

SAME SEX MARRIAGES : THE LEGAL QUESTIONS

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I. INTRODUCTION

The issue of gay and lesbian legal “equality” remains unresolved and highly contested.¹ In recent years, both due to liberal attitudes and the need to control HIV/AIDS several NGOs and state agencies have all demanded legislation or at least decriminalization of homosexuality and acceptance, tolerance and equality for gay men, lesbians and bisexuals.² However, the question remains ‘Are we ready for it?’ We all know that the present laws in almost all parts of the world permit marriages between a man and a woman. The family arena is one in which it has been particularly difficult for lesbians and gay men to gain equal footing with heterosexuals.³ The mixed-sex requirement for civil marriage seriously disadvantages same-sex couples and distorts public discourse.⁴ Here in India, a marriage is believed to be an institution which is sacred and forms a part of every religion. So, the question that needs an answer is ‘Can the current laws governing this sacred institution of marriage, govern homosexual marriages?’ The reason why so much of debate has taken place on the topic of homosexual marriage is that “marriage is ... the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men.”⁵ With the increasing number of lesbian and gay couples in India, the day is not far when such couples would demand to have families and raise children. This paper is an attempt to answer the possible legal

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¹ See generally, Evan Gerstmann, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS AND THE FAILURE OF CLASS BASED EQUAL PROTECTION* (1999) 3-39.

² Subhash Chandra, *HOMOSEXUALITY AND THE LAW: A POLICY OF CONTROL AND CONTAINMENT*.

³ Marla J. Hollandsworth, *Gay Men Creating Families Through Sarro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM UJ GENDER & L. 183 (1995).

⁴ David B. Cruz, *Just Don't Call it Marriage: The First Amendment and Marriage as an Expressive Resource* 74 S. CAL L REV 925.

⁵ Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, in Suzzanne Shermah (ed.), *LESBIAN AND GAY MARRIAGE* (1992) 13, 14-16.

questions that surround the current laws on homosexual relationships and also to answer the possible legal questions that may arise, especially in reference to family laws, if at all homosexuals are allowed to enter into a marriage.

II. WHY CAN'T HOMOSEXUALS HAVE A RIGHT TO FAMILY?

Article 21 of the Constitution of India guarantees the right to life and personal liberty to every person. Right to life includes many incidental rights which are not specifically given under the Constitution. There can be no doubt that an individual has a right to family. Also, sex is an integral part of the life of any animal, including humans. So, when we say that all human beings have a right to family and right to sex, would it be wise to suggest that homosexuals do not have a right to family. Merely on the grounds of sexual orientation, a person should not be discriminated. So, it would not be wrong to suggest that homosexuals too should have a right to family. Why do we have to interpret marriage to mean only a heterosexual union? A marriage can be a homosexual union as well. After all a few would disagree that the operative word in the phrase "heterosexual union" is "union". Marriage is, above all, a union.⁶ So, why can't such a union be a "homosexual union"?

Moreover, apart from our Constitution, there are other international instruments on human rights which provide for the right to marry as a fundamental human right. An example of such an instrument is the International Covenant on Civil and Political Rights. Although, the International Covenant on Civil and Political Rights does not expressly protect homosexual marriage as a fundamental human right, the instrument does contain provisions on both the right to marry and equal protection.⁷ Therefore, in the light of the ICCPR also, homosexuals have a right to marry and therefore have a right to family.

One of the most common arguments against same-sex marriage is that traditionally the essential purpose of marriage is to procreate. John Quinn, the Archbishop of San Francisco has stated, "The permanent

⁶ Anne M. Burton, *Gay Marriage- A Modern Proposal: Applying Baehr v. Lewin to the International Covenant on Civil And Political Rights*, 3 IND J GLOBAL LEGAL STUD 177.

