



## Changing Paradigm of Marriage in India: A Socio-Legal Analysis

Dr. Nirmala Devi, Assistant Professor, GNDU Regional Campus, Jalandhar, and  
Ms. Supreet Kaur, Research Scholar, Department of Laws, GNDU, Amritsar

### Introduction

The key components of every society are marriage and family.<sup>1</sup> **In sociology, social structure is the distinctive and stable arrangement whereby the human beings live together and interact. Within every society there is a structure of sexual reproduction, care and education of children.**<sup>2</sup>

The term 'society' is derived from the Latin word "*socius*" which means companionship or friendship. Millennia ago, Aristotle said that man is a social animal, who needs society for his existence.<sup>3</sup> The word "family" is of Roman origin and derived from the word, "*famulus*", which means a servant. Under Roman law, this word denotes the group of producers and slaves and other servants as well as other members who are connected by common descent or marriage.<sup>4</sup>

According to Charles Cooley,<sup>5</sup> "*Family is the primary group and we are member of primary group. History of mankind is the history of family. At birth child is only biological being. His needs are fulfilled by his family. Right from the birth to death, the family exerts a constant influence on the child.*"<sup>6</sup> According to Burgess and Locke<sup>7</sup>, "*the family is a group of persons united by ties of marriage, blood or adoption constituting a single household interacting with each other in their respective social role of husband and wife, mother and father, brother and*

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<sup>1</sup> Chapter14: Marriage and Family, *available at*: <https://opentextbc.ca/introductiontosociology/chapter/chapter14-marriage-and-family/>, visited on May 10, 2019.

<sup>2</sup> Nico Wilterdink and William Form, "Social Structure", *available at*: <https://www.britannica.com/topic/social-structure/Structure-and-social-organization>, visited on May 10, 2019.

<sup>3</sup> Navendu K. Thakur, *An Introduction to Sociology*, 50, Central Law Publication, Allahabad, Second Edition (2011).

<sup>4</sup> Shelly Shah, "The Meaning and Characteristics of Family", *available at*: <https://www.sociologydiscussion.com/family/the-meaning-and-characteristics-of-family/2332>, visited on May 10, 2019.

<sup>5</sup> Charles Horton Cooley (1864 – 1929) was an American sociologist.

<sup>6</sup> Family, *available at*: <https://www.civildserviceindia.com/subject/Sociology/notes/family.html>, visited on May 10, 2019.

<sup>7</sup> Ernest W. Burgess and Harvey J. Locke. *The family: From institution to companionship*. New York: American Book Company (1945).



*sister creating a common culture*". G.P Murdock<sup>8</sup> defines the family as “a social group characterized by common residence, economic cooperation and reproduction. It includes adults of both sexes at least two of whom maintain a socially approved sexual relationship and one or more children own or adopted of the sexually co-habiting adults.”<sup>9</sup>

Family is a part of the society and every family starts with marriage. The institution of marriage exists in every society in one form or the other. People generally feel that marriage and family are the only proper and possible ways of living to live. They have derived such feelings as they have lived in a family as children and have always felt that family is the safest place for living.<sup>10</sup> As described by Kanaiyalal Motilal Kapadia,<sup>11</sup> marriage as “a socially approved union of men and women aiming at ‘dharma’, procreation, sexual pleasure and observance of certain social obligations”. Edward Westermarck stated that marriage is the more or less durable connection between male and female lasting beyond the mere act of propagation till after the birth of offspring.<sup>12</sup>

Hence, marriage is an established norm which reflects the attitude, beliefs and behavior of the people. It is an interpersonal relationship with communal or religious acknowledgment.<sup>13</sup> The concept of marriage is deeply and effectively rooted in every society of the world. Many countries consider marriage as a bond which exclusively gives consent for a sexual relationship and for having children, as in such countries sex and having children before marriage is seen as a sin.<sup>14</sup> The concept of marriage being multi-dimensional involves social, legal, economic and cultural aspects.

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<sup>8</sup> George Peter Murdock (1895 – 1985) was an American anthropologist.

<sup>9</sup> Family, available at: <https://www.sociologyguide.com/marriage-family-kinship/Family.php>, visited on May 10, 2019.

<sup>10</sup> *Supra* note 3 at 161.

