



Journal Homepage: - www.journalijar.com
**INTERNATIONAL JOURNAL OF
 ADVANCED RESEARCH (IJAR)**

Article DOI: 10.21474/IJAR01/4940
 DOI URL: <http://dx.doi.org/10.21474/IJAR01/4940>



RESEARCH ARTICLE

**CHANGING DIMENSIONS OF THE CONCEPT OF MARRIAGE - A CONTEMPORARY CHALLENGE
 TO PERSONAL LAWS IN INDIA.**

*Balwinder Singh.

Assistant Professor, School of Law, The NorthCap University, Gurugram.

Manuscript Info

Manuscript History

Received: 24 May 2017
 Final Accepted: 26 June 2017
 Published: July 2017

Key words:-

Cohabitation, Gay, Interpersonal, Live-in relationship, Maintenance, Non-marital

Abstract

The institution of a marriage is an oldest social institution and provides a foundation on which whole super structure of civilization and prosperity is built. Different personal laws have given different meanings to the concept of marriage ranging from sacramental to contractual union. As far as position in India is concerned, India is still looked by the world as a country where marriage occupies a sacramental position both philosophically and practically. But with the change in the modern setup the traditional concept of marriage has changed and now-a-days a change is visible in our society from arranged marriages to love marriages and now to 'live-in-relationships as well as gay marriages'. Despite all these developments and even granting a level of legal legitimacy to the live-in relationship or gay relationships, it is still largely perceived to be an immoral relationship in our society. In the absence of legislation to deal particularly on live-in relationship as well as gay relationships in India, the partners in these types of relationships often face hardships. At last, the judiciary is looked upon as the last resort to deal with such issues. Here an attempt is made to look into recent developments in the attitude of the Courts in granting various rights to live-in couples as well as gay relationships in India.

Copy Right, IJAR, 2017.. All rights reserved.

Introduction:-

Marriage as an institution is very old and popular in most parts of the world. Marriage is very well accepted and supported by the society as it involves many religious rituals which strengthen the family system. It leads to sustain a longer relationship unless and until it is annulled either by the husband or the wife. The institution of a marriage is an oldest social institution and provides a foundation on which whole super structure of civilization and prosperity is built. It is an unconditional sacrament in which husband and wife are submissive to each other. Marriage is defined as the "legal status, condition, or relation of one man and one woman united in law for life, or until divorced, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex." (Black's Law Dictionary, 1990). But in the present milieu the meaning of this relationship has changed drastically. (Dr. Puja Jaiswal, 2012). Marriage (besides blood relationships) is not the only relationship that exists between men and women. Such other relationships between men and women can be beautiful, complex and difficult. What view society forms about a particular relationship is generally reflected in its laws. (Shyam Krishan Kaushik, 2011). Law has been playing vital role in social change. Society is constituted of individuals. Law and society try to regulate the conduct of an individual. The institution of marriage being foundation of the society, interest of the society is well protected by keeping the foundation of institution of marriage strong. Since the matter

Corresponding Author:- Balwinder Singh.

Address:- Assistant Professor, School of Law, The NorthCap University, Gurugram.

relating to marriage falls within the purview of personal law, each religion in India is having its own law relating to marriage along with other family matters. As we are observing changing living patterns in the society, law has to respond properly keeping in view the societal and constitutional values in its mind. India has strong cultural roots that focus purely on morality and social ethics. But things are changing now. The definition of marriage given under different personal laws does not carry that much influence in the eyes of young generation, as a new concept called live-in-relationship has been introduced in the society by them. Though Indian society has not accepted such relationship, but the problem pertaining to certain aspects like the status of the children born out of such relationship, share in property, violence against women who are into such relationship, stands unanswered. Our Apex court's decisions pertaining to maintenance, share in property to children born out of such relationship, are in par with the decision given in case of marriage. The matter is also true in case of homosexual marriages as the 21st century is also witnessing homosexuality, which is making strides towards equal recognition of their families. All these changes are having serious ramification on the institution of marriage and try to change the customary concept of marriage. Hence, it would be abomination to hold such relationship in par with marriage and every effort should be made to see that recognition of such unions should not cause unnecessary upheaval in the set societal norms.

