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CONSTITUTIONAL FRAMEWORK FOR PROTECTION AND RECOGNITION OF RELATIONS IN THE NATURE OF MARRIAGE

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***Abstract*-- The issue dealt with in the present research paper deals with the human rights based on constitutional provisions with respect to woman living in relations in the nature of marriage, though not married in strict legal sense. Factum of marriage in strict sense may not be legal established due to various reasons, *viz.*, for the lack of marriageable age, capacity, consanguinity, legality, already having spouse etc. Question therefore would arise as to whether in such cases, merely because the marriage between the parties is not established in the eyes of law in strict legal sense, would it be appropriate on the canvas of Indian Constitution to deny right to livelihood, that is maintenance etc., to such aggrieved woman as a human rights issue? The research paper ultimately finds that the issue needs serious analysis and debate. After all, prerequisite qualifications for becoming entitled to avail "human rights" one has to satisfy the only test "to be human" indeed, and nothing more!**

Key words: Live-in relations; extra-marital relations; extra-marital affairs; right to life; right to livelihood; human rights; transgender; surrogacy; maintenance; subsistence allowance.

RESEARCH QUESTION

Whether a woman living in relations in the nature of marriage would have legal rights or status, with reference to subsistence, palimony, right to residence with custody and maintenance of children born out of such relationship?

INTRODUCTION

Till date, women have been in a way controlled by and dependent upon man from various perspectives, be it the societal or even the very family of the woman. This is not prevalent just in India but has been witnessed globally throughout centuries. Even after expiry of good amount of time during which a woman may have lived with a male partner and yet not able to prove the factum of marriage for various reasons is often asked in courts of law to prove solemnization of marriage. For the want of evidence, woman may not be able to prove marriage and suffer consequences.

Likewise, there may be cases where either woman is having her husband living with whom she may not have taken divorce technically, or else, the male partner may be having a wife living with or without children. A question would, therefore, necessarily arise as to whether such woman, though not married *stricto sensu*, but is dependent on her male partner for her bare living would in law, or in equity, be entitled to have a legal recourse to her grievances, particularly in the light of recent legislative attempt to include grievances based on "relations in the nature of

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marriage" by virtue of enactment of Domestic Violence Act.[1] Necessary corollary thereto would be a question as to what would be legal rights, duties and obligations of parties living in extra-marital or live-in relations in the present legal set-up; and if none, what it ought to be on the touchstone of principle of equity.

This profoundly is a serious question having multifarious dimensions, not only legal but social and political as well. A destitute woman in such circumstances necessarily requires humanitarian approach for the reason of she being a human species. On the other hand, it would be equally essential to weigh the consequences that may fall upon the legal wife and her children, and other dependents of the male partner.

Thereafter, again a question would arise as to the legal position of woman who may be living with the prospective father, or may not be so living, during the currency of surrogacy agreement. Similar would be the position with respect to lesbians, gays, transgenders, and other intersex genders living together for a considerable period of time.

> "*With changing social norms of legitimacy in every society, including ours, what was illegitimate in the past may be legitimate today*."
>
> — Honourable Justice A.K. Ganguly[2]

The expression "domestic relationship", includes not only the relationship of marriage but also a relationship "in the nature of marriage". Unfortunately, this expression has not been defined in the Protection of Women from Domestic Violence Act, 2005. This can be liberally interpreted to cover those relationships where individuals cohabit without getting married. By extension, this right to partake in a non-marital domestic relationship should be extended to both hetero-sexual and homo-sexual relationships, in the researcher's humble view. Therefore, the study shall seek not only constitutional validity for relations in the nature of marriage between persons of opposite sex but also amongst the members of the same gender (as conceived by the aggrieved or the person objecting to the same).

The present paper seeks to explore the constitutional foundation on which non-marital domestic relationships might find a ground to stand on, while attempting to weigh the personal legal rights explicitly conferred to the citizens with social as well as constitutional morality.

2.1 Constitutional Morality

The role of the society is instrumental and cannot be neglected as they dictate the terms for

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[1] The Protection of Women from Domestic Violence Act, 2005.