<sup>11</sup> Kanaiyalal Motilal Kapadia, *Marriage and Family in India*, (Oxford University Press, Bombay, 1966)

<sup>12</sup> C.N. Shankar Rao, *Sociology, Principles of Sociology with an Introduction to Social Thought* p.327 (6th Rev. Edn. 2006 edition, 2019)

<sup>13</sup> Role of Marriage in Society, available at: <https://www.ukessays.com/essays/sociology/role-of-marriage-in-society-and-culture-sociology-essay.php?vref=1>, visited on May 10, 2019.

<sup>14</sup> *Ibid.*



## **Evolution of Concept of Marriage**

The concept of marriage which was first seen in 1250-1300 C.E., comes from the Middle English.<sup>15</sup> **It has been widely accepted that the concept of marriage dates well before as recorded history. As suggested by the evidences** marriage is around 4,350 years old.<sup>16</sup> Anthropologists have been of the belief that thousands of years before the evolution of institution of marriage, families comprised of loosely organized groups of around thirty people. Such groups were led by several males sharing multiple females and children out of such relations. When there was transformation of men from hunter-gatherers and settling down into agrarian civilizations, there was a need for a more stable societal arrangement.<sup>17</sup> **But the earliest recorded evidence of the marriage ceremonies uniting a woman and a man dates back about 2350 B.C. in the Far East. Thereafter over the next several hundred years, the concept of marriage evolved into a widespread institution embraced by various cultures of the world. It became** popular institution especially across ancient Hebrews, Greeks and Romans.<sup>18</sup> Amongst the Greeks and Romans married were allowed to satisfy their sexual urges with concubines, prostitutes, and even teenage male lovers, while their wives were supposed to stay home and do the household chores. In case of failure of the wives to produce an offspring, their husbands could give them back to their father and marry someone else.<sup>19</sup>

As revealed by the ancient texts the human race originally lived in a state of promiscuity, where there was no concept of individual marriage. There was indiscriminate access to all the women in the tribe by all the men in a horde and children born out of these unions belonged to the entire community at large.<sup>20</sup> During the Rig Vedic period,<sup>21</sup> there was a strong implantation

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<sup>15</sup> Dr. V.K.Maheshwari and Mrs Sudha Rani Maheshwari, “MARRIAGE- Convention, custom, moral, or law” available at: <http://www.vkmaheshwari.com/WP/?p=1758>, visited on May 10, 2019.

<sup>16</sup> Ramona Gohil, “The Origin of Marriage & should Women still change their Surname?” available at: <https://www.raniandco.co.uk/blogs/feminist-blog/the-origin-of-marriage-why-women-change-their-surname-feminist-blog>, visited on May 10, 2019.

<sup>17</sup> The origins of marriage, available at: <https://theweek.com/articles/528746/origins-marriage>, visited on May 10, 2019.

<sup>18</sup> *Supra* note 16.

<sup>19</sup> *Supra* note 17.

<sup>20</sup> Institution of Marriage, available at: <https://ithihas.wordpress.com/2016/10/26/institution-of-marriage-in-ancient-india/>, visited on May 10, 2019.

<sup>21</sup> Rig Vedic period (1500B.C. – 1000 B.C.)



of the institution of marriage. The Rig Veda states that the institution of marriage enables a man to perform sacrifice to the Gods and to procreate sons.<sup>22</sup> In ancient India, marriage was a medium to bring the two distinct halves of life, man and woman, together.<sup>23</sup> During those times husband and wife were not considered two separate entities capable of division, but two halves which constitute an entire single organic whole and it was in this wholeness that a perfect humanity manifested.<sup>24</sup>

As discussed above, men used to live in groups with no concept of marriage. The children born in the group were considered to be children of the entire group. Thus, initially the system of promiscuity was prevalent. At present, in India it is the monogamous form of marriage which is prevalent except in few religions or communities which allow multiple spouses. With the passage of time there was a need to have a defined sexual relationship and established paternity, which led to the system of marriage. Marriage of a man multiple wives is known as polygamous marriage and marriage of a woman with multiple husbands is known as polyandry. In certain cases of polygamous marriages, spouses live under the same roof. The lineage of human race never evolved out of monogamous marriages. If it is said that monogamous marriages is having advantages of long term and stable bond, but evidences show that even the polygamous relationships have been long-term bonds.<sup>25</sup>

### **Objectives of Marriage**

Marriage forms the basis of society and enforced for various purposes as no man and woman can live without companionship, home making, and personality development at the level of biological, psychological, social, ethical and spiritual evolution.<sup>26</sup>

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<sup>22</sup> *Supra* note 20.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Carl Zimmer, Monogamy and Human Evolution, available at: <https://www.nytimes.com/2013/08/02/science/monogamys-boost-to-human-evolution.html>, visited on May 21, 2019.