Concept of marriage under different Personal Laws:-

Marriage under Hindu Law:-

According to the tenets of Hinduism, marriage is sacred relationship, a sacrament and a divine covenant meant for procreation and continuation of family lineage. Vedic era was considered as golden era of the Hindu society. Hindus described marriage as the most important of all *Samskaras* and the only *Samskara* for a woman. Every Hindu was enjoined to marry, to enter the *Grishastha ashrama*. According to Vedas marriage is a union of "bones with bones, flesh with flesh and skin with skin, the husband and wife become as if they were one person." (U.C Sarkar, 1972). The purpose of marriage was to enable a man by becoming a householder, to perform sacrifices to the gods and to procreate sons (Rig Veda X 85.36) (P.V Kane 1974). Apasthamba Dharamsutra (II.5.11.12) indicated that main purposes of marriage were the wife enabled a man to perform religious rites and was mother of son or sons who were supposed to save a man from hell. Marriage meant unity of personality as in Rigveda it is enshrined, "*Be thou mother of heroic children, devoted to the gods, be thou queen in thy father-in-law's household, may all gods unite the heart of us into one.*" The term of marriage used by Hindus is 'vivaha' which literally means carrying away the bride but Hindu marriage could be consecrated in broadly eight forms. (K.P. Bahadur, 1974). The first four namely *Brahma*, *Daiva*, *Arsa* and *Prajapatya* were *Dharmya* (proper or Approved) and *Asura*, *Gandharva*, *Rakshasa* and *Paisacha* were called *Adharmya* (improper or unapproved). A marriage was legally completed only when the proper rites like *homa* (offering in the sacred fire), *Panigrahana* (taking the hand of the bride) and *Saptapadi* (the bride and groom taking seven steps together) were performed. (Srikant Mishra¹⁹⁹⁴).

Marriage is not undertaken by a Hindu utterly for worldly purposes (*artha* and *kama*) but mainly for the fulfillment of the religious duties with the association of wife who is therefore called *Dharmapatni*. According to ancient texts and Shastras, a Hindu marriage is a *Samskara* giving rise to certain religious duties and obligations like making of offerings to the Devas, oblations to *Pitrus* etc. For the performance of those religious duties, the participation of wife is essential. The continuance of lineage (*santati*) through the son is also a religious duty as he brings salvation and save the ancestors from hell. Manu (IX.101) explained that, "let mutual fidelity continue till death," which depicted the eternal character of Hindu marriage. Manusmriti deepened the concept of eternity in Hindu marriage by the verses as, "husband and wife are united to each other not merely in this life to come" and "a true wife must preserve her chastity as much after as before her husband's death." (K.M Kapadia, 1966). The Hindu concept of marriage which at one time considered as Indissoluble, Permanent and Eternal union with the growth of civilization, now is understood as voluntary union for life of one man and woman to the exclusion of all others. The eternal factor of sacramentality and indissolubility of Hindu marriage has vanished with later legislative developments by granting the right of divorce.

Marriage under Mohammedan Law:-

In case of Muslim marriages, religion and law are indissolubly bound and it cannot be said that a Muslim marriage is not a religious rite. According to the traditions of the Prophet, marriage is considered to be a religious duty (*Sunnat*), and it is obligatory on those who are physically fit. (Syed Khalid Rashid, 2008). The Muslim jurists regard the institution of marriage as partaking the nature of both *ibadat* (devotional acts) and *muamlat* (dealing among men or worldly) affairs. (A.A.A. Fyzee, 1999). As a matter of fact it is only the form of marriage *i.e.*, in Muslim law marriage is contractual and non-ceremonial which requires *ijab* (proposal), *qubul* (acceptance), competency of parties (parties must not be *maharin*) *i.e.* within prohibited degree and legally incompetent like minor in age or

