband and who will be regarded as the wife in the relationship, as in Indian personnel laws although the definition of marriage differs in personnel laws, all recognizes marriage as a relation between a man and a woman, or more than one woman in case of Muslims. Hence, the gender roles in the marriage are clear specifically in such cases. The property being transferred to the partner, in case of a deceased person with a spouse living or the child inheriting the surname of the father.

Gender roles are influenced with societal norms, cultural practices and even legal frameworks laid down. Traditionally, the gender roles specified are a man being the breadwinner of the family and the woman is regarded as the homemaker,²³ although the society has move forward from this traditional notion and woman and man have switched roles or both started participating equally as a breadwinner as well as a homemaker, the questions that arise are related to the legal and the family formation issues. Same-sex marriages redefine the whole

¹⁹ "Article 15, Constitution of India

²⁰ *Shafin Jahan v. Asokan K.M. & Ors.*, (2018) 16 SCC 368

²¹ Article 14, Constitution of India

²² K. Suresh & Arulkappan, *A Study on Special Marriage Act, 1954*, 120 *Int'l J. Pure & Appl. Math.* 2955 (2018)

²³ Atwood, Sydney Faith, "The determination of gender roles and power dynamics within female same-sex couples" (2019). Honors Program Theses. 402"

concept of family structure based on traditional notions especially of India, also altering the parenting compositions. As, both mom and dad are regarded as important for a child's positive growth²⁴, it will be influenced as having two fathers for instance or two mothers would be regarded as negatively impactful on a child's growth.

In the matter of addressing parents, the male parent is regarded as the father and the female parent is regarded as mother. In the position of inheriting surnames who will be regarded as the father, as it is the father's last name that is supposed to be inherited for the child, traditionally although there is no legal foundation to it. There will be two fathers in instance of gay marriage, and two mothers in case of a lesbian marriage than whose name will the child be regarded as.

Although the same-sex marriage poses problems in defining gender roles it also gives a transformation to the traditional concept, and emphasize on the gender-neutral roles to be performed in a marriage and not a member of a particular gender has to abide with pre-defined roles but re-defines it as marriage responsibilities being shared burden and either of them can perform any function.

But talking beyond the traditionally defined roles, gender roles are also influenced with socioeconomic status, education etc. Discrepancies in paying wages to women²⁵ might make it more difficult for two mothers to sustain a standard living for children. Also, in India marriage is rather treated as a relation building between two families²⁶ rather than two individuals which is challenged by the same-sex marriage itself.

Drawing a comparison with other countries can help us assess the roles to be determined in such marriage. As of now, 36 countries have legalized same-sex marriage²⁷. These countries have enacted marriage laws bases on an egalitarian approach. These countries take a gender-neutral approach in their laws as in to refer "husband" and "wife" and rather referring the

²⁴ "Atwood, Sydney Faith, "The determination of gender roles and power dynamics within female same-sex couples" (2019). Honors Program Theses. 402

²⁵ Reanna Karp, *Same Sex Couples Influence Their Children: Sexual Orientation & Emotional Well-Being*, 7 UC Merced Undergrad. Res. J. 13 (2014)

²⁶ K. Suresh & Arulkappan, *A Study on Special Marriage Act, 1954*, 120 *Int'l J. Pure & Appl. Math.* 2955 (2018)

²⁷ Bronwyn Winter, Maxime Forest, & Réjane Sénac, *Global Perspectives on Same-Sex Marriage: A Neo-Institutional Approach* 241 (Palgrave Macmillan 2018)"

relationships as “*spouse*” and “*partner*.”²⁸ Couples in same-sex marriage are allowed the same benefits and rights like public health benefits, property rights, tax benefits etc. Moving further they recognized that issues like domestic violence etc are not limited to woman being the victim of such actions but both genders. Also the adoption rights are ethically provided to them challenging the notion that father and mother are needed for a child’s growth, although it is contradicting in itself that in India a single parent can as well adopt a child again challenging the old notion of two parents being the need for a proper growth of a child.²⁹

We can conclude that gender roles are not too specifically typical to determine into simply if a gender-neutral aspect is taken, the challenging aspect as mentioned by the Union of India is the definition of family unit in marriage. Disrupting the basic definition of a family unit which consists of father-mother and children is destructive of traditional notions, but legal frameworks have always guaranteed protection to individuals from such traditional concept, example of which is allowing inter-caste marriage and inter-faith marriage³⁰. Herein the issue arises is of biological perception of family.