⁷ *Ibid.*

commitment of husband and wife in marriage is intrinsically tied to the procreation and raising of children.”⁸

Procreation is only one of many reasons that people choose to marry. Today, people marry for a variety of reasons including emotional companionship and the security of a dual income. Homer Clark writes:

Recently, marriage has come to resume some of its importance as a producing economic unit. . . providing the benefits of two sources of income for the maintenance of a single home. But the fact is that the most significant function of marriage today seems to be that it furnishes emotional satisfactions to be found in no other relationships. For many people it is a refuge from the coldness and impersonality of contemporary existence.⁹

III. IF HOMOSEXUALS HAVE A RIGHT TO FAMILY THEN..?

Once we say that homosexuals too should have a right to family there are various legal questions that would arise. What would be the legal status of a homosexual couple? Would they be considered as a single entity in the eyes of law as an ordinary couple or should they be given a different status? Of equal importance to the establishment of the same-sex family as a legal entity are cases concerning the right of lesbians and gays to adopt, to engage in second-parent adoption, and to establish custodial and visitation rights following the termination of long term gay relationships.¹⁰ Should the lesbians and gays be allowed to exercise the right to adoption? And in case of separation of such a homosexual couple, how would the court decide as to who should be given the custody of the child so adopted and who would be given the visitation rights? While deciding upon these questions one should always keep in mind that society does not extend to homosexuals, the same adoption opportunities that it extends to heterosexuals.¹¹ Even in the west, parenthood for gay men and lesbians has always been an issue of societal condemnation, social

⁸ Isaacson Walter, *Should Gays Have Marriage Rights?*, TIME NOV. 20, 1989.

⁹ Homer H. Clark, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* (2nd ed. 1988) 22.

¹⁰ Timothy Lin, *Social Norms And Judicial Decision making: Examining The Role of Narratives in Same Sex Adoption Cases*, 99 CLMLR 739.

¹¹ David P. Russman, *Alternative Families: In Whose Best Interest?*, 27 SUFFOLK UL REV 31 (1993).

discomfort, and repudiation and this societal bias makes the process of family building for homosexual couples problematic.¹² It is usually seen that lesbians and gay men who wish to raise children often confront prejudice and misconceptions about their sexual orientation that “turn judges, legislators, professionals, and the public against them, frequently resulting in negative outcomes such as loss of physical custody, restrictions on visitation, and prohibitions against adoption.”¹³ Another obstacle for homosexuals is the popular belief that a family is based on the union of man and woman, and therefore most of the people believe that homosexual households are incapable of providing balanced role modeling for several relationships that are crucial to the formation of healthy, stable families.¹⁴ At times we also find people arguing that homosexuality is a mental disorder, one of the early reasons of which is Sigmund Freud’s work on child development and sexual preference which led to the categorization of homosexuality as a mental illness.¹⁵ However, such beliefs are not new. Homosexuality has also been called “a sin, an illness, a way of life, a normal variant of sexual behavior, a behavior disturbance, and a crime.”¹⁶ However, such arguments, especially in the light of scientific research and the changing society, do not hold much ground.

Many people also believe that homosexual parents would encourage their adopted children to become homosexuals. But, the question here is, would these homosexual parents like to do anything like this? And one can find an answer to this question by analyzing how the homosexuals are treated in the society. It is highly improbable that homosexual people, who themselves face a great deal of prejudice, would consciously choose a similarly difficult life for their children to lead.¹⁷

However, the most rational question that has ever been raised so far about the homosexual marriages pertains to the life of the child of a

¹² *Supra* n. 4.

¹³ Charlotte J. Petterson, *Lesbian and Gay Parenting: A Resource for Psychologists*, as cited in Lin Timothy, *Social Norms and Judicial Decision making: Examining the Role of Narratives in same Sex Adoption Cases*, 99 CLMLR 739.

¹⁴ *Supra* n. 11.

¹⁵ *Ibid.*

¹⁶ Gayle S. Rubin, *Thinking Sex: Notes For a Radical Theory of the Politics of Sexuality*, in Carole S. Vance (ed.), *PLEASURE AND DANGER* (1984).

