

The Changing Contours of Family Law with Special Reference to Revolutionary Judgments: A Critical Thinking Towards the Future Family

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Abstract— India was fabulous for having family system, family values and family culture. ‘Family’ is sine qua non because the family provides love, affection, care, support and one can share his ‘joys and sorrows’ with others in the family. The family supports and serves one another sans expectation. By family, one can get safety, identity and values. The conventional definition of ‘family’ was consisting of grandparents, parents and their children. But in modern times, the definition of ‘family’ was abridged to include only the father, mother and their children. Now, again due to the technological improvement, life style has been changed and the definition of ‘family’ has also been changed in the name of live in relationship. This relationship, according to the catena of judicial decision is nothing but a “walk in and walk out” relationship. The relationship was no doubt, between a male and a female for considerable period of time and no question of kids and other relations like parents and grandparents arose in such relationship for the reasons to be discussed in this paper. By this relationship, the definition of ‘family’ was restricted only between “a man and a woman”. At last, in the age which we are living and due to the revolutionary pronouncements by the Constitutional Courts, the existing definition of ‘family’ becomes

somewhat open and inclusive. Under this open and inclusive definition, the ‘family’ might be consisting of any two parents irrespective of the gender, whether married or not. Therefore, in this paper, the authors attempt to inter alia analyse the impact of the recent judicial pronouncement on the definition of ‘family’ and also going to argue as to the nature of the changing trends of family and their impact on the society since the society depends on the family. Lastly, the authors try to suggest the remedial measures towards the effective protection of the future family and the society.

Keywords— Changing Contours, Family Law, Future of Family, Judicial Pronouncement, Live in Relationship, Same Sex Marriage - and the Society.

I. INTRODUCTION

Meaning of Family

‘Family’ means, according to Cambridge Dictionary, a group of people who are related to each other, such as mother, father and their children¹. ‘Family’ means “the basic unit in society traditionally

¹.Dictionary.cambridge.org/dictionary/English/family.

consisting of two parents rearing their children”². A group of individuals living under one roof and usually under one head is called as family. According to Burgess and Locke, “family is a social group of persons united by the ties of marriage, blood or adoption; consisting of single household, interacting and intercommunicating with each other in their respective social roles of husband and wife; mother and father; son and daughter; brother and sister creating common culture”. G.P. Murdock defines “The family as a social group characterized by common residence, economic cooperation and reproduction”³. Malinowski opined that “Family is the institution within which the cultural tradition of a society is handed over to a newer generation”⁴. The relationship among the members of the family is based on the consanguinity, marriage or adoption.

II. SINE – QUA – NON OF ‘FAMILY’

Family being a biological unit regularizing the sexual relationship plays a pivotal role in the society. According to Confucius, if you want to improve the society, improve the family. To build a strong society, we need a family because the family is the foundation for a strong society. If a society is strong, then the nation will be strong. If the family collapses, then the society will be collapsed and lastly the entire nation will also be collapsed.

² Merriam-webster.com/dictionary/family.

³ Sociologyguide.com/marriage-family-kinship/family.php. Last accessed on 25.11.2019.

⁴ Sociologyguide.com/marriage-family-kinship/family.php. Last accessed on 25.11.2019.

Therefore, to build a strong nation, a meaningful family as defined earlier is essential. No doubt, in the family, the sex is institutionalized and the sexual satisfaction and the harmony are promoted. Mating relationship through the institution of marriage, procreation and legalizing children and having distinct identifiable name for the family....are some of the important features of the family. But in the modern era, the life style has changed and the basic unit of the society itself is receiving major attacks and shocks in the name of live in relationship and same sex by the modern development causing its decompose.

III. TYPES OF FAMILIES

The families in India are classified into the following categories: Matriarchal Family⁵, Patriarchal family⁶, Joint family and Nuclear family, etc. In this paper, since we are all, in the present era, familiar with the Joint family and the nuclear family system, the authors intend to discuss the joint family and the nuclear family alone as the paper pertains to future of the family.