[2] *Revanasiddappa* v. *Mallikarjun*, Civil Appeal arising out of SLP No. 12639 of 2009, dated 31-03-2011, Supreme Court.

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regulation of social and personal relationships. The domain of non-marital relationships as well as sexuality is policed not so much by the State in India but by the *Samaj*.[3] The topic of 'immoral nature of relations other than marriage' have long been looked down upon and prejudiced by the society. The issue gets magnified when the law drafted to protect individuals against discrimination sets out to outcast and suppresses the desires of two consenting individuals to cohabit without intending to get married.

For instance, High Court of Punjab and Haryana[4] recently refused to grant protection to a live-in couple who apprehended harassment by their families, clearly going against the view of the Hon'ble Supreme Court. Briefly, the court held that live-in relationships are not morally and socially acceptable and that granting of protection to such couples would disturb the entire social fabric of the nation. This is to be condemned and is contemptuous in the wake of the dictum of the Supreme Court.[5]

Live-in relationships exist in Indian society and have inevitably found their way to the courts. In the case of *Indra Sarma* v *V.K.V Sarma*[6] the Supreme Court dealt with the issue of whether a woman involved in a failed live-in relationship would be entitled to benefits as if it was a relationship akin to marriage. In its judgment, the Supreme Court observed that while live-in relationships are not socially acceptable in India, they are neither a sin, nor a crime, thus affirming that there is no procedure established by law which bars relationships of this nature. The Supreme Court laid down the criterion for judging whether a live-in relationship would fall in a relationship similar to marriage or not.

Influenced by societal norms, in the judgment of *Naz foundation*[7] the Apex Court overruled the judgment of the Delhi High Court, thus upholding the constitutional validity of Section 377 of IPC. This widely criticized judgment was finally overruled in *Navtej Singh Johar* v *Union of India*[8] thereby decriminalizing the consensual sex between two adult persons, be they of the same gender or involving a transgender person.

In the case of *Deena* v *Union of India*,[9] the Supreme Court emphasized that the law is dynamic

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3 A Hindi word, meaning "society".

4 Ritika Jain, Punjab & Haryana, *HC To Decide If Live-In Couples Entitled to Protection*, accessed on 25 of may 2021 athttps://www.boomlive.in/law/live-in-relationships-punjab-and-haryana-high-court-13242.

5 *Infra.*

6 JT 2013 (15) SC 70.

7 *Suresh Kumar Koushal* v *Naz Foundation*, (2014) 1 SCC 1.

8 AIR 2018 SC 4321.

9 1983 AIR 1155.

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and its social utility consists in its ability to keep abreast of emerging trends in society and its willingness to readjust its postulates to accommodate those trends. These observations are an important reiteration of the fact that the law changes with time, much like our Constitution is a living and evolving document. It is because of the above that courts are to be guided not simply by morality but constitutional morality.

Constitutional Morality is hardly a new concept. It is written largely in the Constitution itself like in the part that deals with Fundamental Rights (Article 12 to 35), Directive Principle of State Policy (Article 36 to 51), Preamble and Fundamental Duties. In *Lt Governor of Delhi* case,[10] the Supreme Court proclaimed constitutional morality as a governing idea that "*highlights the need to preserve the trust of people in the institution of democracy*". In *Sabarimala* case[11], the Supreme Court bypassed the "doctrine of essentiality" to uphold the Constitutional morality.

The concept of constitutional morality was addressed by the Supreme Court in *Manoj Narula* v *Union of India.*[12] The principle of constitutional morality involves examining the norms or provisions of the constitution and acting in conformity with them, and not violating the rule of law or acting in an arbitrary manner. According to the court, the traditions and conventions have to grow to sustain the value of such morality and people at large, and persons in charge of institutions must strictly be guided by it. The working of the Constitution of India is made for a progressive society and its implementation and working will depend upon the prevailing atmosphere and conditions.