unsoundness of mind, consent of *wali* i.e. guardian, presence of witnesses *shahadat* except for shias, *majlis-e-wahid* (*ijab* and *qubul* should be made in one sitting), moreover the words of marriage contract must be clear and unambiguous. Tahir Mahmood, 2002). Ameer Ali defined the purpose of marriage is for protection of society and in order that human beings may guard themselves from foulness and unchastity. In *Abdul Kadir v. Salima* (1886) 8 All. 149 Justice Mahmood describe marriage among Muhammadans is not sacrament but purely civil contract¹ in which consent of parties plays an important role and indissolubility is not the rule and nature. So, though Muslim marriage is a religious duty (*sunnat*) but it differs from the original Hindu concept of marriage which describes marriage as an indissoluble union continuing even after death i.e. eternal in nature. The fundamental concept of individual liberty and responsibility, which is feature of Muslim jurisprudence, is mingled in the concept of marriage (free volition of the parties to marriage) as well as in its dissolution, though its dissolution have become one sided engine of oppression in the hands of the husband.

Marriage under Christian Law:-

With the advent of Christianity, all over the World, marriage came to be regarded as sacrament with its indissoluble character. The Christians believe that marriage is made in heaven and no man could put them as under. There is no escape from the holy tie, only death is the escape route to marriage. This is proclaimed by Holy Scriptures that god was the author of the law of sacramentality and indissolubility of marriage. It was he who constantly supervised and ordained the stability of marital tie, its utility and firmness. (Paras Diwan, 2002). Marriage is such an institution that if man and woman choose wrongly as parties to marriage, they should take their cross on their back gladly as a duty owned to god. Marriage has to be sanctified by religious ceremonies performed by clergy and church was supreme ecclesiastical authority in matrimonial matters as early in seventh century in England and other parts of the world. (Pollock and Maitland, 1968). To sum up, Christian concept of marriage had been that marriage being obligatory for every human being, was a sacrament, had been ordained by god and was indissoluble solemn union entered into by the parties with their full and free volition for life so as to prevent fornication (a moral sin) and with a view to provide safeguard against depopulation. But according to later Canon law, marriage could be contracted by consent alone without any physical act or ecclesiastical ceremony, provided the consent was notified in words of the present tense (*pre verba de prasenti*). (J.H. Baker, 1979). But with reformation in Christian world, it divided into Catholics and Protestants. Protestants with lofty ideals of liberty, equality and pursuit of happiness gave further impetus to accept the marriage as contract and considered it as dissoluble union. As in other human affairs, so in marriage people had the opportunity to rectify their errors. According to Protestants, freedom implied to correct their errors of choosing his or her life partners, by getting their marriage dissolved which had failed in substance. Protestants propounded the notion of contractuality and dissolubility of marriage while Catholics continued to hold the notion that marriages are made in heaven. With the background and plane of English law, in India too in the later part of 19th century divorce was introduced by statutes The Native Convert's Marriage Dissolution Act of 1866 and Indian Divorce Act, 1869.

Live-in-Relation and Marriage: Inherent Contradictions:-

Live-in relation i.e. cohabitation is an arrangement whereby two people decide to live together on a long-term or permanent basis in an emotionally and/or sexually intimate relationship. The term is most frequently applied to couples who are not married. The legal definition of live in relationship is "an arrangement of living under which the couple which is unmarried lives together to conduct a long-going relationship similarly as in marriage." (Deepali Sharma and Shikha Rajpurohit, 2012). It is an informal arrangement between intended parties although some countries allow registration of such arrangements between the couples. This form of relationship does not thrust the typical responsibilities of a married life on the individuals living together. The foundation of live in relationship is individual freedom. People generally choose to enter into such consensual arrangements either to test compatibility before marriage or if they are unable to legally marry or simply because it does not involve the hassles of a formal marriage. It may also be that couples in live-in relationship see no benefit or value offered by the institution of marriage or that their financial situation prevents them from being married on account of marriage expenses. Whatever be the reason it is quite clear that even in a traditional society, where the institution of marriage is considered to be 'sacred' an increasing number of couples choose a live-in relationship, sometimes even as a permanent arrangement over marriage. In such situations, various social, economic and legal issues have arisen and continue to do so.

