

ISSN: 2582-2942



LEXFORTI

Legal Journal

Vol-II Issue- I

October, 2020

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Validity of same sex marriage under the Hindu Marriage Act, 1955: The way

forward

Aaryana Anand and Soumya Shankar Ukil

In India, marriage is seen to have strong religious and cultural significance. Marriage is considered to be a sacrament and the religious ceremonies are an essential part of the marriage.¹ Recognising the importance of cultural interplay any law that would govern the same, marriage and divorce is governed by personal law. The Christian Marriage Act² between Christians, the Shariat Act³ for Muslims and the Parsi marriage and Divorce Act⁴ for the parsi community codifies and regulates marriages in these communities. The special marriage act governs marriages between members of different religions, and provides for a secular alternative to religious personal law. The Hindu Marriage Act, 1955 governs the rules and regulations for a valid Hindu marriage. The act is also applicable to Sikhs, Jains and Buddhists. While traditional interpretations of this act envisage a valid union as heterosexual only, advocates of LGBTQIA rights have argued that the act must be interpreted to allow for same sex unions. On the 8th of September, 2020, A PIL was filed in the Delhi High court seeking a declaration recognizing the right of same-sex couples to get married under the Hindu Marriage Act, 1955.

The PIL argues that while homosexual relations were decriminalised in 2018, by the *Navtej Johar*⁵ judgement, there has been no legal progress on same sex marriage in India. Further, inroads into the destigmatisation and protection of this vulnerable community can only take place when same sex couples are given legal protections in the form of maintenance, succession and pension rights, which are only available to heterosexual married couples. Economic benefits from laws like the Employment Provident Fund Scheme, 1952 and Workmen's Compensation Act, 1923 are given only to those related by blood or marriage.⁶

The Supreme Court in the *Naz Foundation*⁷ judgement, held that that Article 15 of the Constitution conferred personal autonomy on all individuals and prohibited discrimination on the basis of religion, race, caste, sex and place of birth. The Court had recognised that a common thread runs through these – they are either immutable characteristics or entail a fundamental choice. It further provided that analogous grounds that can potentially be used to impair personal autonomy also have to stand the test of strict scrutiny in court. The court opined that sex as a ground includes within it sexual orientation since “*discrimination on the basis of orientation is grounded in stereotypical judgments and generalisations*

¹ B.N. Sampath, Hindu Marriage as a Samskara: A resolvable conundrum, 3(3) J. Ind. L. Inst. 319-331 (1991)

² Indian Christian Marriage Act, 1872.

³ The Shariat Act, 1937.

⁴ Parsi Marriage and Divorce Act, 1936.

⁵ Navtej Singh Johar Anr. v. UOI AIR 2018 SC 4321

⁶ Employment Provident Fund Scheme, S. 2(g) (1952). Workmen's Compensation Act, S. 2(d) (1923).

⁷ Naz Foundation v. Govt. of NCT Delhi 160 DLT 277

*about the conduct of either sex.*⁸ The petition states that as per the same, a denial of same –sex marriage would constitute a violation of article 15 of the constitution. Further, the petition stipulates that the right to marry has been recognised as an essential part of the Right to Life under Article 21 of The Constitution of India, and the same must be available to all individuals, irrespective of sexual orientation or gender identity.

The petition lays emphasis on the particular validity of homosexual marriage under the Hindu Marriage Act, 1955, and advocates for a purposeful interpretation of the same by the judiciary. Section 5 of the Hindu Marriage Act, 1955 lists the conditions for a valid marriage under the same, as follows:

“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 the marriage; 1 [(ii) at the time of the marriage, neither party— (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or 1. Subs. by Act 68 of 1976, s. 2, for clause(iii) the bridegroom has completed the age of 2 [twenty-one years] and the bride, the age of 3 [eighteen years] at the time of the marriage”

The section thus, just stipulates that the act allows for a marriage between two Hindus without discriminating between homosexuals and heterosexuals. The plea stipulates that Section 5 does not contemplate within itself, the requirement of a Hindu Man and a Hindu Woman A similar petition has been filed in the Kerala HC seeking a similar plea under the Special Marriage Act.

While Section 5 per se does not stipulate a union between a Hindu man and a Hindu woman as the only union contemplated, the terms bride and bridegroom see mention in in Section 5(iii), as well as Section 7 of the act which stipulates the ceremonies for a Hindu marriage as *“(2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.”*¹⁰. Other than this, the act is largely gender neutral.

There are several approaches to legalising same sex marriage in Hindu law. The first is the interpretation of existing law to allow for the same. As the act is largely gender neutral, it is possible to argue that homosexual couples fulfil the criteria under this act if one is characterised as the bride, and the other as the groom. This has been tried by lesbian couples, where one identifies as a male and

⁸ Tarunabh Khaitan, Reading Swaraj into Article 15 – A New Deal for All Minorities, in Law Like Love 281-283 (Arvind Narrain & Alok Gupta eds., 2011).

⁹ Hindu Marriage Act, 1955 s 5

¹⁰ Hindu Marriage Act, 1955 s7

the other as a female.¹¹ However, the same is against traditional principles of statutory interpretation, where the common definitions of bride and groom are gender conforming. While some judicial inroads have been made in terms of purposeful interpretation of 'bride' in Section 7 of the Hindu Marriage Act by the Madras HC¹², which allowed for a marriage between a man and a transwoman on the basis of the fact that transwomen fell under the meaning of the word bride, the same has not been made applicable to heterosexual cis-gendered couples. While there appears to be no statutory bar to homosexual marriage within the act itself, the act does not seem to contemplate the validity of same-sex marriage.