The Supreme Court held that the public's moral opinions cannot be used as a justification for limiting LGBT persons' fundamental rights. The Court observed:

> "Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjective notions of right and wrong. If there is any type of 'morality' that can pass the test of compelling state interest, it must be 'constitutional' morality and not public morality."[13]

This observation was heavily influenced by the judgments passed in:

1. *Gobind* v *State of Madhya Pradesh*[14]
2. *Lawrence* v *Texas*[15]

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10 *Government of NCT of Delhi* v *Union of India* (2018) 8 SCC 501.

11 *Indian Young Lawyers Association* v *State of Kerala* (2019) 11 SCC 1.

12 (2014) 9 SCC 1.

13 *Suresh Kumar Kaushal* v *Naz Foundation*, (2014) 1 SCC 1.

14 (1975) 2 SCC 148.

15 539 U.S. 558 (2003).

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3. *Dudgeon* v *UK*[16]
4. *Norris* v *Republic of Ireland*[17]
5. *National Coalition for Gay and Lesbian Equality* v *Minister of Justice*[18]

It also derived significantly from:

1. the words of Dr. Ambedkar quoting Grotius while moving the Draft Constitution,
2. Granville Austin in his treatise "The Indian Constitution – Cornerstone of A Nation",
3. The Wolfenden Committee Report,
4. 172nd Law Commission of India Report,
5. the address of the Solicitor General of India before United Nations Human Rights Council,
6. the opinion of Justice Michael Kirby, former Judge of the Australian High Court.

This 'constitutional morality' that the Court identifies is based on the liberal democratic ideals that underlie the Indian Constitution, and not on any particular religious or cultural tradition. They derive the concept from Dr. Ambedkar, who in the Constituent Assembly noted, *'constitutional morality is not a natural sentiment. It has to be cultivated.'* The Judges conclude that to stigmatize or to criminalise homosexuals only on account of their sexual orientation would be against constitutional morality.

The case of *K.S. Puttaswamy* v *Union of India*[19] provided the Supreme Court with a good opportunity to add to our constitutional jurisprudence. It observed that the best decision on how life should be lived is best left to individuals because they are continuously shaped by the social milieu that they live in. According to the court, the state is duty-bound to protect this individual autonomy rather than dictate how individuals should live their lives.

The Constitution is guided by the Preamble which states its objectives and acts as an aid during the interpretation of Articles when language is found ambiguous. Although not enforceable in court, the Preamble to the Constitution of India beautifully reflects the vision of the founding fathers of the Constitution. In the words of Dr. B.R. Ambedkar - one of the architects of the Indian constitution:

"Preamble is a way of life which recognizes liberty, equality, fraternity as the principles of life and which cannot be divorced from each other."

The Preamble enshrines in itself the following guiding principles:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith, and worship;

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16 European Court of Human Rights Application No.7525/1976.

17 European Court of Human Rights Application No. 10581/1983.

18 South African Constitutional Court 1999 (1) SA 6.

19 (2017) 10 SCC 1.

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EQUALITY of status and opportunity;
DIGNITY of the individual"

The preamble is widely regarded as the backbone of the Indian constitution, and is seen as embodying its spirit. Thus, the fulfillment of these significant objectives shall be matters of legislative and judicial priority. These also have a significant bearing upon the rights of individuals cohabiting in non-marital domestic relationships.

With the benefit of marriage, there arise certain obligations and responsibilities, which includes marital obligation towards the spouse, towards the family, towards the children and towards the marital house. To avoid the obligations of a traditional marriage and on the other hand to enjoy the benefit of cohabiting together, the concept of relationship in nature of marriage has come into picture. The term 'relations in the nature of marriage' is nowhere defined in any statue. But this word has been used in Sec 2(f) of The Protection of Women from Domestic Violence Act, 2005. Sec 2(f) states that "domestic relationship" means "a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or are family members living together as a joint family."[20] Under this act, 'a relationship in the nature of marriage' protects,

i) Women in marriage which is considered as void or voidable in the eyes of law, where all other elements of a marriage exist.
ii) Women in common law marriage who represent to the world that they are married.
iii) Women who are in the relationship of cohabitation or live-in-relationship.[21]

It is argued by the researcher that it should also include same sex couples living and cohabiting in a shared household.