Persons may find themselves in live-in relationships either 'by choice' or 'by circumstance'. Relationships 'by choice' are those where the partners live together. It may exist even where one or both of the partners are already legally married to another person and yet engage in such a relationship as a matter of preference. Relationship in this

category is wholly voluntary. There are live-in partners who are consciously choosing to live as 'live-in'. They do not want a status of formal marriage, they are happy to continue to live as live-in partners only. (Vijender Kumar, 2012). On the other hand, relationship 'by circumstance' occur where one or both partners are under the mistaken assumption that a valid marriage exists between them or where parties thought they had validly divorced from persons married or cannot afford to be married again due to economic reasons. This may occur in case where the man or woman was led to believe that the man was unmarried, divorced or widowed and married him. If the man and woman followed all rituals of the marriage but already had a wife or husband living at such time from whom, he or she had not divorced as yet, this marriage will not be recognized in law. The relationship that subsisted thus becomes in the nature of a live-in. Live-in-relationship is non-marital relationship prevailing in West with the name of common law marriages, informal marriages or marriage by habit, deemed marriages etc. It is a form of interpersonal status which is legally recognized in some jurisdictions as a marriage even though no legally recognized marriage ceremony is performed or civil marriage contract is entered into or the marriage registered in a civil registry. These deemed marriages are legally binding in some countries but have no legal consequences in others. (Dr. G. L. Sharma and Dr. Y. K. Sharma, October 2011).

Legal facet of live-in relation: a Judicial Analysis:-

The practice of men and women living together without being in a relationship of formal marriage has been in practice for a long time. It was not at all considered 'immoral' for men to have live-in relationships with women outside their marriage. Concubines (*avarudh stris*) were kept by married men. In feudal society sexual relationship between man and woman outside marriage was totally tabooed and regarded with disgust and horror. Following Independence, as society matured, bigamy was outlawed and women became more aware of their rights. This practice is now illegal though this has not prevented people from violating this law. The last few decades have however seen the advent of a new form of 'live-ins', where men and women cohabit together without entering into formal marriage even though there is no legal hurdle preventing them from doing so. The traditional Indian society however disapproved of such living in arrangements, for several reasons. First, society revered the institution of marriage. Secondly if a woman was financially dependent on the man, the instability of such a relationship created a subservient status for the woman. Till recently and even now in small towns and cities, there is much social criticism and stigma attached to such relationships, forcing them to remain largely secretive.

No law at present deal with the concept of live-in-relationships and their legality in India. None of the statutes dealing with succession or marriage such as the Hindu Marriage Act, 1955, the Special Marriage Act, 1954 or the Indian Succession Act, 1925 recognise live-in relationship directly. Under section 17 of the Hindu Marriage Act, children born out of such relationships are considered to be legitimate and have been granted the right to succession. In India the judicial attitude is somewhat in favour of holding such relationship at par with marriage and granting all such rights that are available to married couples. These are some of the legal aspects peculiar to Indian conditions:

Legality of marriage and live-in Relationship:-

At present in India, persons entering into marriage are recognised and governed either by their personal laws or by civil law such as the Special Marriage Act, 1954 while marriage between Hindus is considered being a samakara (Sacrament), whereas under Muslim, Christian, Jewish and Parsi laws marriages are contracts. Marriage solemnized and /or registered under the provisions of the Special Marriage Act, 1954 are a civil contract. In case of Hindus certain ceremonies are required to be performed to solemnise a marriage as provided under section 7 of the Hindu Marriage Act, 1955. As the Hindu social system stands today, socio- religious norms are clear that a married daughter changes her surname and gotra after marriage and acquires the gotra and surname of the family of her marriage whereas females in live- in partners have no means of recognition as such. The concept of live-in relationship, the freedoms and liberty it offers to partners and most importantly the fact that an increasing number of urban couples in India are choosing to live-in rather than marry is a new development that has turned the traditional Indian marriage on its head.