¹⁷ *Supra* n. 11.

homosexual couple. Would the child of a homosexual couple suffer harassment and dejection from the society? Recently, a court found that “living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the ‘social condemnation’ attached to such an arrangement, which will inevitably afflict the child’s relationship with its peers and with the community at large.”¹⁸ However, there is a research which shows that such a fear of stigmatization is far in excess of the actual incidence of stigmatization.¹⁹ Furthermore, the studies have shown that children from homosexual parents are liked more by their peers as compared to children from heterosexual parents.²⁰

Further, a very important question is also that why the homosexual couples should be denied the legal rights and privileges that other heterosexual couples enjoy? Legal system around the world grant legal spouses with many social and economic benefits. It is no wonder that homosexual people have pushed to have their relationships legally recognized. Homosexual couples in Denmark,²¹ Norway,²² and Sweden²³ already enjoy most marital rights under the registered partnership laws of their respective countries.²⁴ For Indian homosexual couples, however, the struggle has yet to produce any progress.

IV. WHAT WOULD BE THE RIGHTS AND DUTIES OF A HOMOSEXUAL IN A HOMOSEXUAL MARRIAGE?

If the homosexual couples are allowed to marry legally, then many legal questions will arise as to the rights and duties of a homosexual towards

¹⁸ *Bottoms v. Bottoms*, 457 SE 2d at 108.

¹⁹ Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND LJ 623 at 652.

²⁰ Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and other Non-traditional Families*, 78 GEO LJ 459.

²¹ Denmark’s partnership law was passed in 1989.

²² Norway’s version passed the Odelsting chamber of the Norwegian Parliament on Mar. 29, 1993.

²³ Sweden’s law became effective on Jan. 1, 1995; Parliament legalized gay marriage on June 7, 1994.

²⁴ Registered partnership legislation is pending in many countries, including Finland, Iceland, the Czech Republic, and Slovenia.

his/her partner in a homosexual marriage. One must analyze this aspect by considering what are the general rights and duties of a person towards his/her marital partner.

(a) Conjugal Rights

A valid and subsisting marriage confers the rights, and perhaps the duty to cohabit – to live together in a conjugal relationship. During cohabitation, the spouses have a mutual obligation of financial support, and an individual obligation of financial support. One aspect of cohabitation is the expectation of a sexual relationship. A persistent and unjustified refusal of sexual relations by one spouse may constitute “cruelty” as a basis for divorce.²⁵

(b) Economic Benefits & Financial Obligations

The married couples have rights to share in the estate after the death of the other, whether or not the deceased left a will. In India, under apparently all the succession laws the spouse and children have been conferred the status of class-I heirs. The couples also have specific rights as conferred by the various statutes. For instance, they may treat each other as dependants for tax purposes and take the deductions on the same. They can insure each other’s lives and qualify for pension benefits.

(c) Divorce & Maintenance

In the case of divorce or separation, it is generally the duty of the husband to maintain the wife and provide her with alimony. However, in case of same-sex couples, the question arises as to who shall maintain whom? If we say, in case of ‘Fault-based divorce’ the defaulting party shall do the same – like adultery, cruelty or desertion, what shall be the position in case of ‘no-fault divorce’ or divorce based on mutual consent? The space and scheme for maintenance and alimony for a homosexual couple has to be carved out by the legislative mechanism of the states.

(d) Issues with respect to the ‘child’

(i) The usage of Surrogacy and Donor insemination Techniques

Advance in reproductive medicine requires us to rethink the notions of parenthood. On the one hand, it has always been possible to distinguish

²⁵ Kronby Malcolm C., *Marriage* (Chapter-I), in *CANADIAN FAMILY LAW* (9th edn. 2006) 4.