The Supreme Court in various judgements has held that Relationship in the nature of marriage is akin to a Common Law Marriage. Common Law Marriages require that although not being formally married:-

a. The couple must hold themselves out to society as being akin to spouses
b. They must be of legal age to marry
c. They must be otherwise qualified to enter into a legal marriage, including being unmarried,
d. They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

Although this broad explanation is not restricted to hetero-sexual relationship, it is, therefore, pertinent here to examine these relationships 'in the nature of marriage' through the prism of constitutional values and guarantees as an extension to the ongoing debate of social morality vis-

[20] Domestic Violence Act, 2005

[21] Ibid.

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à-vis constitutional morality.

2.2 JUSTICE: SOCIAL, ECONOMIC AND POLITICAL

'Justice' is the concept of fairness. 'Social justice' is fairness as it manifests in society. That includes fairness in healthcare, employment, housing, and more. Discrimination and social justice are not compatible. Social justice applies to all aspects of society, including race and gender, and it is closely tied to human rights. The connection between social justice and human rights is age old. It has become clear that one can't exist without the other. When a society is just, it protects and respects everyone's human rights. This connection is essential since human rights are recognized globally.

There have been long standing efforts to recognize right to choose a life partner as a basic human right, albeit without the legal necessity of marrying them. On the same rights, there have been great endeavors to institutionalize choosing a same sex partner as a human right as well. Even among the LGBTQ community, right to marry hasn't been recognized in various countries, including ours which could be argued by many as blatant discrimination.

This is despite the fact that Universal Declaration of Human Rights (1945) states in Article 2 that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind." Social justice cannot co-exist with inequality. The object of social justice, set out in our Preamble, can be materialized through Article 14 of the Constitution.

2.2.1 Right to Equality before Law and Equal Protection of Law

Article 14 states that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Article 14 guarantees equality to all persons, including citizens, corporations, and foreigners. Partners in live-in relationships, homosexual relationships or other forms of domestic relationships should also be guaranteed the right to be treated equally. Commenting on the interpretation of equality, Supreme Court in *E. P. Royappa* v. *State of Tamil Nadu*[22] commented:

> "Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within the traditional and doctrinaire limits. From the positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14."

The doctrine of equality before the law is a necessary corollary of Rule of Law which pervades the Indian Constitution. 'Equality before Law' is a negative concept which ensures that there is

[22] AIR 1974 SC 555.

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no special privilege in favour of anyone, that all are equally subject to the ordinary law of the land and that no person, whatever be his rank or condition, is above the law. This is equivalent to the second corollary of the *Dicean* concept of the Rule of Law in Britain. 'Equal protection of laws' is positive in content implying that among equals, the law should be equal and equally administered, that the like should be treated alike without distinction of race, religion, wealth, social status or political influence. It does not mean that identically the same law should apply to all persons, or that every law must have a universal application within the country, irrespective of differences of circumstances.

In *Western U.P. Electric Power and Supply Co. Ltd.* v *State of Uttar Pradesh*[23], the Apex Court observed:

> "Art. 14 of the Constitution ensures equality among equals: its aim is to protect persons similarly placed against discriminatory treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the differential treatment had no reasonable relation to the object sought to be achieved by the law."

The discrimination faced by persons inclined towards same gender is nearly not obliterated by the decriminalization of Section 377 and upholding of the right to privacy. For justice to be effective, it must not merely be done but also appear to be done. Decriminalization can in no manner be equated with legalization. Where any law is discriminatory or appears to be so, it is the duty of the Courts to step up and rectify that malady. The Supreme Court observed in *K. Thimmappa* v *Chairman Central Board of Directors*[24] the following:

> "When a law is challenged to be discriminatory essentially on the ground that it denies equal treatment or protection, the question for determination by the Court is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relation to the object of the legislation. Mere differentiation does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any rational basis having regard to the object which the legislature has in view".

2.2.2. Social Equality and Equal Access to Public Areas

Article 15(1) specifically bars the state from discriminating against any citizen of India on grounds only of religion, race, caste, sex, place of birth, or any of them. It ensures safety and better conduct against State's discrimination on the grounds only of religion, race, caste, sex,

[23] AIR 1970 SC 21.