In other countries like the United Kingdom and the United States of America, live-in partners may register themselves in a 'domestic register' or formally enter into a 'cohabitation contract,' after which they receive legal recognition as domestic partners. However in India the law is yet to provide for such recognition. As a result women in live-in relationships are not recognised by their partner's surname, for any legal or financial matters including opening a bank account, submission of income tax return, applying for loans, etc. They retain their identity as an individual and are not recognised as a domestic partner. Consequently live in couples can separate informally without any formal divorce or the intervention of a court. However, the law does have a concept called 'presumption

of marriage' which could be used to recognise such relationships. In *Gurubasawwa v. Irawwa* (1997) 1 HLR 695 Karn it was held that a presumption is available if a man and woman are living under the same roof and cohabit for a number of years. In *Sobha Hymavathi Devi v. Setti Gangadhara Swamy*, (2005) 2 SCC 244 it was held that a Continuous and prolonged cohabitation raises a presumption in favour of marriage and against concubinage. This is in accordance with Section 50 and Section 114 of the Indian Evidence Act, 1872. In *S.P.S Balasubramanyam v. Suruttayan* 1992 supp (2) SCC 304 the Supreme Court held that if a man and woman are living under the same roof and cohabiting for a number of years, there will be presumption under section 114 of the Indian Evidence Act that they live as husband and wife and the children born to them will not be illegitimate. Again in *Tulsa v. Durghatiya* (2008) 4 SCC 520 the Supreme Court held that when a man and woman live together for a long spell there would be a presumption in favour of their having been married, unless rebutted by convincing evidence. This decision suggests that the law treats long live-in relationships as good as marriages. This decision was challenged by claimants to the property rights of the husband and wife as opposed to their children. The Courts could subsequently interpret live-in relations to mean 'living together as husband and wife' to exclude those who enter into a live-in relationship 'by choice' without intending to be married is still a matter of doubt and debate.

Maintenance rights of live-in partners:-

There are uniform provisions for maintenance available to all married persons of any religion under Section 125 of the Code of Criminal Procedure, 1973. The need to include live in female partners for the right of maintenance under Section 125 of Criminal Procedure Code, 1973 was supported by the judgment in *Abhijit Bhikaseth Auti v. State Of Maharashtra and Others* AIR 2009 (NOC) 808 (Bom.). In this case, the Supreme Court observed that it is not necessary for woman to strictly establish the marriage to claim maintenance under sec. 125 of Cr.P.C. A woman living in relationship may also claim maintenance under Sec.125 Cr.P.C. In the case of *Chanmuniya v. Virendra Kumar Singh Kushwaha*, SLP (Civil) No. 15071/2009 MANU/SC/0807/2010 the Supreme Court observed that "in those cases where a man, who lived with a woman for a long time and even though they may not have undergone legal necessities of a valid marriage, should be made liable to pay the woman maintenance if he deserts her. The man should not be allowed to benefit from the legal loopholes by enjoying the advantages of a de facto marriage without undertaking the duties and obligations." Court also wanted to interpret the meaning of "wife" broadly under Section 125 of Cr.Pc. for claim of maintenance, so that even women in live-in relationship can claim maintenance. The Maharashtra Government in October 2008 approved a proposal suggesting a woman involved in such a relationship for a 'reasonable period' should get status of a wife. The Malimath committee had also suggested that the word 'wife' under Cr.P.C. be amended to include a 'woman living with the man like his wife' which means the woman would also be entitled to alimony. The Malimath Committee and the Law Commission of India also suggested that if a woman has been in a live-in relationship for considerably long time, she ought to enjoy the legal status as given to wife. However, recently it was observed that a divorced wife is treated as a wife in the context of Section 125 of CrPC but the live in partners cannot get divorced, and hence cannot claim maintenance under Section 125 of CrPC.