between the biological aspect of being a parent, or reproduction, and the social component, or rearing, on the other.²⁶ In such cases, a child can have as many as six parents: the genetic father, who provides the sperm; the genetic mother, who provides the egg; surrogate who is not genetically related to the child she carries and bears; and the intended rearing parents who have no biological connection to the child. Such multiplication of parents also results in custody disputes, and courts have had to decide who the 'real' parents are. In a very recent case, the San Francisco Court of Appeals ruled that the genetic mother of twins born to her lesbian partner has no parental rights because she signed a waiver of parental rights at the time of donating her eggs. E.G. and K.M. began living together in March 1994 and registered as domestic partners in San Francisco in October 1994.²⁷ The couple planned to have a child of their own. Hence, E.G. asked K.M. to donate her eggs, provided that K.M. would be a 'real donor' and E.G. would be the only legal mother. The possibility of a future adoption by K.M. was discussed, but the women agreed that this should not happen for at least five years when the relationship was proven stable and permanent. For the next five years, the couple with their twins lived as a family unit, with both women caring for and raising the girls. The couple however separated in March 2001 and E.G. filed a notice of termination of the domestic partnership. In February 2002, K.M. filed a new petition to establish a parental relationship. She also sought joint custody. In response, E.G. filed a motion to quash and dismiss the petition on the ground that K.M. lacked standing to assert parentage. The Court of Appeals upheld the contention of E.G. and stated that K.M. lacked standing to bring the action to determine parentage under the Uniform Parentage Act (UPA). As the genetic mother, K.M. qualified as an 'interested party' for purposes of obtaining a judicial declaration of her status as a parent. However, K.M.'s claim to be a legal parent was rejected. Following this principle, the court said that when there are two biological mothers, the legal mother is the one who 'from the outset intended to be the child's mother'.²⁸ In subsequent cases, the courts have construed this test to mean that the intent to be the parent is the 'tie-breaker' when two women have equal claims. The courts in California generally take the path of

²⁶ *Id.* at 312.

²⁷ *Ibid.*

²⁸ *Ibid.*

'initial parenting intention', not the parental role, not the best interests of the child as laid down in the *Johnson* case.²⁹ The courts have rejected the best interest standards on parentage as that would implicate governmental interference in matters of parentage and custody and also put at risk the rights of any natural parent who entered into a relationship and encouraged the formation of parental bonds between the children and the new partner. The courts have however not addressed the issue as to what if both women or men had intended to raise the children together? If such a situation arises, which is quite likely, the courts might have to recognize both as legal parents.

(ii) *De facto* Parenthood & Parenthood by Estoppel

The homosexual rights movement has also restructured the established child rearing roles of "parents". In such cases, the definition of parent becomes highly significant. A parent is either a legal parent, a parent by estoppels, or a de facto parent.³⁰ A "legal parent" could be identified as a parent from the state law, such as adoptive or biological parent. A "parent by estoppels" is a person who, though not classified as a parent under traditional legal principles, assumed "full and permanent responsibilities as a parent" with the acquiescence of the child's legal parents. Finally, a "de facto parent" is an individual who, with the legal parents' acquiescence or spurred by their complete failure or inability to parent, lived with the child and performed caretaking functions equal to those of the child's legal parents for two years or longer.³¹ Under the notions of child's best interests, it is the "parents by estoppels" that should be accorded a parenting status fully equivalent to that held by traditional parents. Till now, none of the countries have formally adopted such expansive definitions of parenthood; several of them have begun to move tentatively in that direction. The American Institute of Family Law recommendations

²⁹ (1993) 5 Cal. 4th 84, 19 Cal Rptr. 2d 494. In *Johnson v. Calvert*, an embryo was created with the gametes of a husband and wife was implanted and gestated in a third party (a surrogate), the Supreme Court of California held, when the surrogate refused to hand over the child after its birth, that the genetic parents were parents for all legal purposes and that the surrogate had no parental rights over the child.

³⁰ Margaret F. Brinig, *Domestic Partnership*, JOURNAL OF LAW & FAMILY STUDIES 19-20 (2002).

³¹ David D. Meyer, PARTNERS, CARE GIVERS AND CONSTITUTIONAL SUBSTANCE OF PARENTHOOD (Cambridge, 2006) 63.

have also drawn the possibility and plausibility that a child might have three or more parents all at the same time. No cap is however imposed on the number of parents that a child might have, although some limits are placed on the extent to which parenting responsibilities may be divided up among these parents. Several courts have positively interpreted the definition of “de facto parenthood” in justifying custodial awards to long time care givers who lacked formal legal ties to a child.³²

