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Alternative Families: Making Marriages equal and families more inclusive

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Marriage and family are considered two fundamental units of society. And like any societal institution, they have changed over the generations. This paper discusses various aspects of change in these structures and how the law has accommodated these changes by creating provisions for safeguarding individuals in these institutions. But like most changes take time acceptance of LGBTQ is also taking time. Meanwhile, progress in ensuring their rights is taking place. The paper mentions 2 such rights: the right to marriage and the right to adopt. And suggests how the same can be achieved. The aim of the paper is to advocate for legal recognition of same-sex marriage and making the right to adopt a fundamental right.

Keywords: *same-sex marriage, right to adopt, marriage equality.*

INTRODUCTION

“Marriages are like fingerprints; each one is different and each one is beautiful.”

- Maggie Reyes

Marriage and family are often linked together with the former being foundation of later. And in India, the latter decides the former. Families especially but not limited to parents often want

their children to be married to a person of their choice. This choice can be based on various factors such as looks, personality, financial status, age, educational qualifications, family background, caste, colour, etc. a lot of these factors can give one idea about what kind of things are considered about marriage. Although love marriages are becoming popular, arranged marriages are still the norm. So what things are changing with this move away from an arranged marriage? Inter-caste marriages and inter-faith marriages are rising albeit at a slow pace. Love does not see colour, caste, or religion. Love is love. But this does not apply to homosexual couples. Even after the decriminalisation of homosexual sex, society still views it as a sin or a threat to culture. this paper discusses this very idea. And law and courts can come to the aid of same-sex couples.

Kids are considered an essential part of the family. However biological kids are not the only way to have kids as can be seen from adoption slowly becoming popular. This too like marriage is a privilege for heterosexual couples and not a right for. The paper discusses the steps taken to make adoption inclusive and what more can be done in the future. Family structures have changed from joint to nuclear, the definition of a home with 2 parents and 2 kids also has changed with single-parent households, unmarried parents, childfree couples, etc. it's time we stop gatekeeping LGBTQ people from family and marriage institutions. So that they too can become a part of society. And the first step towards that would be legal recognition of same-sex marriage and the right to adopt for the LGBTQ+ community.

NOTHING REMAINS UNCHANGED

Family is often given more importance than an individual in most Asian countries and India is no exception. Family is considered by many as the fundamental unit of society. However, this fundamental unit is not set in stone and is malleable. With a rich culture built and passed on from generation to generation, family is deviating more and more from the traditional definition. And this can be seen from the fact that many people first think of the nuclear family when they hear the word family.

However, the nuclear family was not that common earlier it is only in recent decades that multigenerational families are becoming less popular especially in urban areas. Multigenerational homes are still the norm in rural areas. One of the factors for this shift is the influence of western culture, nevertheless, this is not the only reason. Another reason and probably more important is economic opportunity. Earlier in an agriculture-based economy living in the same home as parents and working in the same field was common. But with the education and technology revolution, newer forms of employment were generated. However, these were often more in abundance in urban areas, encouraging people to shift to cities and towns away from the parental home. Many settled there and started new families in urban areas.

Another change in the family was the reduction in the number of children in a family. Three reasons can be attributed to the same- Fertility, age of marriage, and mortality rates. In most nations throughout the world, including India, decreasing fertility rates have resulted in a reduction in family size. After two decades of rapid economic growth, fertility rates have fallen as a result of the successful implementation of family planning programmes. Mortality rates of both mothers and infants have decreased to a great extent. Hygiene was one of the key contributors here.¹ A mere soap and bucket of water can and do save lives, this is becoming more evident in this covid-era when soaps and sanitisers became essential. Better healthcare facilities for pregnant women and more awareness and availability of nutritious diet have also contributed to bringing the deaths of women and infants. Another major factor is the age of marriage, by increasing the age of marriage, family structure has changed. This has been explained in the next section.