<sup>26</sup> Pooja Mondal, "Marriage: Meaning, Definition and Forms of Marriage", available at: <https://www.yourarticlelibrary.com/paragraphs/marriage-meaning-definition-and-forms-of-marriage/31312>, visited on May 21, 2019.



1. **Social Aims** - Begetting and bringing up children is both form a biological as well as social function of marriage.<sup>27</sup> Almost every man and woman in every society of the world has a desire to become parents and continue their family and lineage. The society gives and shows a higher status to a married person after a certain point of time. The alliance of marriage also strengthens the bonds of the kinship and its extension with other families.<sup>28</sup>
2. **Religious Aims** - In many societies of the world marriage is performed with some religious aims. Muslims consider marriage mandatory as it protects an individual from various social evils.<sup>29</sup> Amongst Hindus, marriage provides responsibility and duty towards the performance of religious activities.
3. **Biological Aims** – The most important aim of marriage is the satisfaction of the biological needs. Sex is a natural biological need of males and females, whose satisfaction leads to child birth.<sup>30</sup> Sex, an important biological need every man and woman which can be legally satisfied with marriage. It is the way of reproduction of children who can be continuously taken care of by the family.<sup>31</sup>
4. **Economic Aims** – Most of the primitive societies recognized the biological, social as well as economic aims of marriage.<sup>32</sup> Since ages females have been working and helping men in agricultural activities or cultivation, which in turn results in economical advantages. It was considered in some primitive societies that more the members in the family, more will be the income.<sup>33</sup> The hard struggle for life, lower economic status and undeveloped natural environment are the prominent reasons for this state of affairs. Therefore, marriage is a union of a man and a woman not only to enjoy together but also to face the struggles of life together.<sup>34</sup>

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<sup>27</sup> Sukesh Dey, “What are the important aims of marriage?”, *available at*: <https://www.preservearticles.com/social-science/what-are-the-important-aims-of-marriage/13493>, visited on May 11, 2019.

<sup>28</sup> Why do people marry I Aims of marriage, *available at*: <http://studylecturenates.com/why-do-people-marry-aims-of-marriage/>, visited on May 11, 2019.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Supra* note 27.

<sup>31</sup> *Supra* note 28.

<sup>32</sup> *Supra* note 27.

<sup>33</sup> *Supra* note 28.

<sup>34</sup> *Supra* note 27.



5. Psychological Aims – Marriage being the foundation of a family provides emotional and psychological security, stability and satisfaction to the individuals. This sense of security and stability helps a person to develop his personality to the fullest.<sup>35</sup>

### **Contemporary shifts in the Concept of Marriage in India:**

It is clear from the above discussion that the institution of marriage is a union between a man and a woman and the aim of such union is more than mere act of propagation of children. In other words, marriage is a union between one male and one female or one male and two or more females. The saying that there is only one thing which is constant in the world and i.e. change. Hence, there has been a gradual change in the concept of marriage as well. In the last few decades globalization hastened the changes, which affect almost all aspects of our social life, family structure, marriage, conjugal relationship, and so on. There have been various changes like concept of divorce, same sex marriages, prenuptial bonds and live in relationship, which took place and were introduced in the institution of marriage.

#### **1. Prenuptial bonds**

The concept of prenuptial agreement is not new to the world, either legally or culturally. Prenuptial agreement is a legal contract which is signed by the parties to the marriage before exchanging the wedding vows. The evolution of this concept can be traced 2000 years ago in Egypt in order to ensure a sense of social and financial security and assurance to women in the event of a divorce or death of the husband.<sup>36</sup> Every coin has two sides, so if on one side this concept provides security to the women but on the other side it has weakened the sacrament nature of the marriage. This concept seems akin to the Muta marriage under Muslim Law. Prenuptial agreements are mainly prevalent in the developed nations like the United States of America and Australia. But in India, any contract which has marriage as an object is null and void. Such agreements are not legally valid in India as the Indian law doesn't consider marriage as a contract in the strict sense. India has no law on either on prenuptial or post nuptial agreements.<sup>37</sup> As early as in 1901, in the case

<sup>35</sup> *Supra* note 28.