IV. JOINT FAMILY

According to family law, A Joint family consisting of all males or females lineally descended from a common ancestor and will include their wives or husbands and unmarried daughters. Joint family is

⁵ This type of family is popularly known as mother centered or dominated family. Mother or the women is the head of the family, she manages the property and exercises the authority. After the marriage, the woman stays back in her mother’s home. The descent is traced through the mother. Etc, are the features of the Matriarchal Family.

⁶ Vice versa of the Matriarchal Family is the Patriarchal family.

a family in which parents and their male children with their families including the unmarried daughters live together and are considered as a single unit. Joint family means “a family of which the members live together, have a common mess and are descendants from a common ancestor and shall include wives or husbands, as the case may, of its members, but shall exclude married daughters and their children”⁷. Joint family is an extension of a nuclear family. In other words, Joint family means “a group or unit the members of which by custom or usage are joint in estate or residence”⁸. In olden days, in the joint family, the children were under the care of the elder and the elders taught the children, the family and traditional values, norms and culture along with the love and affections. They narrated the stories which were ethically, morally and legally importance in their life and the children were grown accordingly with high moral values standards and sentiments. But in due course of time, the joint family system shifted and transferred as a nuclear family system for the reasons best known to them. No doubt, each and every family system having their own pros and cons. The joint family system also have had some disadvantages like denial of women employment, all the male members are under the control of the one common ancestor and the male members’ remuneration are stocked and pooled in or with the common ancestor. Therefore, they shifted and prepared to form a single unit family popularly called “Nuclear Family”.

⁷Section 2 (27) of the Manipur Municipalities Act, 1994.

⁸ Section 2 (17) Karnataka Land Reforms Act, 1961.

V. WHAT IS A ‘NUCLEAR FAMILY’?

Nuclear family is a kind of family that includes two married person of opposite sexes and their biological or adopted children in the same roof. According to your dictionary, nuclear family is defined as parents and their minor children who are living under one household. Under this system also, the very object of the marriage is begetting children for their parental satisfaction. In this system, both the parents went for employment and earned for their livelihood and they lived for them and their children. They completely enjoyed their freedoms and ultimately they started to neglect their parents and in some cases they ventured to admit their parents in old age homes forgetting that one day they will also become as age old parents and the old age home will be waiting for their arrival. As we already discussed, under this system, the children are, in some cases, are brought out by the maiden servants or the children are admitted in crèches since both the parents are in outside due to their employment⁹. Their children lost the love of parents and were longing for their love but lastly the expectations of the children went in vain. Ultimately, they frustrated and adopted a changing definition of a nuclear family.

⁹ In most of the cases, the parents are not living in same roof. They are giving more importance only to their employment and eager to earn money in their lifetime and forget about their remaining life. The think to be remembered here is, money is not the life, but the money is essential to live the life. Both should be balanced to lead, not a sophisticated life, a normal standard life with their children and parents. Children should get opportunities to meet and grow with their grandparents.

VI. CHANGING DEFINITION OF A 'NUCLEAR FAMILY'

With the advent of technology and in the modern technological era, the definition of a nuclear family has been considerably changed and the present generation instead of living in same roof in a permanent form, adopted a temporary recourse in the name of "live in relationship" or "walk in and walk out relationship" without thinking about the future generation or the society. The conservative method of marriage is becoming failure in recent past. One of the reasons for adopting the live in relationship is responsible for oneself. The rest of the reasons are (i) financial freedom (ii) no societal obligation (iii) identity crises free (iv) independent (v) smooth breaks up (vi) no commitment hassle¹⁰, (vii) failure of marriages whether arranged or love marriage, (viii) higher studies, (ix) global world¹¹, (x) freedom to walkout without the stamp of divorce. All the above are some of the examples as to why the people preferred the live in relationship.

VI. LIVE IN RELATIONSHIP VIS A VIS THE LAW

According to various sources, though the above are the advantageous of the live in relationship the question arose as to whether a live in relationship would amount to "relationship in the nature

¹⁰ Kirti Sinha, 10 reasons why live in relationship is better than marriage, updated on 2nd September, 2019 available at topyaps.com/live-in-relationships/ last accessed on 26.11.2019.