[24] AIR 2001 SC 467.

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place of birth or any of them. Therefore, any law discriminating on any one of these grounds would be void. Besides, the guarantee under the clause can be invoked only when discrimination has been made by the State and not otherwise. Thus, the State on its part is absolutely barred to treat any person unfavorably merely on the ground that he belongs to a particular religion or caste though on any other ground, a consideration of differential treatment will not be unconstitutional. The term 'sexual preference' doesn't find a place in the Article which facilitates this to be used as a legal loophole by those opposing the legitimization of homosexual relationships.

The law is however a dynamic concept. Inevitably the nature of marriage would change if there is a change in society. Consequently, the law would have to be amended to keep pace with this societal change. However, one cannot ignore that the supreme source of the law is the Constitution, and hence the egalitarian and liberating spirit of the Constitution must necessarily interact with social rules. Even if society does not change, the principles of the Constitution must nevertheless apply. The recent judgement decriminalizing unnatural sex[25] was based to a large extent on the autonomous right of an individual to choose her own partner, regardless of sex. Chief Justice Dipak Misra has observed:

> 'There can be no doubt that an individual also has a right to a union under Article 21 of the Constitution. When we say union, we do not mean the union of marriage, though marriage is a union. As a concept, union also means companionship in every sense of the word, be it physical, mental, sexual or emotional. The LGBT community is seeking realisation of its basic right to companionship, so long as such a companionship is consensual, free from the vice of deceit, force, coercion and does not result in violation of the fundamental rights of others.'

Justice Chandrachud held in the privacy case:[26]

> "family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognizes an inviolable right to determine how freedom shall be exercised".

This finally begs the question that when right to marry and procreate extends to heterosexual couples, why deny it to homosexual partners?

The Supreme Court has been instrumental in upholding the principle of equality, thus securing socio-economic-political justice, sometimes even by reversing its own judgments. For instance, in *Yousuf Abdul Aziz* v *State of Bombay*[27], Section 497 of Indian Penal Code which only punishes man for adultery and exempts the woman from punishment even though she may be equally

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25 *Navtej Singh Johar* v *Union of India* AIR 2018 SC 4321.

26 *Justice K.S. Puttaswamy* v *Union of India* (2017) 10 SCC 1.

27 (1954) AIR 321.

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guilty as an abettor was held to be valid and not violative of Article 14. This opinion was however, overruled by its judgment in *Joseph Shine* v *Union of India*[28] striking down Section 497 as unconstitutional being violative of Art 14, 15 and 21 of the Indian constitution. After such landmark judgments, it gives hope to some that the discrimination faced by couples in non-marital domestic relationships, both heterosexual and homosexual, might be addressed sooner than later.

2.3 EQUALITY OF STATUS AND OPPORTUNITY

In *Naz Foundation* case,[29] it was observed that the Indian Constitutional law does not permit that statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual. The Court drew upon the notion of equality, which underlies the Indian Constitution and made an organic connection between the intentions of the founding fathers and the need to ensure that LGBT persons are not discriminated against today:

> "The notion of equality in the Indian Constitution flows from the 'Objective Resolution' moved by Pandit Jawaharlal Nehru on December 13, 1946. Nehru, in his speech, 28 moving this Resolution wished that the House should consider the Resolution not in a spirit of narrow legal wording, but rather look at the spirit behind that Resolution. He said, 'Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion.... (The Resolution) seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future."[30]

The Court went on to say:[31]

> "If there is one constitutional tenet that can be said to be (the) underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that (the) Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognizing a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracized."

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28 (2018) SC 1676.