Another approach could be to obtain the recognition of the LGBTQ community as a community with independent customs and practices. The Arya Samaj and the anti-Brahmin Self-Respect movement in Tamil Nadu formulated their own marriage rituals and practices.¹³ While the Arya Samaj drew upon the Hindu scriptures in its marriage ceremony, the Self Respect marriages did not do so. But both these forms of marriages got recognition when the Act was amended in Tamil Nadu by inserting Section 7-A to recognise Self-Respect marriages.¹⁴ The LGBT community could agree on a common marriage practice and seek recognition under the Act. But the difficulty is that members of the LGBT community are governed by different personal laws and follow different customs and practices. As members of the community are spread over multiple religions, advocating protection per customary practices and protections is unlikely to be accepted by the judiciary.

A third approach could be rooted in judicial interpretations of the spirit and nature of the law, as one that never excluded same sex couples. The same could be done on the basis of discrimination by sexual orientation, as was contemplated in the *Naz Foundation*¹⁵ judgement, and strengthened by the fact that traditional Hindu religious text is rife with homosexual relationships. Ancient texts like Rig-Veda which dates back around 1500 BC and sculptures and vestiges depict sexual acts between women as revelations of a feminine world where sexuality was based on pleasure and fertility¹⁶. Further, instances of alternate marriage systems have been seen to exist in India as validly recognised parts of cultural tradition. An example of this is among the Kutchi community of Gujarat. Ritualistic

¹¹ Ruth Vanita, *Homosexuality and Hinduism*, GAY AND LESBIAN VAISHNAVA ASSOCIATION, <http://www.galva108.org/hinduism.html> (last accessed September 15, 2020).

¹² Arunkumar v. Inspector General of Registration, WP(MD) No. 4125 of 2019,

¹³ EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 58 (2ND Edn., 2008)

¹⁴ Hindu Marriage Act, 1955, S. 7-A.

¹⁵ Naz Foundation v. Govt. of NCT Delhi 160 DLT 277

¹⁶ Giti Thadani-Independent lesbian researcher', Interview with Lesbia magazine reprinted in Shakti Khabar, Issue 14, 1991.

transgender marriage is performed during the time of Holi, where Ishaak, the bridegroom and Ishakali, the bride are both men.¹⁷ Further, the Nayar community in South India allow for several men to have access to a woman through the tali rites and subsequent Sambandham unions¹⁸. The Tali chain and locket worn around the neck was tied by a man of appropriate ritual status on behalf of his sub-caste collectively, which acquired sexual rights over the woman concerned. These rights were extended to any member of the higher caste usually Nambudiri who was attracted to and was found acceptable for the woman. Men who had Sambandham relations did not have any exclusive rights as husband or as father; the woman could withdraw the sexual access allowed to them at any time if she so wished.¹⁹ Despite the existence of alternative marriage systems and customs, the conventional definition of a family includes a man and a woman along with their resultant progeny. This definition is based on the notion of compulsory heterosexuality and homophobia, and must be seen as contrary to notions of equality and sexual autonomy.

Finally, a clear amendment to the law itself would seem the best solution. Such an amendment however, would strike hostility within certain sections of society, and would view it as an interference with the practices and customs of religious groups. Appearing for the union government, Solicitor general Tushar Mehta stated before the court “our legal system, society and values do not recognise marriage between same-sex couples”²⁰. While any inclusion of homosexual marriage within the Hindu Marriage Act, 1955 is sure to see backlash from factions of the community, the proponents of same sex marriage have made significant inroads to allow for societal acceptance. The past decade has seen several instances of lesbian marriages, including performance of religious ceremonies, exchange of garlands in temples or quasi-legal friendship contracts (maitrikarar)²¹ 1988, two policewomen married each other in a Hindu ceremony. Though their marriage could not be registered and they were suspended from their jobs, their marriage was accepted and supported by their families and community.²² It is interesting that the numerous reported lesbian marriages have been largely between small-town, lower-middle class, non-English speaking women who are not connected to the LGBT movement.²³

¹⁷ Khanna Shamona: 'Gay Rights', Ale Lawyers, June (1992).

¹⁸ Evan Gerstmann, Same-Sex Marriage and the Constitution 58 (2nd Edn., 2008).

¹⁹ Jeffrey A. Redding, Queer Theory – Law, Culture and Empire 125-127 (Robert Leckey & Kim Brooks eds., 2010)

²⁰ Dhruvo Jyoti 'Delhi HC to hear plea on same sex marriage', The Economist, <<https://www.hindustantimes.com/india-news/delhi-hc-to-hear-plea-on-same-s>> (accessed 24 September 2020)

²¹ Arvind Narrain, Queer – Despised Sexuality, Law and Social Change 79 (2004).

²² Somak Ghoshal, The Well of Loneliness, The Telegraph, November 25, 2008.

²³ Ruth Vanita, Wedding of Two Souls, 20(2) J. Feminist Stud. Rel. (2004).

Further, this debate sparks the need for marriage inclusion to the LGBTQIA community, not just within the ambit of Hindu law, but other personal laws. It is clear that the anti-discriminatory initiative of Naz Foundation has to be built on to obtain legal and social recognition of long term same sex relationships through marriages²⁴. While Hindus form a portion of the community, members of other religious should not be denied access to marriage equality. Indian society has seen constant reformation, and movements towards caste, religious and gender equality have seen widespread societal acceptance. Thus, while the PIL is an important way forward for same sex marriage, the clarity in the success of this endeavour at court is unclear, and legislative solutions would provide a more definitive way forward.

²⁴ Nayantara Ravichandran, 'Legal Recognition of Samesex Relationships in India', <http://docs.manupatra.in/newsline/articles/Upload/B07BDF52-0AA4-4881-96AC-C742B9DB217D.pdf> accessed 24th September 2020.