¹¹ What is the reason behind the increasing live in relationship in India?, see qries.com, last accessed on 26.11.2019.

of marriage¹²," falling within the definition of domestic relationship under section 2 (f) of the Protection of Women from Domestic Violence Act, 2005 and the disruption of such a relationship by failure to maintain a women involved in such relationship amounts to domestic violence under Section 3 of the Domestic Violence Act, 2005 (Hereafter the DV Act).

No doubt, live in relationship is purely an arrangement between the parties unlike a legal marriage and once a party to a live in relationship determines that he/she does not want to live in such a relationship, that relationship comes to an end¹³. In **Indra Sharma Vs K.V Sharma**¹⁴, the Apex Court held that "Domestic Violence Act, 2005 Act does not recognize such a relationship and that relationship cannot be termed as a relationship in the nature of marriage under the Act". From the above, it is crystal clear that live in relationship has not been socially and legally accepted in India. Further, the Apex Court in the same case reiterated that "though Section 2(f) of the DV Act uses the expression "two persons", the expression "aggrieved person" under Section 2(a) takes in only "woman", hence, the Act does not recognize the relationship of same sex (gay or lesbian) and, hence, any act, omission, commission or

¹² "Relationship in the nature of marriage means "a relationship which has some inherent or essential features or characteristics of a marriage though not a legally recognized marriage". Both the "marriage" and "relationship in the nature of marriage" are significantly differs in many aspects. For details see *Indra Sharma Vs K.V Sharma* 2014 (1) RCR (CrI) 179 (SC), Para 36.

¹³ *Indra Sharma Vs K.V Sharma* 2014 (1) RCR (CrI) 179 (SC).

¹⁴ 2014 (1) RCR (CrI) 179 (SC).

conduct of any of the parties, would not lead to domestic violence, entitling any relief under the DV Act”.

In **Lata Singh v. State of U.P**¹⁵, The Apex Court observed that “a live-in relationship between two consenting adults of heterosexual sex does not amount to any offence even though it may be perceived as immoral.” However, “in order to provide a remedy in Civil Law for protection of women, from being victims of such relationship, and to prevent the occurrence of domestic violence in the society, first time in India, the DV Act has been enacted to cover the couple having relationship in the nature of marriage, persons related by consanguinity, marriages etc¹⁶.”

But, here the thing is if the woman who wants to claim anything legally from her male spouse, she has to prove and establish the conditions which are laid down in **D. Velusamy Vs. Patchaiammal**¹⁷. Once the conditions¹⁸ laid down are established, then the woman will legally be entitled to claim the legal status which is akin to the common law marriage. Therefore, though the relationship is started as live in relationship¹⁹, if it continues for a

¹⁵ AIR 2006 SC 2522.

¹⁶ “We have some other legislation where reliefs have been provided to woman placed in certain vulnerable situations”.

¹⁷ 2010 RCR (CrI) 746 (SC)

¹⁸ The conditions are (i) The couple must hold themselves out to society as being akin to spouse, (ii) they must be of legal age to marry, (iii) they must be otherwise qualified to enter into a legal marriage, including being unmarried, and (iv) they must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

¹⁹ Not all live in relationship will amount to a relationship in the nature of marriage to

considerable period of time, then the relationship will be considered as “relationship in the nature of marriage which is akin to the common law marriage and the male spouse and his family members will be subjected to the DV Act, 2005²⁰”.

Realizing the risk of live in relationship which knowingly or unknowingly become as relationship in the nature of marriage which is akin to the Common law marriage, the people now adopted a new recourse in name of same sex marriage otherwise called as “LGBT Community”, in which no liability or responsibility have been attributed against the other party²¹.