29 *Suresh Kumar Koushal* v. *Naz Foundation* (2014) 1 SCC 1

30 *Id.*

31 *Id.*

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2.4 Liberty of Thought, Expression, Belief, Faith and Worship

The Supreme Court in *Shakti Vahini* v *Union of India*[32] held that "assertion of choice is an insegregable facet of liberty and dignity… That is why the French philosopher and thinker Simone Weil has said, 'Liberty, taking the word in its concrete sense consists in the ability to choose'…" the author of that judgment, then CJI Dipak Misra, observed at the outset. It is clear from the above that the bench in *Shakti Vahini* wanted to protect not just married couples, but also the live-in ones from any threat of violence. "It should be first ascertained whether the bachelor-bachelorette are capable adults. Thereafter, if necessary, they may be provided logistical support for solemnising their marriage and/or for being duly registered under police protection, if they so desire" the bench held. It is argued by the researcher at this point that the same principle should not be limited to couples of opposite genders but also for couples belonging to the same sex.

It is the obligation of the Courts considering the interpretation of constitutional matters, as the *sentinel on qui vive*, to zealously guard the right to liberty of an individual as the dignified existence of an individual has an inseparable association with liberty. This guiding principle has been made enforceable through Part III of the Indian Constitution dealing with Fundamental Rights.

2.4.1 Right to Life and Personal Liberty

A bare reading of Article 21 of Constitution of India would be that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law." The Courts haven't shied away from extending its Judicial Activism in reformation of Personal Laws in the past.

The intervention of judiciary in formulating right to marriage among majors as a part of Article 21 first came up in the case of *Ravi Kumar v State*[33], where the Delhi High Court answered in the positive. The same was reiterated by the Hon'ble Supreme court in the case of *Lata Singh v State of Uttar Pradesh*[34] where, it was held that Right to Marriage is an essential part of the right under Art.21 and that people have the right to choose their partners without any compulsion. It was stated in this case,

> "This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or

32 (2018) 7 SCC 192.

33 124 (2005) DLT 1.

34 (2006) 5 SCC 475.

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instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage."

This begs two pertinent questions:

1. Whether Article 21 validating the right to marry also includes right to choose a life partner without marriage?
2. Whether right to marry can also be extended to same-sex couples?

Both of these issues can be addressed to an extent through judicial decisions. By virtue of Section 2(f) of the Domestic Violence Act, 2005, the court interpreted the expression "relationship in the nature of marriage." These provisions are presently made applicable to the individuals who are in live-in relationships. Prior to 2000, no courts in the country ever uttered the word 'live-in Relationship', but Justice M. Katju and Justice R. B. Mishra of the Hon'ble Allahabad High Court recognized the concept of live-in relationship in case of *Payal Katara* v *Superintendent, Nari Niketan*[35] and held that a man and a woman can live together as per their wish, even without getting married. It was further stated that such behaviour may be considered to be immoral for the society but is not illegal in the eyes of law.

Courts presume live-in relationships to be covered under the ambit of the expression as the words nature of marriage and live-in relationship stand on the same line and meaning. This gives women some basic rights to protect themselves from the abuse of fraudulent marriage, bigamous relationships. But there can be more to expression "relationship in the nature of marriage" than just live-in relationships. For instance, relations where the 'couple' is not necessarily cohabiting but exists 'in the nature of marriage' through emotional or financial dependency might be exposed by this narrow interpretation of the law.

A two-Judge Bench of the Supreme Court, constituting of K.S.P. Radhakrishnan and Pinaki Chandra Ghose, JJ. in *Indra Sarma* v *V.K.V. Sarma*[36] held:

> "[W]hen the woman is aware of the fact that the man with whom she is in a live-in relationship and who already has a legally wedded wife and two children, is not entitled to various reliefs available to a legally wedded wife and also to those who enter into a relationship in the nature of marriage."

But in this case, the Supreme Court felt that denial of any protection would amount to a great injustice to victims of illegal relationships. Therefore, the Supreme Court emphasised that there is a great need to extend Section 2(*f*) which defines "domestic relationships" in PWDVA, 2005 so as to include victims of illegal relationships who are poor, illiterate along with their children who are born out of such relationships and who do not have any source of income. Further, Supreme Court requested Parliament to enact a new legislation based on certain guidelines given by it so that the victims can be given protection from any societal wrong caused from such

35 AIR 2001 All 254.

36 JT 2013 (15) SC 70.

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relationships.