Of equal significance, courts in slightly more states have begun interpreting legal parenthood in nontraditional ways and, specifically, designating as parents adults who have no biological or adoptive ties to the child. This innovation occurs often in the context of new reproductive technologies, where courts have emphasized parenting intentions over genetic or biological contributions in deciding legal parentage.³³ In *Marriage of Buzzanca*,³⁴ the California Court of Appeals held that a couple was the legal parents of the child born to a surrogate because they intended to create the child as parents, even though they don’t share a biological relation with the child. This trend is equally discernible outside the reproductive technologies context as well. In a few cases, women agreeing to co-parent children born to their same sex partners have been deemed legal parents without any formal adoption proceeding.³⁵ This willingness to recognize legal parentage based solely upon the assumption of a parental role with the agreement of the child’s biological parents shares a basic premise principle that parenthood is essentially and predominantly a functional status, rather than one derived from biology or legal entitlement.

(iii) The place of parenthood in Existing Custody Law

The law of custody and guardianship generally emerges when the family (parents) is either disintegrating or the child has to be assisted to

³² See, e.g., *C.E.W. v. D.E.W.*, 845 A. 2d 1146, 1152 &n. 13 2004 (recognizing former lesbian partner of parent as a “de facto parent” entitled to seek an allocation of parenting responsibility).

³³ See *Johnson v. Calvert*, 510 13.8.874 (1993).

³⁴ 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

³⁵ See *Elisa B. v. Superior Court*, 117 P. 3d 660 (Cal. 2005). In this case, the couple contested parentage after breaking up. It was held that “when two women involved in a domestic relationship agree to bear and raise a child together by artificial insemination of one of the partners with donor semen, both women are the legal parents of the resulting child”

find a guardianship. Child custody law has always made it essential to identify clearly a child's parents. The "tender years doctrine" favoring mother custody, and earlier law recognizing a custody entitlement for fathers, assumed knowledge of the child's mother and father. Although courts today use the more indeterminate "best interests of the child" standard to allocate custodial rights, status as a parent remains nearly as determinative as under the older gender-specific presumptions. Threshold determinations of parentage are vitally important because the law in every state strongly prefers, in some fashion, parents over non parents in deciding child custody. In many states, for instance, a parent is entitled to custody in a contest with a non-parent unless the parent is affirmatively "unfit" to parent. Even in the rare cases in which courts nominally employ "best interests" standard, status as a parent remains "a strong factor for consideration."³⁶ This preference for parent custody has led courts to deny continuing custodial rights even to care givers who had assumed major parenting roles with the acquiescence of the legal parent.³⁷ For example, a New York court held that a man who had assumed the role of girl's father since her birth nevertheless had no standing to seek custody or visitation after it was discovered that another man was actually the girl's biological father.³⁸ Even his acknowledgement of paternity years earlier, allegedly with the mother's full cooperation and consent, was legally ineffective against DNA evidence establishing the other man's reproductive role. Similarly, reproductive parents have got similar preferences over adoptive ones involving the separation of same-sex partners who jointly raised a child born to one of the partners.³⁹ Despite evidence clearly demonstrating a joint undertaking to parent, these courts have concluded that the status and prerogatives of parenthood remain exclusively with the biological parent. It is pertinent to note that similarly, homosexual parents are bound to be discriminated. Bias and prejudice, whether rooted in ignorance or in intolerance, appear to play a substantial role in many custody cases involving lesbian and gay parents.⁴⁰

³⁶ *Ibid.*

³⁷ *Ephraim H. v. Jon. P.*, 2005 WL 2347727 (awarding custody, following death of 12 year old boy's mother, to legal father who had not visited the boy prior to the mother's death rather than to stepfather.

³⁸ *Sean H. v. Leila H.*, 783 NYS 2d 785 (2004).

³⁹ *In re Thompson*, 11 SW 3d 913, 1999.

⁴⁰ Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and their Children*, 71 IND LJ 623 at 664.

V. CONCLUSION

There is no doubt that societal discourse regarding lesbians and gays has centered so singularly on their sexuality that it appears as their defining trait. However, this fact should not affect the basic fundamental human rights of the homosexual people. There is no doubt that the homosexuals cannot be denied the right to marry or the right to have a family. However, the present laws, especially governing marriages and families will require an overhaul because with the legalization of homosexuality, many questions will arise which the present laws are incapable of dealing with.