<sup>36</sup> Donnchadh O Corrain, "Marriage in Early Ireland", *available at*: [https://celt.ucc.ie//marriage\\_ei.html](https://celt.ucc.ie//marriage_ei.html), visited on May 11, 2019.

<sup>37</sup> Prenuptial Agreements in India, *available at*: [https://www.international-divorce.com/prenuptial\\_agreements\\_in\\_india](https://www.international-divorce.com/prenuptial_agreements_in_india), visited on May 11, 2019.





of *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*,<sup>38</sup> it was held that such agreements go against the sacramental values enshrined in the institution of marriage which is treated as a religious bond under the Indian customs and the judiciary has always inclined towards preserving this sacramental thread. The same was reiterated in the case of *Krishna Aiyar v. Balammal*,<sup>39</sup> by the Madras High Court. Thus, being contrary to Indian customs and views about marriage such agreements are not common in India.<sup>40</sup>

## **2. Live-in relationships**

Indian society has seen a drastic change in the pattern of living in the past few years. The Indian society is accepting the ideas of pre-marital sex and live-in relationships. However, these practices have been highly criticized on the grounds of legality and morality as it encourages people to cohabit without marriage.<sup>41</sup> India does not have any law dealing with the issues of live-in-relationship. However, the Judiciary through various judicial pronouncements has tried to clarify the concept of live-in relationship and the rights and obligations of the women and children of a live-in relationship.<sup>42</sup>

As early as in 1927 the live-in-relationships were legalized by the Privy Council in *Dinohamy v. WL Blahamy*<sup>43</sup> and it was held that there will be presumption of marriage when a man and a woman live together, unless contrary is proved. This Privy Council reiterated the same view in *Mohabbat Ali Khan v. Md. Ibrahim Khan*,<sup>44</sup> wherein the court held there is a presumption of marriage as both the partners have lived together as a couple.

In *Gokul Chand v. Pravin Kumari*,<sup>45</sup> it was held that long cohabitation doesn't guarantee legitimacy of the relationship.<sup>46</sup> The Supreme Court in *Badri Prasad v. Deputy Director*

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<sup>38</sup> (1901) ILR 28 Cal 751.

<sup>39</sup> (1911) ILR 34 Mad 398.

<sup>40</sup> *Supra* note 37.

<sup>41</sup> Astha Saxena, "Live-In Relationship And Indian Judiciary", available at: <https://www.scconline.com/blog/post/2019/01/23/live-in-relationship-and-indian-judiciary/>, visited on May 11, 2019.

<sup>42</sup> *Supra* note 41.

<sup>43</sup> AIR 1927 PC 185

<sup>44</sup> AIR 1929 PC 135

<sup>45</sup> AIR 1952 SC 231

<sup>46</sup> Suwaiba Malik, "Supreme Court on Live-in-relationships", available at: <https://www.lawzgrid.com/legal-blog/Supreme-Court-on-Live-in-Relationships>, visited on May 11, 2019.



*Consolidation*<sup>47</sup> observed that “If man and woman who live as husband and wife in society are compelled to prove, after half-a-century of wedlock by eye-witness evidence that they were validly married fifty years earlier, few will succeed. A strong presumption arises in favor of wed-lock where the partners have lived together for a long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies on him who seeks to deprive the relationship of its legal origin. Law leans in favour of legitimacy and frowns upon bastardy.” The Supreme Court reiterated the *Badri Prasad v. Deputy Director Consolidation*,<sup>48</sup> in *SPS Balasubramanian v. Suruttayan*,<sup>49</sup> and observed that there will be a presumption in favour of marriage of a man and a woman who have had long cohabitation, unless contrary is proved and children born out of such relationship would have a right of inheriting the property of the parents.