MARRIAGE IS NOT CHILD'S PLAY

Earlier child marriages were common in various developing nations however the implementation of laws has reduced this vicious practice to a great extent. Child marriage is marred by various issues including – lack of education opportunities especially for the girl

¹ Alexandra Chitty & Joanna Esteves-Mills, 'WASH and Maternal and Newborn Health: Time to Act' (*Lshhtm.ac.uk*, 2015) <<https://www.lshhtm.ac.uk/sites/default/files/2017-07/Policy%20Brief%20-%20WASH%20%26%20MNH.pdf>> accessed 15 September 2021

child, children being married without having the mental ability to understand marriage, and thus also not being capable of giving consent. This could be seen as a form of forced marriage. Further, it also contributed to pregnancy in girls when their bodies were not developed enough to give birth leading to grievous health issues and in some cases death during childbirth. The increase of the age of marriage gives women more opportunities to gain education as well as become financially independent. This makes marriage and the marital relationship between men and women more equal.

Prohibition of Child Marriage Act, 2006 was enacted to curb the menace of child marriages under which a child is defined as a girl under the age of 18 and a boy under the age of 21.² Efforts are being made by NGOs and lawmakers to also increase the age of marriage for women to 21. But there is still a long way to eliminating this practice from society as a report by UNICEF on South Asia stated that India contributes to the second-highest number of child marriages.³ Further, the law on the question of child marriage is still ambiguous. As not all personal laws prohibit child marriage and also mention different ages of marriage for women who are less than 18. A possible solution to the legal conundrum would be the implementation of a uniform civil code.

This issue is once again in news due to the recent order in Rajasthan that child marriages too can be registered.⁴ Some have also warned that this will lead to legitimising such marriages and encourage people to push their children into marriage at a tender age. Irrespective of whether this order will encourage and increase child marriage or not, it has given people an idea about how many child marriages still exist. People who have access to resources, education and live in urban areas often see child marriage as a thing of the past or happening rarely. This is an opportunity to show people the ground reality so that they too are aware and help in eradicating this issue. Further awareness regarding this social evil should be given

² Prohibition of Child Marriage Act, 2006

³ 'Improving Children's Lives, Transforming the Future 25 Years of Child Rights in South Asia' (*Files.eric.ed.gov*, 2014) <<https://files.eric.ed.gov/fulltext/ED560005.pdf>> accessed 19 September 2021

⁴ Rajesh Asnani, 'Rajasthan Passes Bill to Register Child Marriages, Minister says move does not mean Wedlocks Valid' (*The New Indian Express*, 2021) <<https://www.newindianexpress.com/nation/2021/sep/17/rajasthan-passes-bill-to-register-child-marriages-minister-says-move-does-not-meanwedlocks-valid-2360169.html>> accessed 23 September 2021

freely to remote areas where the implementation of the law is lax and people are not connected with the internet and other resources. Protection of children from such practices should be the top priority instead of maintaining such a marriage.

SAME-SEX MARRIAGE: GAY PRIVILEGE OR EQUAL RIGHTS?

“Marriage should be between a spouse and a spouse, not a gender and a gender.”

— **Hendrik Hertzberg**

If love is love and marriage is an expression of love, how can we deprive a section of society of the right to marry a person of their choice? Nowadays, marriage is viewed as a symbol of love, trust, and commitment. Spouses, husband-wife, and life partners are commonly used interchangeably. The word life-partners itself implies a change away from the husband's supremacy and toward greater egalitarian relations. Is marriage, on the other hand, equal? Unfortunately, in many definitions and legislation worldwide, the terms husband-wife, man-woman, male-female, or bride-groom still depict marriage as an institution that excludes persons who do not fit into the heteronormative or cis-gendered categories.

While the **Navtej Singh Johar and Others v Union of India** decision is a stride in the right direction and opens up several possibilities for future rights, it is not without flaws.⁵ Only decriminalisation of gay intercourse will not protect the LGBTQ people from prejudice, nor will it ensure their human and civil rights. The fact that the Supreme Court dismissed a petition for a review of the LGBTQ community's marriage, adoption, and surrogacy rights demonstrates that people from the LGBTQ community still want and need these rights.⁶ Racism, casteism, religious intolerance, classism, and homophobia have all played a role in making marriage a privilege of few.

