

TIF - Redefining the Same-Sex Marriage Question

SAPTARSHI MANDAL

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An LGBTQ community member poses with a rainbow flag at a pride walk in Kolkata (2019). | Avijit Ghosh/Wikimedia

Even as courts begin to consider the lawfulness of restrictions on same-sex marriages, queer groups should engage with the burdens of legal marriages and help build on feminist efforts to turn marriage into an equal partnership.

The issue of same-sex marriage is before the High Courts of Kerala and Delhi. The petitioners are queer individuals, some of whom have approached the courts as couples. They seek inclusion within different existing laws, such as the Hindu Marriage Act under which two Hindus can get married; the Special Marriage Act (SMA) that allows marriage between two Indians irrespective of religion; the Foreign Marriage Act through which Non-Resident Indians can register their marriages under Indian law; and the Citizenship Act that allows the foreign spouse of an Indian citizen to register as an Overseas Citizen of India. Currently, these laws allow or recognise marriage only between opposite-sex persons.

As courts begin considering the lawfulness of these restrictions, there is a need for clarity on the issues at stake. In other words, what's *really* in it for queers? And relatedly, *which* queers?

The legal relationship of marriage entails both benefits, as well as burdens for those who enter it. While there is

no getting around the fact that excluding queers from marriage is discriminatory, the equal rights case for same-sex marriage is incomplete and inadequate without an account of these burdens.

The underside of equal treatment

The petitioners in the above cases have justifiable reasons to want legal validation for their relationships. Marriage, after all, protects people's claims arising from their relationships — not only against their partners but also against the state and third parties. A married woman facing domestic violence has the right against being thrown out of the home that she shares with her husband, along with rights to maintenance and compensation for the harms suffered. Such remedies are not available to those in non-heterosexual relationships, where too, violence is rampant.

Or consider a woman working in another country and in a relationship with a woman there, who wants to move back to India to look after her elderly parents. But doing so would put her relationship in peril, for unlike a heterosexual woman in a similar situation, she would not even have the option of marrying her lover to avail the latter a spouse visa for her to move to India as well. There is no reason why queers alone should be confronted with such predicaments.

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Besides such practical issues, marriage also has symbolic attributes that some queers may want. Marriage accords people dignity by virtue of occupying a status, as opposed to having inherent dignity simply for being humans. Even if regressive and exclusionary, such dignity must be available to queers as long as straight people have access to it.

The desire for marriage in India cuts across caste, class, and religious divides, and queer people are not outside this milieu. Excluding queers from marriage is thus, discriminatory.

Arguments such as these, which foreground the unequal treatment of similar situations, have both an emotive and a logical appeal. Indeed, all the cases before the Kerala and Delhi High Courts have framed their claims in these terms. But like all arguments for equal treatment, they ignore the burdens imposed by the larger framework within which equal treatment is sought.

Beyond inclusion

Current laws governing marriage have minimal space for individual freedom and do not adequately protect the interests of the parties to the relationship. The SMA, for instance, makes it difficult for people to have a civil marriage, by placing multiple legal and bureaucratic hurdles in their path. These hurdles often give an opportunity to disapproving third parties, including Hindu vigilante groups, to prevent such marriages from happening.

Divorce laws are another example of the absence of individual autonomy, where the state controls the conditions under which two adults may part ways. The law does not allow a person to end their marriage unilaterally if they are unhappy. They can do so either when their spouse also agrees to end the marriage, or by proving that the spouse is guilty of committing a wrong — and that too within state-defined limits. Further, current laws do not protect the economic interests of the parties to a marriage. Thus, a wife may give up opportunities of paid work in order to run the household and look after the children and the elderly, and yet receive no remuneration for these vital services, whether during the marriage or upon divorce.

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These may not seem like queer issues. But these are part and parcel of the institution of marriage that queers are seeking entry into. The right to marry not only means obtaining legal recognition for one’s relationship, but entails entering a complex of laws that determine each aspect of the relationship. If the current laws exacerbate misery in heterosexual married life, either by preventing people from easily ending their unhappy marriages or by intensifying economic inequality and power imbalance between spouses, then these issues will be faced by married queer couples as well. If heterosexual interfaith couples face difficulties in using the SMA, then so would queer couples, whether interfaith or not.

Thus, the time for queer groups to engage with and intervene in these “general” family law issues, is now, rather than after queers have gained entry into marriage. None of the above are arguments against queers having access to marriage. The point is that we have to redefine the terms of the discussion. The first step in that direction would be to confront the politics of family law reform in India.

Wider context of family law reform

Shortly before the general election of 2019, a prominent queer rights group in Mumbai declared that the Uniform Civil Code (UCC) was the most important legal issue for queers, as it would give them equal rights in marriage and inheritance. They wanted to see which political party would take up the issue.