In 2006 in *Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel*,<sup>50</sup> it was observed by the Apex Court that people living in a live-in relationship without marriage are not criminals. In *Lata Singh v. State of Uttar Pradesh*,<sup>51</sup> it was held although live-in relationship is not morally accepted, but such relationship between two consenting adults of opposite sex, does not amount to any offence under the law.

In *Madan Mohan Singh v. Rajni Kant*,<sup>52</sup> the Court held that, there is a presumption of marriage if the live-in relationship if continues for long time. A “walk-in and walk-out” relationship cannot be termed as a live-in relationship. Thus, the Court clearly favoured in treating a long-term living relationships as marriage rather than giving it merely a nomenclature of live-in relationship. In another important case, *Khushboo v. Kanaimmal and another*,<sup>53</sup> the Supreme Court observed though live-in relationship is considered immoral by the society, but it is definitely not illegal in the eyes of the law. Living together with a person of one’s own choice is a part of fundamental right to life,<sup>54</sup> and therefore it cannot be held illegal. Justice A.K.

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<sup>47</sup> AIR 1978 SC 1557

<sup>48</sup> *Ibid.*

<sup>49</sup> AIR 1992 SC 756

<sup>50</sup> (2006) 8 SCC 726.

<sup>51</sup> AIR 2006 SC 2522

<sup>52</sup> (2010) 9 SCC 209.

<sup>53</sup> (2010) 5 SCC 600

<sup>54</sup> Article 21, *The Constitution of India, 1950.*





Ganguly in the case of *Revanasiddappa v. Mallikarjun*,<sup>55</sup> stated that “With changing social norms of legitimacy in every society, including ours, what was illegitimate in the past may be legitimate today.” In *Chanmuniya v. Chanmuniya Kumar Singh Kushwaha*,<sup>56</sup> the Supreme Court held that in the light of Section 26 of the Protection of Women from Domestic Violence Act, 2005, a woman of a live-in relationship is entitled to the same rights and claims that are available to a legally married woman under Section 125, the Code of Criminal Procedure, 1973.

In the landmark judgment of *Indra Sarma v. V.K.V.Sarma*,<sup>57</sup> the Apex Court held that though live-in relationship is neither a crime nor a sin but it is socially unacceptable and regarded as immoral and opposed to religious policies. Though still there is no legal clarity law about the status of such relationship yet certain rights have been granted by interpreting and amending the existing laws to prevent the misuse of such relationships by the partners<sup>58</sup>, like protection from domestic violence,<sup>59</sup> maintenance,<sup>60</sup> and legitimacy of children.<sup>61</sup> Justice M.Y. Eqbal and Justice Amitava Roy in the landmark judgment of *Dhannulal v. Ganeshram*,<sup>62</sup> held that the couples in live-in relationship will be presumed to be legally married and the woman in such relationship will have a right of inheritance over the property of her partner after his death.

Prior to 2018, in case of the domestic cohabitation between a married or unmarried man with a married woman was a criminal offence of “adultery,” under Section 497 of the Indian Penal Code, 1860 under which only a man was punishable. But in September 2018 the Supreme Court of India held the Section to be violative of Article 14 of the Constitution of India in the case of *Joseph Shine v. Union of India*.<sup>63</sup> Hon’ble Justice AK Sikri and Justice Ashok Bhushan in *Nandakumar v. State of Kerala*,<sup>64</sup> held that even if a couple have a right to live together even without marriage even if they are not competent to enter into a valid wedlock.

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<sup>55</sup> (2011) 11 SCC 1

<sup>56</sup> (2011) 1 SCC 141.

<sup>57</sup> (2013) 15 SCC 755

<sup>58</sup> *Supra* note 46.

<sup>59</sup> Section 2(f), *The Protection of Women from Domestic Violence Act, 2005*.

<sup>60</sup> Section 125, *The Code of Criminal Procedure, 1973*.

<sup>61</sup> Section 114, *The Indian Evidence Act, 1872*.

<sup>62</sup> (2015) 12 SCC 301.

<sup>63</sup> 2018 SCC Online 1676.

<sup>64</sup> Criminal Appeal no. 597 of 2018.