However, the law and justice system have come in the protection of inter-faith and inter-caste couples. This same protection needs to be provided for same-sex couples. And for the effective

⁵ *Navtej Singh Johar & Ors v Union of India* WP (Cr) No 76 of 2016

⁶ 'SC Dismisses Review Plea Seeking Marriage, Adoption, Surrogacy For LGBTQ' (*Business-standard.com*, 2019) <https://www.business-standard.com/article/pti-stories/sc-dismisses-review-plea-seeking-same-sex-marriage-adoption-surrogacy-for-lgbtq-119081200515_1.html> accessed 05 September 2021

protection of same-sex couples, they would need legal recognition. There are no uniform marriage laws in our country. It is governed by laws that are specific to various faiths, such as the Hindu marriage act, 1955. However, in specific situations, like the recent one in which the High Court of Madras upheld a marriage between a man and a transgender woman, change can be undertaken. This is the first time **Article 21 of the Constitution (Right to Life and Personal Liberty)** has been upheld in the instance of a trans individual.⁷ Thus, marriages can break their traditional definition and become more inclusive and for that, we need laws and courts that are ready to interpret laws without a bias on sexual orientation or gender.

The Other Side of The Coin: Why Gay Marriage Should Not Be Legalised: It's often said that hearing argument from both sides makes us more capable of taking decisions that would be beneficial. In this section, certain arguments against gay marriage are presented.

MARRIAGE IS BETWEEN A MAN AND A WOMAN

This is a widely claimed argument made by people. And this can be found through a look at definitions in dictionaries and laws around the world. However, it is interesting to note that this is not some constant and historically true depiction of marriage. Marriages were common amongst man and women and in some places amongst a woman and men. However now the majority follow monogamy. Similarly, other changes could be who this man and woman are... changes in age- throughout history, many a time children were married, further, the purpose of marriage to has been changed throughout history some of earlier ones being- expansion of kingdoms, finding an heir in case of only daughter being present in the family, etc. however now more and more people are marrying for love and companionship. This shows that the argument of man and woman is based on the assumption that the definition of marriage is rigid. However, like all social institutions marriage too has undergone enormous change throughout history and will continue to do so in the future.

⁷ B Tilak Chander, 'HC Upholds Marriage between Man, Transwoman' (*The Hindu*, 2019) <<https://www.thehindu.com/news/cities/Madurai/hc-upholds-marriage-between-man-and-transwoman/article26915045.ece>> accessed 23 September 2021

Also, marriage between different races, nationalities, religions, caste, etc has been made legal even when the society was not ready to accept such couples then why are people being denied this right based on sexual orientation? Probably it's time we change the definition of marriage between genders and instead move towards gender-neutral terms. As was beautifully stated marriage is between two souls and not genders. "*After all, what is marriage? It is a wedding of two souls. Where in the scriptures is it said that it has to be between a man and a woman?*"⁸

MARRIAGE IS FOR PROCREATION

This too has been a popular claim. That people marry to have kids or raise kids. This argument however limits itself to biological kids, but with the increasing popularity of adoption by both heterosexual and homosexual people worldwide this argument weakens. Further surrogacy and advances in reproductive technology give chance to a same-sex couple to have kids. Moreover, couples who are unmarried too are having kids. Thus, 'marriage is necessary for procreation' seems outdated. Further, the only purpose of marriage being procreation is defeated by the fact that many couples are child-free. Also, people, who cannot have children and those who are past their reproductive ages to get married and are accepted as part of society so why can't same-sex couples be allowed to do the same?

IS THERE A MIDDLE PATH?