Inheritance rights of live-in partners:-

Hindu law gives the widow of a male Hindu the status of a class I heir under section 8 of the Hindu Succession Act, 1956 giving her right to one share with absolute ownership over her deceased husband's property, if he dies intestate under section 10 of the Hindu Succession Act, 1956. Likewise, under section 15(a) of the same Act of 1956, a husband would have the right to inherit a share of his wife's property upon her death. In Muslim law, a widow having children is entitled to 1/8th of her deceased husband's property and 1/4th of it, if they are childless. A husband would similarly inherit 3/4th of his wife's property in case of the former and half otherwise, upon his wife's death. But partners in a live-in relationship do not enjoy an automatic right of inheritance to the property of their partner. The Hindu Succession Act, 1956 does not specify succession rights to even a mistress living with a male Hindu. However, the Supreme Court in *Vidhyadhari v. Sukhrana Bai*(2008) 2SCC 238 created a hope for persons living in together as husband and wife by providing that those who have been in a live-in relationship for a reasonably long period of time can receive property in inheritance from a live-in partner. Similarly in *Revanasiddappa v. Mallikarjun* (2011) 11 SCC 1 property of a Hindu male, upon his death (intestate), was given to a woman with whom he enjoyed a live-in relationship, even though he had a legally wedded wife alive.

Rights of children born out of live-in Relation:-

The child born through a Live-in relationship enjoys the same rights of succession and inheritance as are enjoyed by a child through a married couple under the Hindu Marriage Act. Notwithstanding that marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall

be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act. Thus in order to keep up the spirits of law in the righteous direction and to subside the social evils wherein illegitimate child was denied his rights the Hindu Marriage Act has granted legitimacy to children born through marriages which are not valid. Hence such definition brings within itself the ambit of live-in relationships and children born through such relations.

While still the other laws have not guaranteed such legality to children born through such relationships and therefore the status is dwindling for legal status of children which results in extensive misuse of the provisions and still escape liability. Hence the legality of a child is doubtful in other laws and has to be proved beyond reasonable doubt. In *Vidhyadhari v. Sukhrana Bai*, 2008 2SCC 238 the Supreme Court granted the inheritance right to the four children born from the woman with whom the man shared a live-in relationship, calling them 'his legal heirs.' It was further held that a child born out of a live-in relationship is not entitled to claim inheritance in Hindu ancestral coparcenary property (in the case of an undivided joint Hindu family) and can only claim a share in the parents' self-acquired property. The Court thus ensured that no child born from a live-in relationship of a reasonable period may be denied their inheritance. In *Madan Mohan Singh & Ors v. Rajni Kant & Anr.*, AIR 2010 SC 2933 once again the debate on legality of the Live-in relationship as well as legitimacy of child born out of such relationship was questioned. The Court while dismissing the appeal in the property dispute held that there is a presumption of marriage between those who are in live-in relationship for a long time and this cannot be termed as 'walking-in and walking-out' relationship. The Hon'ble Supreme Court accepted the principle that a long term of cohabitation in a live-in relationship makes it equivalent to a valid marital relationship. The Court went further on the issue and stated that the children born out of live-in-relationship are legitimate and they are entitled to property except right in coparcenary property.

Thus all these decisions show that live-in-relationship is in par with the marriage. Hence the requirement of marriage as laid down in our personal laws, may be dispensed for various matters like as to presumption of marriage, seeking maintenance and alimony, legitimacy of children, then the property rights to children born out of such relationship etc. Marriage whether sacramental or contract was foundation of morality but the above decisions does put us into dilemma as to what is marriage.