#### **4.4 Same Sex Marriages**

Gender identity is the psychological sense and feeling in which a person considers herself or himself as a man or a woman or both or in between or neither. Sexual orientation is a term used to describe one's emotional, romantic or sexual attraction. This orientation may be in any form like attraction towards the opposite gender known as heterosexuality, towards the same gender known as homosexuality, towards both men and women called bisexuality, all genders i.e. pansexual, or neither i.e. asexuality. Hence, homosexuality refers to the enduring pattern of or disposition to experience sexual, affectionate, or romantic attractions towards the people of the same sex.<sup>65</sup> Marriage in India has always been considered as a sacramental union between persons of opposite genders.<sup>66</sup> Although homosexuality is prevalent in India since ancient times, but it has been always considered as immoral and inappropriate in India from its very inception.<sup>67</sup>

The existence of homosexuality in India had been denied by many people on the ground that it is the system prevalent in the developed and industrialized nations. Another set of people who acknowledged it always condemned it and were of the view that it is an individualistic concern which will unnecessarily divert the attention of a developing country like India. It has always been labeled as a disease which requires cure and treatment, as an abnormality which needs correction and a crime to be punished.<sup>68</sup>

During the 19<sup>th</sup> Century under British rule, sexual activity against the order of nature including the consensual homosexual activities was criminalized under Section 377 of the Indian Penal Code, 1860. In 1990s there people started expressing freely their preferences and inclinations towards gender and sexuality.<sup>69</sup> In 1994, the first ever petition was filed in the Delhi

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<sup>65</sup> Ananya Khanna, "Same Sex Marriages in India", *available at*: <https://www.lawctopus.com/academike/same-sex-marriages-in-india/>, visited on May 13, 2019.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> Dhamini Ratnam and Dhruvo Jyoti, "How a 'pink book' paved the way for equal rights for LGBT community" *Hindustan Times* (September 10, 2018), *available at*: <https://www.hindustantimes.com/india-news/how-a-pink-book-paved-the-way-for-equal-rights-for-lgbt-community/story-SihCPYm43Kjj24RvDiHPuO.html>, visited on May 18, 2019.

<sup>69</sup> *Ibid.*



High Court in the case of *AIDS Bhedbhav Virodhi Andolan v. Union of India and others*,<sup>70</sup> against Section 377 of the Indian Penal code, 1860. The petition demanded the declaration of Section 377, the Indian Penal Code, 1860 as unconstitutional as being against Article 21 and Article 14 of the Constitution of India. But the Delhi High Court put the petition at rest and paid no heed to this petition.<sup>71</sup>

The Law Commission 172<sup>nd</sup> Report submitted on March 25, 2000 by the B.P.Jeevan Reddy, the Chairman to Ram Jethmalani, the then Union Law Minister.<sup>72</sup> Thus, even on the recommendation of the Law Commission in its 172<sup>nd</sup> Report to repeal of Section 377, the Indian Penal Code, 1860, it was not repealed.<sup>73</sup>

In 2001, NAZ Foundation, an NGO working on HIV/AIDS and issues related to sexual health filed the first petition in the Delhi High Court against Section 377, the Indian Penal Code, 1860.<sup>74</sup> In 2004, the plea filed by the NAZ Foundation seeking the repeal of Section 377, the Indian Penal Code, 1860 was dismissed by the Delhi High Court on the ground that the Foundation has no locus standi as it is not a matter involving public interest. NAZ Foundation went to the Supreme Court against the dismissal order of the Delhi High Court. The Supreme Court sent the matter back to the Delhi High Court ordering to consider the matter on merits. It was also stated by the Apex Court that the matter is of public interest and NAZ foundation has the standing of filing of the petition.<sup>75</sup>

Finally on July 02, 2009, the case of *Naz Foundation v. Government of NCT of Delhi*,<sup>76</sup> was decided by a bench comprising Chief Justice Ajit Prakash Shah and Justice S. Muralidhar of the Delhi High Court. The Delhi High Court decriminalized homosexual intercourse between the

<sup>70</sup> Civil Writ Petition 1784 OF 1994.

<sup>71</sup> *Supra* note 68.

<sup>72</sup> Dhananjay Mahapatra, "Law Commission had recommended Section 377's deletion 13 yrs ago" *The Times of India* (December 13, 2013), available at: <https://timesofindia.indiatimes.com/india/law-commission-had-recommended-section-377s-deletion-13-yrs-ago/articleshow/27264963.cms>, visited on May 11, 2019.