Often people argue that giving equal rights of marriage to homosexuals might be too drastic a step or too radical for society to accept and hence they are against legalising gay marriages. Disputes arise about whether same-sex couples should be permitted to marry or be obligated to utilise an alternative status such as a civil union, which grants equal legal rights like marriage or fewer privileges in contrast to marriage.⁹ Human rights dictate that everyone should be treated equally, therefore homosexual weddings have been permitted in many nations. And although civil unions might provide rights, this 'equal but different' institution

⁸ Ruth Vanita, 'Wedding of Two Souls: Same-Sex Marriage and Hindu Traditions' (2004) 20 Journal of Feminist Studies in Religion <https://www.jstor.org/stable/25002506?seq=1#metadata_info_tab_contents> accessed 07 September 2021

⁹ Balwinder Singh, 'Changing Dimensions of the Concept of Marriage - A Contemporary Challenge to Personal Laws in India' (2017) 5 International Journal of Advanced Research

implies that somehow same-sex couples are less important or legitimate than heterosexual couples.

Further this civil union might provide for legal rights and become a safeguard against discrimination for LGBTQ people but this is ultimately a temporary provision and to ensure true marriage equality steps would again have to be taken to legalise gay marriage. This means that while civil unions might be the only option for the short run however in the long run same-sex marriage would be needed. Thus, this option may be seen as a lifeboat to save people until a ship is built but can't be an alternative to the ship itself.

SUGGESTIONS FOR CHANGE

1. Fundamental Right to Marry

The freedom to marry the person of one's choice has been declared a basic right under **Article 21** by the court.¹⁰ This has helped a lot of inter-caste and inter-faith couples from societal opposition and to marry people they want to. Forced marriages are continuing and faced by both heterosexual and homosexual people. This leads to unhappy marriages and in some cases suicide.¹¹ There is enough reason to provide this right to same-sex couples so that they have the choice and freedom to marry people that they want and not be forced to submit to heterosexual moulds made by society.

2. Amending Personal Laws

As marriage is usually governed by different personal laws, adding a provision in it for same-sex couples and/or replacing gendered terms such as man-woman, male-female, etc with gender-neutral terms such as spouses, persons, partners, etc. Although this may be one of the most effective ways it should be noted that this method might not be feasible. As it will be met with fierce opposition from most if not all religious groups. It also might lead to only certain religions having provision for same-sex couples and people from other groups having to convert to get married.

¹⁰ *Shafin Jahan v Asokan KM & Ors* AIR 2018 SC 1933

¹¹ *Vanita* (n 8)

3. Amending Special Marriage Act, 1954

The Special Marriage Act is secular thus solves the problem mentioned in the previous method.¹² As people won't find interference with their religious belief or freedom this method will probably be met with less opposition of religious grounds. As mentioned previously a clause mentioning same-sex marriage or the use of gender-neutral terms could be pursued.¹³

4. Uniform Civil Code

As the debate on UCC continues, it's interesting to note that it is more often based on treating religions equally but not sexualities. But can legislation whose aim is equal treatment of all be truly equal without equality for minorities. Provision for same-sex marriage in a uniform civil code ensures equality for sexual minorities. Further personal laws have often been at odds with fundamental rights whether that be women empowerment or transgender rights. uniform civil code can solve this issue once and for all.¹⁴

ADOPTION: A RIGHT FOR EVERYONE

"Every child deserves a home and love. Period."

- Dave Thomas

News of covid-19 has made many children orphans and vulnerable to neglect and abuse. It's no surprise that India has a large number of orphans due to abandonment or death of parents. In a patriarchal society, sons were often viewed as those who will carry forward the name of the family while daughters were seen as liabilities. This led to the abandonment of girl children, female foeticide, female infanticide, child marriage, dowry,¹⁵ etc. various

¹² Special Marriage Act 1954

¹³ Nayantara Ravichandran, 'Legal Recognition of Same-Sex Relationships in India' (*Docs.manupatra.in*, 2021) <<https://docs.manupatra.in/newsline/articles/Upload/B07BDF52-0AA4-4881-96AC-C742B9DB217D.pdf>> accessed 10 September 2021

¹⁴ Dr Sangeetha Sriraam, 'The Need for Uniform Civil Rights for The Sexual Minorities' [2020] SSRN Electronic Journal