Similar issue marginalizes the same-sex couples cohabiting in an unrecognized live-in relationship. In *Madan Mohan Singh* v *Rajni Kant*[37], the Court held that, the live-in relationship if continued for long time, cannot be termed as a "walk-in and walk-out" relationship and that there is a presumption of marriage between the parties. By this approach of the Court it can be clearly inferred that the Court is in favour of treating long-term live-in relationships at par with marriage rather than treating it as a new concept. Moreover, in the landmark case of *S. Khushboo* v *Kanniammal*[38], the Supreme Court held that a living relationship comes within the ambit of right to life under Article 21 of the Constitution of India. So why is it that this interpretation cannot be extended to same-sex couples as well? Article 21 must be extended to right to decide one's sexuality, sexual autonomy, choice of sexual partner and expecting a reasonable level of equality, dignity and privacy.

Indian judiciary has taken a lead, many a times, to fill the gap that was created in absence of any specific statute relating to various subjects in personal laws. What may be considered immoral in the eyes of society may not at all be 'illegal' in the eye of the law. The Supreme Court as the *sentinel qui vive* has had to intervene to give liberal interpretation to various personal laws to uphold the constitutional values.

Prejudice is prevalent in both a hetero-sexual couple not wanting to get married as well as a homo-sexual couple wanting to get married. Article 21 guarantees right to life and liberty and it can be taken away only by the due procedure established by law. Right to life includes right to live without constant threat to life and right to liberty includes the liberty to choose the partners with whom one wishes to live. It cannot be extended to full extent till social prejudice prevents one's right to be in a relationship in the manner they want to be in as long as it is not unlawful.

Another impedement is the lack of legislative sanction hindering the process of implementation.

1. Firstly, courts lack the facilities to gather detailed data or to make probing enquiries. Recent trends of the judiciary like appointing of *amicus curiae* in cases, the appointment of ad-hoc probe panels or committees is working their way to remove this hurdle from the working of the judciary.
2. Secondly, even if courts have to rely on their own knowledge or research, it is bound to be selective and subjective.
3. Thirdly, the courts also have no means for effectively supervising and implementing their orders, since courts mandate for isolated cases, their decrees make no allowance for the differing and varying situations which administrators will encounter in applying the mandates to other cases. The judicial pronouncements are more often on a case-to-case basis without, however, laying down a ratio making it law of the land.

[37] (2010) 9 SCC 209.

[38] AIR 2010 SC 3196.

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4. Moreover, the judiciary at times could be biased and views reflected by the bench need not necessarily represent the view of the majority. Another impediment is that various high courts have varied opinions as to the interpretation of a law.

2.5 Dignity Of The Individual

Immanuel Kant stated that there are things that should not be discussed in terms of value, and that these things could be said to have dignity. He spoke about morality, dignity and human value intrinsic to the dispensation of justice.[39] Dignity can be said as the right of a person to be valued and respected for their own sake, and to be treated ethically and equally.

The *Naz Foundation, supra* begins by adopting a view of human dignity with respect to freedom of choice about how to live one's life.

> "At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognizes a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others."[40]

From this notion of dignity, the Court derived a concept of privacy that ' *...deals with persons and not places.*' That is, the right to privacy is not merely the right to do what one wants in 'private spaces' like the home, but also a right to make choices about how to live one's own life. Privacy protects personal autonomy, both zonal and decisional.

In the Privacy case,[41] Justice Sanjay Kishen Kaul held that:

> "It is an individual's choice as to who enters his house, how he lives and in what relationship. The privacy of the home must protect the family, marriage, procreation and sexual orientation which are all important aspects of dignity."

Thus, a majority of at least five of the nine judges who were party to the judgement held that people of alternate sexuality had a right to family life, which included marriage. Justice Chandrachud, who was party to the *Navtej Johar* judgement,[42] had also authored a judgement in the privacy case. The privacy case in fact could reasonably be said to be the foundation of the Navtej Johar judgement. In several passages, he laid the groundwork not merely for the eventual

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39 Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals* (1949) at p67.

40 *Suresh Kumar Koushal* v. *Naz Foundation* (2014) 1 SCC 1.

41 *K.S. Puttaswamy* v. *Union of India* (2017) 10 SCC 1.