<sup>73</sup> Law Commission of India, 172<sup>nd</sup> Report on Review of Rape Laws, 2000, available at: <https://lawcommissionofindia.nic.in/rapelaws.htm>, visited on May 11, 2019.

<sup>74</sup> "NAZ Foundation withdraws curative petition against Section 377", available at: [https://www.business-standard.com/article/news-ani/naz-foundation-withdraws-curative-petition-against-section-377-119021100595\\_1.html](https://www.business-standard.com/article/news-ani/naz-foundation-withdraws-curative-petition-against-section-377-119021100595_1.html), visited on May 11, 2019.

<sup>75</sup> Sheela Bhatt, "Gays rights is matter of public interest: SC", available at: <https://us.rediff.com/news/2006/feb/03gay.htm?q=tp&file=.htm>, visited on May 16, 2019.

<sup>76</sup> 160 Delhi Law Times 277.



consenting adults and stated that Section 377 of the Indian Penal Code, 1860 is unconstitutional being violative of right to life and personal liberty<sup>77</sup> and right to equality.<sup>78</sup>

In *Suresh Kumar Koushal v. Naz Foundation*,<sup>79</sup> a two judges bench of the Supreme Court consisting of G. S. Singhvi and S. J. Mukhopadhaya overruled the decision of the Delhi High Court in *NAZ Foundation v. Government of NCT of Delhi*,<sup>80</sup> and held that Section 377, the Indian Penal Code, 1860 it is not unconstitutional.<sup>81</sup> The Supreme Court backed out of this matter and passed it to the Parliament to review the law which considers private sexual activity criminal.<sup>82</sup> Thus, prior to 2018, the sexual relationship between two adults of same-sex constituted the crime of unnatural offence under Section 377 of the Indian Penal Code, 1860.

In 2018, in the case of *Navtej Singh Johar v. Union of India*,<sup>83</sup> a five-judge bench of the Supreme Court overruled its decision in *Suresh Kumar Koushal v. Naz Foundation*.<sup>84</sup> It was unanimously held that Section 377 of the Indian Penal Code, 1860 is unconstitutional to the extent it prohibits the voluntary and consensual sexual activity between adults in private. The Court stated that such a prohibition is violative of the right to live with dignity and right of privacy,<sup>85</sup> freedom of expression<sup>86</sup> and equality<sup>87</sup> of an individual. The verdict of the Apex Court categorizing sexual orientation of a person as a part of fundamental right was found to be a catalytic change by the various activists and members of the LGBT community.<sup>88</sup>

When we talk about fundamental rights, then the right to marry has been recognized as a Fundamental Right under Article 21 through various judicial pronouncements. The Apex Court

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<sup>77</sup> *Supra* note 54.

<sup>78</sup> *Supra* note 54, Article 14.

<sup>79</sup> AIR 2014 SC 563.

<sup>80</sup> *Supra* note 76.

<sup>81</sup> *Navtej Singh Johar v. Union of India: Case Summary and Outcome*, available at: <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/>, visited on May 14, 2019.

<sup>82</sup> Vishnupriya Bhandaram, "Rainbow at end of the tunnel? Curative petition on Section 377, a last legal remedy to toss draconian law out", available at: <https://www.firstpost.com/india/rainbow-at-the-end-of-the-tunnel-curative-petition-on-section-377-a-last-legal-remedy-to-toss-draconian-law-out-2605384.html>, visited on May 12, 2019.

<sup>83</sup> AIR 2018 SC 4321

<sup>84</sup> *Supra* note 79.

<sup>85</sup> *Supra* note 54.

<sup>86</sup> *Supra* note 54, Article 19.

<sup>87</sup> *Supra* note 78.

