

NATIONAL LEGISLATION DRAFTING COMPETITION, 2018

Concept Note

THE UNIFORM CIVIL CODE AMENDMENT BILL, 2018

Homosexuality is a part and parcel of Indian culture from time immemorial and has recently become a subject of public debate. A reference to homosexuality is no more a hidden concept, but is sufficiently visible and is gradually being acknowledged despite having an ancient history, by both Indian civil society and the state. One is not gay or lesbian by choice, but by birth. Hence it is necessary that they are not ostracized by the society and are treated as equals and have a right to marriage and have a family. Accordingly, it requires a legislation to clearly demarcate the rights of both parties in a marriage, their obligations and liabilities with respect to guardianship, adoption and maintenance.

The plight of transgender and homosexuals has been addressed and debated about, but no law has come into force to protect their interest. As far as same sex marriage is concerned, until today, it is a criminal offence for two consenting adult gay, bisexual and transgender persons to have sex in India. Lesbian women are not criminalized under Sec. 377 as it criminalizes only 'penile non-vaginal sex'. However, lesbian women are frequently persecuted and prosecuted under false cases of kidnapping and/or theft offences, when partners elope. A gay, bisexual or trans person solemnizing a same-sex marriage in India may be interpreted as 'intending' to violate the law under Sec. 377, as 'consummation of marriage' by sexual relations is intrinsic to a marriage, as per both social and legal norms.

There requires a Uniform Civil Code would ensure 'equal rights in marriage, divorce, child custody, guardianship, inheritance and succession, irrespective of their gender, sex and sexuality, religious or cultural traditions or beliefs'. Further, 'sexual orientation of a married couple or a couple living in a partnership will not be a bar to their right to adopt a child'.

The scenario calls for immediate need in legislation which includes rules on marriage, divorce, child custody and inheritance 'in line with globally accepted values of human rights'. Personal laws on marriage, divorce, child custody and inheritance are 'not always equitable and fair and

do discriminate on the grounds of sex, gender and sexuality'. The draft code has proposed rules on these issues 'in line with globally accepted values of human rights'.

Following are some of the recommendations in the draft proposal for the Uniform Civil Code:

- The sexual orientation of a married couple or a couple living in a partnership will not be a bar to their right to adopt a child.
- No non-judicial decree on divorce will have any effect on a couple wanting to leave a marriage through legal means.
- While determining the best interest of a child in case of divorce, the religion or sexual orientation of a parent must not be relevant.
- Every child, whether adopted or biological, will have equal share in a deceased parent's property, irrespective of gender, religion or sexual orientation.
- If this code comes into effect, the concept of Hindu Undivided Family will cease to legally exist, and all properties held by such families will be considered divided equally among those involved.
- All other personal laws shall be repealed.

A new Uniform Civil Code must be adopted which defines marriage as "the legal union as prescribed under this Act of a man with a woman, a man with another man, a woman with another woman a transgender with another transgender or a transgender with a man or a woman. All married couples in partnership entitled to adopt a child. Sexual orientation of the married couple or the partners should not to be a bar to their right to adoption. Non-heterosexual couples will be equally entitled to adopt a child".

It has been observed by the US Supreme Court in the landmark judgment of Obergefell vs. Hodges 576 US 2015, 'The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of covertures, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. These new insights have strengthened, not weakened, the institution.

Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.

The right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why Loving invalidated interracial marriage bans under the Due Process Clause. Decisions about marriage are among the most intimate that an individual can make. This is true for all persons, whatever their sexual orientation. Further, the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.

The basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.’ This judgment legalized same sex marriage throughout the United States of America.

The Supreme Court decision in National Legal Services Authority (NALSA) v. Union of India (2014), which requires Central and State governments to amend laws to provide ‘right to marry’ for transgender persons, among other rights.