A SOCIAL ISSUE OR A HUMAN RIGHTS ISSUE

In April, 2014, the Supreme Court of India for the first time in the landmark judgement of *National Legal Services Authority v. Union of India*³¹ recognized third-gender which is neither male or female and this class is also entitled to get reservations in fields of job and education as well. This could be taken as a large leap forward in determining that legal frameworks do evolve and rise above the traditional notions to ensuring the rights of individuals.

It will be fair to say that not recognizing the marriage creates a Constitutional issue of equality not being assured to the citizens under Article 14 and Article 15, while other issues of privacy and personal liberty arising under Article 21. The justification of not recognizing the marriages was constantly supported by bringing in the aspect of ‘morality’ into picture, yet the apex court repeatedly denied the ground of ‘morality’³² as a justification to the discrimination. Apex court of India through its judgement of *Navtej Johar v. Union of India*³³ showed a bend towards the

²⁸ “Bronwyn Winter, Maxime Forest, & Réjane Sénac, *Global Perspectives on Same-Sex Marriage: A Neo-Institutional Approach* 241 (Palgrave Macmillan 2018)

²⁹ Reanna Karp, *Same Sex Couples Influence Their Children: Sexual Orientation & Emotional Well-Being*, 7 UC Merced Undergrad. Res. J. 13 (2014)

³⁰ K. Suresh & Arulkappan, *A Study on Special Marriage Act, 1954*, 120 *Int'l J. Pure & Appl. Math.* 2955 (2018)

³¹ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438”

³² “*Navtej Singh Johar & Ors. v. Union of India thr. Secretary Ministry of Law and Justice*, (2018) 10 SC 947

same-sex marriage being legalized after legalizing same-sex relationships but the formulation of acts or bringing in amendments is a power outside its scope and is a function of legislature. Globally, as United states in the case of *Obergefell v. Hodges* legally recognized same-sex marriage in U.S. and *Ministry of Home Affairs v Fourie* of South Africa have provided with convincing authorities where rights guaranteed by Constitutions that of equality have been interpreted as inclusive of evolving wants like that of same-sex marriage. The barring of same-sex relationships not only have sustained conservative social stigmas but as well infringed the fundamental rights as provided by Indian Constitution.

CONCLUSION

In conclusion, right to marry is not a right that the State cannot interfere in case of India, but a state's authority is to be regulated appropriately, such that the personal liberties under Art. 21 is not compromised. In the question of discrimination based on gender, it could be analysed that state is not completely correct in evaluating that same-sex marriages should not be allowed, and indirectly discriminating based on gender. Determining the gender roles is complex with existing laws, if marital laws be made gender-neutral it could have smoother legal operation. The immediate legal challenge that will be faced by the legislature will be the burdening of bringing in the amendments in the detailed acts as it will require a extensive legal review and drafting.

Without doubt, having such act be legalized in a society which uphold the institution of marriage as sacred and holds a conservative view on the same, bringing in concept of same-sex marriage is a rather radical concept. It might not be accepted morally and socially but the Indian legislative system is supposed to ensure equal rights to those who might be otherwise suppressed by the majority.

The issue requires a multifaceted approach and to fasten the legislative processes as well it might be easier to bring a separate act into existence as Special Marriage Act, 1954 which pens down the procedure of inter-caste and inter-faith marriage which again wasn't accepted traditionally, hence giving recognition to the people of the emerging community and allowing them to live a life of dignity and personal choices.