VIII. SAME SEX MARRIAGE: A GLANCE

The recent judicial pronouncement paved a way for same sex marriages and one step ahead the SC ruled that adultery is also not a crime. In **Navtej Singh Johar & Ors Vs Union of India**²², the Supreme Court of India partially struck down the 150 years colonial provision of Section 377 of Indian Penal Code as unconstitutional in so far as it penalizes any consensual sexual relationship between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) or lesbians (woman and a woman)²³. The Constitutional Court

get benefit or protection under the DV Act, 2005.

²⁰“Continuous cohabitation of man and woman as husband and wife may raise the presumption of marriage” - Gokal Chand v. Parvin Kumari AIR 1952 SC 231.

²¹ Indra Sharma Vs K.V Sharma 2014 (1) RCR (CrI) 179 (SC).

²² 2018 (10) SCC 1.

²³ However, if anyone (both a man and a woman) engages in any kind of sexual activity with an animal, then it is an offence under Section 377 of IPC.

for striking down the provision held that “Consensual carnal intercourse among adults, be it homosexual or heterosexual, in private space, does not in any way harm the public decency or morality”. Further, the Court ruled that “Section 377 IPC subjects the LGBT community to societal pariah and dereliction and is, therefore, manifestly arbitrary, for it has become an odious weapon for the harassment of the LGBT community by subjecting them to discrimination and unequal treatment”. “Under the autonomy principle, the Court further asserted that the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice²⁴”. We, the author agree with the view that “Part III of the Constitution as well as the intention of the framers of our Constitution mandates that the Courts must step in whenever there is a violation of the fundamental rights, even if the right/s of a single individual is/are in peril.” At the same time, we disagree with the view or reasoning given for the transformative constitutionalism. The transformative constitutionalism must be in consonance with the progressive of the society. The transformative constitutionalism should not lead to the destruction of the normative society.

According to our analysis, whether, the Navtej Singh Johar²⁵ judgment is applicable to LGBT

²⁴ In *Joseph Shine Vs Union of India*, the Supreme Court held that “The State must follow the minimalist approach in the criminalization of offences, keeping in view the respect for the autonomy of the individual to make his/her personal choices”.

²⁵ 2018 (10) SCC 1.

Community alone or to the entire community at large who are willing to have same sex intercourse? If the judgment is applicable to the whole of the community at large, we pose the question to the readers whether, under the autonomy principle²⁶, the prostitutions can be legalized in India since the prostitutions are also taken place in private space, which does not in any way harm the public decency or morality.

In *Joseph shine Vs Union of India*²⁷, the Supreme Court of India, while striking down the provision Section 497 of IPC, inter alia held that “The right to live with dignity includes the right not to be subjected to public censure and punishment by the State except where absolutely necessary. In order to determine what conduct requires State

²⁶ We the authors request the reader of this paper to remember the three land mark judgments regarding the constitutionality of Section 9 of the Hindu Marriage Act, 1955. The same autonomy principle was raised in the year 1983 is itself by actress Sareetha while challenging the validity of Section 9 of the HM Act, 1955. See, *Sareetha Vs T. Venkata Subbaiah* AIR 1983 AP 356. In this case, the AP High Court ruled that “Article 21 of the Indian Constitution protects the right to privacy and promotes the individual dignity mentioned in the preamble to our Constitution. The Court should protect and uphold those important Constitutional rights....” The Justice P.Choudary in this case after referring certain trend in American Law, came to the conclusion that section 9 of the HM Act, 1955 was unconstitutional and void. But the Delhi High Court in *Harvinder Kaur Vs Harmander Singh Choudhry*, AIR 1984 Del. 66, differed in its view and held that Section 9 if Constitutionally valid. Lastly, the conflict was settled down by the Supreme Court in *Saroj Rani v Sudarshan Kumar Chadha*, AIR 1984 SC 1562. Wherein, the Supreme Court held the proposition that Section 9 serves a social purpose as an aid to the prevention of breakup of marriage.