<sup>88</sup> Section 377: Supreme Court to begin hearing petitions against criminalising homosexuality today, available at: <https://www.firstpost.com/india/section-377-scs-five-judge-constitution-bench-to-begin-hearing-petitions-against-criminalising-homosexuality-tomorrow-4694431.html>, visited on May 12, 2019.



in *Shakti Vahini v. Union of India*,<sup>89</sup> laid down that *two adults have right to choose each other as their life partners with full and free consent, and their right will be protected under Articles 19 and 21 of the Constitution of India*. In *Justice K.S. Puttaswamy (retired) and another v. Union of India and others*,<sup>90</sup> nine judges Constitution Bench of the Supreme Court held that the right to choose a partner is an integral part of the Article 21 of the Constitution of India, irrespective of caste, creed or religion. The Court further held that right to *privacy*<sup>91</sup> *includes the preservation of one's personal intimacies, sexual orientation, sanctity of family life, marriage, and procreation of children, and even the right to live alone*. In *Shafin Jahan v. Asokan K.M. and others*,<sup>92</sup> the Supreme Court referred Article 16 of the Universal Declaration of Human Rights and *Justice KS Puttaswamy (retired) and another v. Union of India and others*.<sup>93</sup> And it was held by the majority that the **right to marry a person of one's own choice is integral to Article 21 of the Indian Constitution**.

Now, the Indian Government has legally recognized the same-sex relationships. But the question which arises is whether the right to marry which is a fundamental right of every person as it is clear from the above judgments, is also available to the same-sex couples? This question came up before the Madras High Court, in the case of *Arun Kumar @ others v. The Inspector General of Registration & Others*,<sup>94</sup> in petition filed by Arun kumar and Sreeja, a transwoman who got married, on October 31, 2018 as per Hindu rites and customs. Their application for the registration of marriage was dismissed by the Joint Registrar. The petitioners challenged the decision of the Joint Registrar before the District Registrar *vide* proceedings dated November 16, 2018. The District Registrar also confirmed the dismissal order by Joint Registrar's decision on December 28, 2018. The parties went a step further and challenged the decision of the Registrar for marriages before the Madras High Court.<sup>95</sup>

<sup>89</sup> Writ Petition (Civil) No.231 of 2010.

<sup>90</sup> (2017) 10 SCC 1.

<sup>91</sup> *Supra* note 54.

<sup>92</sup> Criminal Appeal No. 366 of 2018.

<sup>93</sup> *Supra* note 90.

<sup>94</sup> W.P. (MD) NO. 4125 OF 2019.

<sup>95</sup> *Ibid*.



The Madras High Court in conferred validity upon the marriage solemnized between a Hindu male and a Hindu transwoman under Section 5 of the Hindu Marriage Act, 1955 and the Registrar of Marriages was also directed to register the same.<sup>96</sup> The Court stated that right to marry under Article 21 of the Constitution of India is also available to the transgender persons. It was also held that ‘bride’ under the Hindu Marriage Act, 1988 would cover a transgender person who identifies herself as a woman.<sup>97</sup>

## **Conclusion**

Marriage forms the basis of every society and it is the source of every relationship which a person develops in the society either directly or indirectly. Marriage gives psychological, economic and social support to a person which ultimately leads to a good mental and physical health. But with the advancement of the society in the name of industrialization and modernization the trends like live-in relationships and same-sex relationships have evolved. These recent trends seriously hit the basic thread of the institution of marriage, leading to various problems and issues like maintenance rights, adoption, inheritance, etc.. Such issues have been given a proper legal framework in case of a legally married couple, but are a setback in relation to the rights and obligations in case of live-in relationships and same-sex marriages. The live-in relationships are somehow taking the human race back to the system of promiscuity from where we started our journey of the concept of marriage. Although there is no scientific evidence to show that the same-sex couples or couples in live in relationships lack physical and mental satisfaction and stability. But inspite of getting legal recognition, these relationships do not fit to fall into the definition of marriage. Instead of using the word ‘marriage’ in case of same-sex couples, it is better to use the trend of a few foreign nations that have given the nomenclature of ‘civil unions’ or ‘civil partnership’ to such couples. There is no personal law in India which gives legal recognition to same-sex marriages, so instead of covering these relationships under

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<sup>96</sup> Devika, “Madras High Court I Transgender Female is a “Bride” under the Hindu Marriage Act, no impediment in registration of transgenders marriage”, *available at*: <https://www.sconline.com/blog/post/2019/04/25/madras-hc-transgender-female-is-a-bride-under-hindu-marriage-act-no-impediment-in-registration-of-transgenders-marriage/>, visited on May 14, 2019.

<sup>97</sup> *Ibid.*





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any of the personal law, it is better to have a separate and complete legislation. Till that time so far as is possible, on the basis of human rights, the same-sex couples can be conferred with the same rights of maintenance etc, as that are available to a live-in relationship couple.