Given the complexities arising from the current personal law framework, it is likely that at some point along the way, a greater number of queers desiring marriage would be inclined to jump on the UCC bandwagon.

The multiple petitions concerning expanding the SMA to include same-sex marriages are based on the faulty premise that since the act provides for civil marriage and is meant to safeguard the common aspirations of all citizens, there is a strong case for altering it without disturbing other laws or community interests. But contrary to what the petitioners believe, one marriage law alone cannot be altered without impacting the others.

The SMA by its very structure implicates Hindu law. The act provides that two persons marrying under it are to be governed by the secular law, the Indian Succession Act, in matters of inheritance. But Section 21A of the SMA states that if the said two persons are Hindus, then they will continue to be governed by the Hindu Succession Act. Thus, this section of the SMA will be inoperative unless same-sex marriage is also recognised by Hindu law.

The Bharatiya Janata Party (BJP) has long promised a UCC. It is another matter that after it returned to power in 2019, the government clarified in the Delhi High Court cases mentioned above, that it viewed marriage essentially as a union between “a biological man and a biological woman” in keeping with the dominant social values of the country.

The Forum Against Oppression of Women envisioned marriage as a registered companionship contract between two consenting adults irrespective of gender.

Clearly, the promise of bare uniformity has little to offer either those who currently have access to marriage or those aspiring for it. Its only function is for a majoritarian state to use it as a “stick to beat the Muslim minority”. The recent incident in Delhi where an event organised by a BJP leader to demand a UCC also involved anti-

Muslim slogans, should not leave any doubt in that regard.

A better recourse for queer groups is to build on feminist efforts to turn marriage into an equal partnership.

In the mid-1990s, a Mumbai based feminist group called the Forum Against Oppression of Women (FAOW) put forward a vision document on gender just family law. Situated in a climate of communal polarisation (like the present), the group felt that it ought to spell out its vision of gender justice in order to distinguish it from the substantively empty demand for a UCC. FAOW envisioned marriage as a registered companionship contract between two consenting adults irrespective of gender. The contract was to be free from the prohibitions that accompany marriage traditionally, parties could end it unilaterally, and there was to be an equitable division of assets and contributions on divorce. Further, cohabittees were to have the same status as married contractees. Conceived thus, marriage incorporated the values of freedom and equity, shed some of its exclusivity, and accommodated the needs of, what FAOW called, "homo-relational realities."

Twenty-five years later, with homosexuality decriminalised and with a large number of queer people openly living their "realities," it is time to revive that vision of marriage. Naturally, a vision must encompass substantive aspects of marriage rather than a mere alteration of its gender composition. A question being debated by feminists at the moment is whether wives should be paid wages for housework since at present family law does not take account of the disproportionate amount of labour performed by them in sustaining the household, and in turn, the society and the economy. The performance and valuation of domestic and care work go to the heart of an equal relationship, be it heterosexual or queer. Pursuing this question gives us a better entry point into the discussion over marriage than afforded by the petitions seeking inclusion in marriage.

"Queer" realities

Having invoked "queer realities" to make a case for substantively reforming marriage, however, one must make two additional points. First, in the present context, "queerness" must be understood without reference to sexual orientation or gender identity. Consider an unmarried cohabiting couple, two cohabiting friends together raising a child who is legally related to only one of them, or two cohabiting friends who have been shunned by their birth families for their gender nonconformity. Each of these non-normative relationships is *queer* in that they constitute kinship outside the dominant models based on blood and marriage.

We encounter the limit of marriage reform here as marriage itself becomes the basis of discrimination.

Second, the particular aspect of these "realities" that give rise to the desire for legal recognition is the absence of control over their own lives that individuals in such relationships often experience. Given that the state determines who a family member is and privileges biological or formal ties in doing so, those in queer relationships do not have any legal status in the lives of their partners in contexts ranging from healthcare decision-making to employment benefits. No matter how much we reform marriage and how egalitarian an institution it becomes, queer realities of the above kind will continue to be disadvantaged for being outside marriage. We encounter the limit of marriage reform here as marriage itself becomes the basis of discrimination.

Thus, if the primary argument for same-sex marriage is that it is a one-stop solution that will secure for queers a range of practical benefits pertaining to their relationships, then we also need to ask if those benefits can be secured without encountering marriage. Is it possible to assert each individual's right to choose their relations for official purposes, without the state deciding it for them as per familiar and established templates of kinship? Could the values of autonomy and self-determination that have made it possible for us to claim our individual sexual orientations and gender identities be used to assert the right to choose the kind of "families" we want?

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