²⁷ 2018 SCC Online SC 1676.

interference through criminal sanction; the State must consider whether the civil remedy will serve the purpose. Where a civil remedy for a wrongful act is sufficient, it may not warrant criminal sanction by the State". The Court further enunciated the principle that "In protecting consensual intimacies, the Constitution adopts a simple principle: the state has no business to intrude into these personal matters. In so far as two individuals engage in acts based on consent, the law cannot intervene. Any intrusion in this private sphere would amount to deprivation of autonomy and sexual agency, which every individual is imbued with." Further, the Court observed that "If the act of adultery is treated as an offence and punishment is provided, it would tantamount to punishing people who are unhappy in marital relationships".

Here the question arose, simply because the married man or women are unhappy in their matrimonial life, can they be allowed to have sexual intercourse outside the wedlock with another man's wife or another woman's husband as the case may be? Or does such sexual urge not affect another man's family life when the sexual intercourse taken place between the married person and the unmarried boy or girl? Does it not affect the others happiness or other's family life particularly, the other spouse of the adulterer or adulteresses in their marital bond? Would it be right to say that the State has no business to intrude into these personal matters?

IX. APPROACH OF JUDICIARY FROM PAST TO PRESENT TOWARDS THE FUTURE FAMILY OR THE SOCIETY: AN ANALYSIS

Once upon a time the judiciary was giving importance to protect the institution of marriage and ruled that the individual desire was subjected to the interest of society. For example, In **Harvinder Kaur Vs Harmander Singh Choudhry**²⁸, while sustaining the institution of marriage, it observed that "Marriage is the most solemn engagement which one human being can contract with another. It is contract formed with a view not only to the benefit of the parties themselves, but to the benefit of the third parties, to the benefit of the common offspring, and to the moral order of the civilized society." No doubt, marriage is an institution which saves us from the tyranny of sex and also for the progression of the human race. This is the status of the institution of marriage. The institution cannot be degraded. The institution cannot be denounced and it is the duty and obligation of every generation to try and sustain the institution. Even for entering into marriage, so as to sustain the institution of marriage, justice Dipak Misra observed that "Do not take a marriage for granted. There has to be an effort, there has to be an endeavor; there has to be a constant attempt to sustain it. The moment the people take marriage for granted, there is a disaster²⁹". The above

²⁸ AIR 1984 Del. 66.

²⁹ Taken from compilation landmarks judgments of High Courts of India on family matters, Year of Publication 2016, Compiled by Jharkhand State Legal Services Authority. See also, A. Nirmal Singh Heera & N. Prabhavathi, Marriage & Divorce

piecemeal observations of the Constitutional Courts reflect the importance of the society and the institution of the marriage. But in the recent past, the differential interpretation by the Constitutional Courts, in the name of fundamental rights, autonomy principle, changing criminal jurisprudence and the transformative constitutionalism, are slowly and gradually forgetting the importance of the family in the society and the nation. The Constitutional Courts while giving much importance to the reflection in the individual's mind, failed to think about the future of the society and the nation. Social morality is very important rather than the Constitutional morality³⁰. To sustain the view, the authors raise the following questions.

Simply because two adults (same sex) having an interest to have sex, can the Court allow them to have sex? If answer to the question is in affirmative, as we already discussed, Can the Court allow the male and the female, by consent, to have sex according to their wishes? Is it not the duty of the court to protect our long cherished culture?

The next question is whether right to have carnal/sexual

intercourse is absolute or subjected to certain conditions/morality?

If two consenting male after having sex, has any choice to choose another male to have another sex and so on....? What is the number of limitation to choose male to have sex with men? Whether monogamy in this sex would be followed? Or the concept of monogamy is applicable only for marriage? In case, if one of the adult consenting party neglects other party after having sex for a long period, can the affected party approach the Court for remedy to have the sex with same adult party? In **Obergefell Vs. Hodges**, on 26th June 2015, the 5-4 of the U.S Supreme Court by a majority, in its 103 pages Judgment has ruled that "same-sex couples have the constitutional right to marry". Justice Anthonny Kennedy while writing in the majority opinion opined that "The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty," However, Chief Justice Roberts called the majority decision "an act of will, not legal judgment." "The fundamental right to marry does not include a right to make a State change its definition of marriage," Roberts has written in his dissenting Judgment. Justice Antonin Scalia also in his dissenting opinion said that "the majority opinion represents a threat to American democracy by a majority"

Laws (Including Adoption, Maintenance, Minority and Guardianship) along with the Prohibition of Child Marriage Act, 2006, 1st Edi, 2017, Yazhini Pub, Cuddalore, P.24.