42 AIR 2018 SC 4321.

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overruling of the *Naz foundation* judgement[43] but also for the recognition of gay marriage. However the opportunity was missed in the landmark 377 judgement[44] where Hon'ble Chief Justice Misra quoted "*When we say union, we do not mean the union of marriage, though marriage is a union*".

Marriage has real social and economic consequences. When two individuals get married, there is a state and a social sanction to the relationship. There are also mutual rights that the parties to the marriage have. The laws of inheritance recognize a married spouse and give them a right in the property of the other spouse. There are insurance and tax benefits, which unmarried couples do not have. These benefits, both instrumental and intrinsic, which extend to all married couples, do not currently extend to same-sex partners or hetero-sexual relationships in the nature of marriage. Therefore, there has to be equality to fulfill the Constitution makers' promise to all Indians because all individuals are equal and deserving of a right to choose their partner. A hetero-sexual couple not wanting to get married is prejudiced the same as a homo-sexual couple wanting to get married.

Equality and dignity co-exist and the society cannot have one without the other. It is tough to imagine leading a dignified life with any sense of self-worth if one is not treated as an equal citizen or entitled to equitable rights as others. The inability to legally recognise one's same-sex partner or non-marital domestic partner is an effective undermining of one's right to choose a partner. It is also a violation of one's right to equality especially when hetero-sexual 'live-in relationships' are quasi-recognised.

According to Sec 114 of Indian Evidence Act, 1872, when a man and a woman live together for a long spell of time as husband and wife, then there would be presumption of marriage. It is argued by the researcher that it should also include same sex couples living and cohabiting in a shared household. The language of the law is to be changed, rather evolved, beyond gender specific restrictions.

Valid marriages have been protected under various legislations and the rights of such females and their children born are obviously intact. However, with the emerging concepts like 'relations in the nature of marriage' we cannot overlook that participants of such relationship should also be given adequate protection. In a changing society, law cannot afford to remain static and should adopt the protective measures for those who enter in a relationship in nature of marriage either due to various factors.

The Court has intervened in the case of inter-caste and inter-religious marriages to protect the choices of those who wish to get married so as to protect their right to dignity. The Courts have generally upheld their role as the jealous and zealous guardians of constitutional liberties. But in the case of same-sex relationships, the issue is vulnerable without any legal validation which

[43] *Suresh Kumar Koushal* v. *Naz Foundation* (2014) 1 SCC 1.

[44] *Navtej Singh Johar* v. *Union of India* AIR 2018 SC 4321.

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requires serious consideration. The Constitution is a living document and needs to recognize the ground developments taking place in the society by virtue of judicial pronouncements, till the legislature takes up its job of meeting with aspirations of the people in present day time.

CONCLUSION

Based on the afore-discussed law and precedent it leaves in no manner any doubt that aggrieved person, more often a woman, should under no circumstances be left unattended only for the want of her disability to prove the factum of marriage in strict legal sense. Right to maintenance, or at least subsistence allowance is indefeasible. We are not living in the age of stone pelting when woman used to be banished physically as well as by ascribing various titles or gestures. They are also full human being and need to be seen as possessor of minimum indefeasible human rights, such as a right to livelihood and maintenance.

In the considered opinion of the present researcher, hapless aggrieved woman should not go, under any circumstances, remediless. Returning back the aggrieved hapless woman is sinister. Merely because such aggrieved woman fails to prove her marriage, or does not satisfy the strict definition of being a woman, this by itself should not leave her destiny on the discretion of other for the redressal of her grievances. Similar issues involving gender identification of transgenders also create hinderance for the want of legal qualifications for being married. The ultimate question, therefore, would arise as to whether grievances of such persons should be left totally unattended for the want of legal qualifications that they were lacking. In the considered opinion of the present researcher, if the court finds its hands tied in the absence of a explicit law, will it not be appropriate to grant bare minimal “subsistence allowance” to such persons based on the principle of equity, justice and good conscious!. This can be done either by suitable statutory amendment or by a simple judicial pronouncement by the Apex Court, which actually is the thesis of the present work. [Emphasis].