¹⁵ Dowry Prohibition Act 1961

legislations¹⁶ were enacted to reduce these social evils.¹⁷ While awareness has led to the acceptance of equality between daughters and sons. And a decrease in cases of female foeticide, we still have a long way to achieve gender equality. But during this ongoing process, what happens to the children who are abandoned? Here we see the importance of adoption. Through adoption, while the children get a home, a safe environment to grow with love, the parents get a chance of having a family. This is a stark contrast to earlier times when adoption was mainly done to either propagate family name and inherit the business or property. Further earlier adoptions were mostly limited to people related by blood. This has changed and the society and state have moved towards a more child-welfare-oriented adoption system. Further daughters are being adopted in more numbers directly challenging the notion of sons being superior to daughters.

So if the reason for adoption has changed can't the people who adopt also change? It can, and it already has.

Formerly, Hindu males could only adopt a son if they had no other sons, grandkids, or great-grandsons, at the date of adoption. A woman, on the other hand, could not adopt a son without her husband's consent. She could only adopt a son after her husband's death if he had given her specific permission to do so. A woman who became a widow cannot adopt a boy on her own; she must do so through her husband. Any son adopted solely by a woman was rendered illegal and had no legal rights.

But with the enactment of the **Hindu Adoption and Maintenance Act, 1956**. Women too were given the right to adopt.¹⁸ A positive ray of hope in the direction of the right to adopt for all has been the statement by CARA: **Central Adoption Resource Authority-**

"The Central Adoption Resource Authority (CARA), in a circular issued on May 31, barred applicants in a live-in relationship from adopting a child on the ground that "the Authority would like the children to be placed only with a stable family and individuals in a live-in relationship cannot be considered as

¹⁶ Prohibition of Child Marriage Act 2006

¹⁷ Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act 1994

¹⁸ Hindu Adoption and Maintenance Act 1956

stable family.” “We have decided to withdraw the circular and applications from prospective adoptive parents will be examined on a case-by-case basis,” Secretary, Women and Child Development Ministry, R.K. Shrivastava told The Hindu on Thursday.”¹⁹

It is hoped that this step would be followed by rights for transgenders and same-sex couples to adopt. One interesting argument for adoption rights is that, while a single homosexual person has the right to adopt the same person when in a relationship cannot apply for joint adoption with his/her partner. Thus, only one person of a same-sex couple would have legal rights and responsibilities of the adopted child while the other does not. This proves problematic in case of an accident or death of the parent with legal rights.

SUGGESTION

A good idea would be to include the right to adopt under the list of fundamental rights. This would prevent discrimination against potential parents on arbitrary grounds such as sex (including both gender and sexual orientation), marital status, religion, etc. the state should ensure that every child gets a safe environment and family to grow up in. excluding same-sex couples from adoption not only limits the chances of a child getting adopted, it also deprives homosexual of a chance to have a family. Further, this might also lead to more adoption of LGBTQ+ children who were abandoned due to their gender identity or sexuality. Another problem can be addressed through opening doors of adoption to same-sex couples- the heinous practice of correction rape and conversion therapy. The same-sex couple being aware of the perils of such practices will not force their children to go through them, thus ensuring the safety of children.

CONCLUSION

Historically people from minority groups have been discriminated against, whether that be on the grounds of religion or language. However, law and courts have taken the responsibility to ensure that this discrimination ceases to exist. It has both protected and given equal rights.

¹⁹ Jagriti Chandra, 'Live-In Partners can Adopt Now' (*The Hindu*, 2018)
<<https://www.thehindu.com/news/national/live-in-partners-can-adopt-now/article25010051.ece>> accessed 10 September 2021

This has led to greater assimilation in society. The same however has not been done for people belonging to the LGBTQ community. Excluding the LGBTQ community from fundamental parts of society such as families and marriages has led to their isolation and is a direct attack on their human rights. For this to change and for greater acceptance in society the law and justice system needs to step forward and give them their civil rights. For an inclusive society, we need inclusive laws that protect all without prejudice based on sexual orientation or gender identity.