³⁰ Reference may be taken from Article 25 (1) of the Indian Constitution. The Constitutional forefathers do not think that the people in future might have such sexual orientation with the same sex. If they were able to foreseen such sexual orientation or physical urge against the order of the nature with same sex, then they might have drafted Article 21 in a different manner limiting the rights subject to common decency, morality and dignity.

X. TRAVELLING OF MARRIAGE TOWARDS THE FUTURE

From the above analysis, it is categorically clear that the concept of right to privacy, principles of autonomy, changing criminal jurisprudence and the transformative constitutionalism are playing the pivotal role in determining the future of the society. It is to be borne in mind that Article 21 is not absolute one and it is subjected to certain reasonable restrictions. If the above interpretation continues, then the concept of marriage and monogamy principles would be defeated. Apart from that, the concept of divorce would become as null and void and soon the divorce provision in the relevant Personal Laws would be challenged and would be declared as unconstitutional and ultimately, we would reach the concept of “**no marriage and no family**” and only sexual intercourse would take place between the individuals either in homo or in heterosexual form. The changing jurisprudence, transformative constitutionalism and the autonomy principles should pave way for the progress of the individual as well as the family, society and the nation rather than reflecting the sexual desires of the individual in the society.

XI. CONCLUSION AND SUGGESTIONS

From the above discussion and analysis, it is categorically clear that none of the judgments analysed above have discussed the impact of the changing dimensions on the society. According to the annual report of the National Aids Control

Organisation 2014-2015³¹, among some other groups, Men who have sex with men (MSM) are highly infected by HIV Infection. It says, while adult HIV prevalence among the general population is 0.36 percent, while it is 5.69 percent and 5.38 percent among Men who have Sex with Men (MSM) and Female Sex Workers (FSWs), respectively³². Therefore, in the interest of protecting the society as well as the nation, we the authors recommend the following suggestions:

- (i) The concept of “legitimate interest of the state” has to be widened even in protecting the society’s interest, i.e, in protecting the matrimonial life. Simply because adultery is immoral, it should not be encouraged. It should be eradicated nib in the bud, since it affects the institution of marriage which is essential for the procreation of children and for the development of the society. The concept of “legitimate interest of the state” should not be confined to physical or mental abuse in matrimonial life or anti dowry legislation, eve teasing and harassment legislation.
- (ii) Section 497 of IPC has to be redrafted in accordance with drawback set out in the **Joseph Shine** Judgment. We accordingly recommend that the nullified Section 497 may be revised as follows without giving any room for gender discrimination³³.

³¹.http://naco.gov.in/NACO/Quick_Links/Publication/Annual_Report/.

³².http://naco.gov.in/NACO/Quick_Links/HI_V_Data/

³³.R.F Nariman J, in his concurring judgment does not accepted that the ostensible object of Section 497, as pleaded by the State, being to protect and preserve the sanctity of marriage for the reasons mentioned in the nullified Section itself.

“497. Adultery.- If any man or woman has sexual intercourse with a woman or man who is, and whom he or she knows or reason to believe to be the wife or husband of another man or woman, with or without the consent of the existing spouse, such sexual intercourse not amounting to the offence of rape, the man and the woman are guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

- (iii) The sexual desire of the LGBT Communities may be streamlined by appropriate legislation or by way of judicial guidelines until the legislation is passed considering the future of the society.
- (iv) **Navtej Singh Johar** and **Joseph Shine** judgments mentioned supra may be reconsidered or revisited taking into account the future of the family, society and the nation since India is well known for its culture and its custom and the court may adopt the principles of reformatory constitutionalism rather than the transformative constitutionalism.

Therefore, we the authors recommended the section to be redrafted as mentioned herein after.