Source : www.thehindu.com Date : 2021-06-19

IN INDIA, LOOKING BEYOND THE BINARY TO A SPECTRUM

Relevant for: Developmental Issues | Topic: Rights & Welfare of Minorities Incl. Linguistic Minorities - Schemes & their performance; Mechanisms, Laws, Institutions & Bodies

Last month, when the cases surrounding the question of same-sex marriages came up before the High Court of Delhi, the Union Government was found to be dithering. The Solicitor General of India made himself available only to request the court to have the matter adjourned on the ground that it was not urgent. Though the Union Government argued that the matter was not important in the context of the second wave of COVID-19 cases, it overlooked the basic notion that the plight of persons in same-sex and queer relationships looking after each other — without the legal protection of marital relationships — was exacerbated by the pandemic. In any case, it is a matter of some concern that the Union Government does not find urgency in a matter of extending civil rights to a class of persons who have approached a constitutional court.

Nevertheless, given the march of law — both international and domestic — in the direction of expanding human rights, jurisprudence necessarily means that the provision of marriage rights to same-sex and queer couples is only a matter of time. Any further delay in doing so would fall foul of our constitutional guarantees, judgments rendered by various High Courts and evolving international jurisprudence.

Also read | Same-sex marriages will cause havoc, Centre tells Delhi High Court

The last two decades have witnessed tremendous progress in establishing civil rights for the LGBTQIA+ community.

In 2005, the Constitutional Court of South Africa in the case of Minister of *Home Affairs and Another vs Fourie and Another; Lesbian and Gay Equality Project and Eighteen Others vs Minister of Home Affairs and Others [2005] ZACC 19*, unanimously held that the common law definition of marriage i.e. “a union of one man with one woman” was inconsistent with the Constitution of the Republic of South Africa, 1996. Consequently, the Parliament of South Africa was given 12 months to amend the Marriage Act 25 of 1961, failing which the Marriage Act would stand amended, by virtue of the decision of the Constitutional Court, to include the words “or spouse” after the words “or husband”. As a result of the verdict, the Civil Union Act, 2006 was enacted, enabling the voluntary union of two persons above 18 years of age, by way of marriage.

In 2007 in Australia, the reforms to civil rights of queer community were prompted by the Honourable Michael Kirby (then judge of the High Court of Australia) writing to the Attorney-General of Australia asking for the judicial pension scheme to be extended to his gay partner of 38 years (at that time). After initial opposition from the Federal Government, the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008 came to be enacted to provide provide equal entitlements for same-sex couples in matters of, *inter alia*, social security, employment and taxation. Similarly, in England and Wales, the Marriage (Same Sex Couples) Act 2013 enabled same-sex couples to marry in civil ceremonies or with religious rites.

More recently, in 2015, the Supreme Court of the United States decided that the fundamental right to marry is guaranteed to same-sex couples. The case of *Obergefell vs Hodges* ushered in a landmark shift in the American position and allowing same-sex marriages to be recognised

and treated on a par with opposite-sex marriages. While doing so, the Supreme Court of the United States held the denial of marriage rights to same-sex couples to be a “grave and continuing harm, serving to disrespect and subordinate gays and lesbians”. Across the world, the recognition of the unequal laws discriminating against the LGBTQIA+ community has acted as a trigger to reform and modernise legal architecture to become more inclusive and equal.

In India, marriages solemnised under personal laws such as the Hindu Marriage Act, 1955, Indian Christian Marriage Act, 1872, Muslim Personal Law (Shariat) Application Act, 1937 and so on. At present, though same-sex and queer marriages are not clearly recognised in India, we are not bereft of judicial guidance. In the case of *Arunkumar and Sreeja vs The Inspector General of Registration and Ors.* [W.P.(MD)No. 4125 of 2019 & W.P.(MD)No. 3220 of 2019], the Madurai Bench of the High Court of Madras employed a beneficial and purposive interpretation holding that the term ‘bride’ under the Hindu Marriage Act, 1955 includes transwomen and intersex persons identifying as women. Therefore, a marriage solemnised between a male and a transwoman, both professing the Hindu religion, is deemed to be a valid marriage under the Act. The import of this judgment cannot be overstated as it expands the scope of a term used in the Hindu Marriage Act, 1955 in a progressive manner and sets the stage for re-imagining marriage rights of the LGBTQIA+ community.

The judgment of the Madras High Court builds on the tenets laid down by the Supreme Court of India in Shafin Jahan vs Asokan K.M. and Others AIR 2018 SC 1933 (Hadiya case), wherein the right to choose and marry a partner was considered to be a constitutionally guaranteed freedom. By doing so, the Supreme Court held that the “intimacies of marriage lie within a core zone of privacy, which is inviolable” and that “society has no role to play in determining our choice of partners”.

The only logical interpretation from reading these cases together, it is apparent that any legal or statutory bar to same-sex and queer marriages must necessarily be held to be unconstitutional and specifically violative of Articles 14, 15 and 21 of the Constitution of India. No longer can the position of the Union Government that marriage is a bond between “a biological man and a biological woman” be tenable.

The domain of marriages, including religious marriages, cannot be immune to reform and review. Self-respect marriages were legalised in Tamil Nadu (and subsequently, in Puducherry) through amendments to the Hindu Marriage Act, 1955. Self-respect marriages, commonly conducted among those who are part of the Dravidian Movement, have done away with priests and religious symbols such as fire or *saptapadi*. Instead, solemnisation of self-respect marriages only requires an exchange of rings or garlands or tying of the *mangalsutra*. Such reform of the Hindu Marriage Act, 1955 to bring self-respect marriages under its very umbrella, is seen as a strong move towards breaking caste-based practices within the institution of marriage.

Similarly, understanding the needs of the LGBTQIA+ community today, the law must now expand the institution of marriage to include all gender and sexual identities. At least 29 countries in the world have legalised same-sex marriage. It is time that India thinks beyond the binary and reviews its existing legal architecture in order to legalise marriages irrespective of gender identity and sexual orientation.

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To reassure Indian Muslims, the PM needs to state that the govt. will not conduct an exercise like NRC

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