Homosexuality and Marriage:-

Same-sex marriage (also known as gay marriage) is marriage between two persons of the same biological sex or gender identity. Supporters of legal recognition for same-sex marriage typically refer to such recognition as marriage equality. The recognition of such marriages is a civil rights, political, social, moral, and religious issue in many nations. The introduction of same-sex marriages has been varied by jurisdiction, resulting from legislative changes to marriage laws as well as court challenges based on constitutional guarantees of equality. Conflicts arise over the issue whether same-sex couples should be allowed to enter into marriage, be required to use a different status (such as a civil union, which either grant equal rights as marriage or limited rights in comparison to marriage), or not have any such rights. In many countries homosexual marriages have been legalized for the reason that human rights mandate that all should be treated equally. One argument in support of same-sex marriage is that denying same-sex couples legal access to marriage and all of its attendant benefits represents discrimination based on sexual orientation. Another argument in support of same-sex marriage is the assertion that financial, psychological and physical well-being are enhanced by marriage, and that children of same-sex couples benefit from being raised by two parents within a legally recognized union supported by society's institutions. *Loving v. Virginia*. 388 U.S. 1 (1967). The other arguments for same-sex marriage are based upon what is regarded as a universal human rights issue, mental and physical health concerns, equality before the law. Whatever kind of human rights we speak; universally all developed countries have accepted marriage and cohabitation of homosexuals. In India acceptance of such marriage will be difficult as our culture and tradition do not accept such relationships. Homosexuality is treated as crime under Section 377 of Indian Penal Code and makes it an offence, commonly known as the 'Anti-sodomy Law'. This section considers "consensual homosexuality as an "unnatural offence" and is punishable with an imprisonment of 10 years.

The recent development of decriminalizing homosexuality in India has raised many eyebrows. It will lead to decrease in the number of traditional marriages and this, in turn, will undermine the whole institution of the family. The decision of Delhi High Court *Naz Foundation v. Government of NCT of Delhi and Others*, (2009) SCC 5 where the petitioner submitted that right to privacy is implicit in the right to life and liberty and guaranteed to the citizens, in order to be meaningful, the pursuit of happiness encompassed within the concepts of privacy, human dignity,

individual autonomy and the human need for an intimate personal sphere require that privacy dignity claim concerning private, consensual, sexual relations are also afforded protection within the ambit of the said fundamental right to life and liberty given under Article 21. Hence, homosexuality does not come within the ambit of Article 21 as it is not pursuit human need and is not dignified in the eyes of Indian society. Bu on December 11, 2013, the Supreme Court's two member bench (Justices [G. S. Singhvi](#) and S. J. Mukhopadhaya) overturned the decision of the Delhi High Court. It said that the 2009 order of the High Court is "constitutionally unsustainable as only Parliament can change a law, not courts". It is submitted here that the SC took a very conservative approach on the issue and the judgment needs to be reconsidered. Under Hindu law, marriage with a eunuch is voidable marriage. "Obviously, a marriage between two males or two females is void". In an English case, *Corbett v. Corbett*, (1970) All E R 83 a marriage between a male and another person who was registered as male at birth had been solemnized and a question as to the validity of the marriage arose, and was held to be void. With the pass of time, western countries have been legalizing such marriages. In *Parmaswami v. Somathammal*, (1969) Mad. 124 while deciding marriage with eunuch, Madras High Court held that marriage with eunuch or between eunuchs is voidable, but marriage between two persons of the same sex is void *ab initio*. Under Muslim law the provisions are clear that the marriage can be solemnized only between people of different sex.

Conclusion:-

Marriage is a culturally sanctioned union between two or more people that establishes certain rights and obligations between the spouses and their children, and between them and their in-laws and with the whole World. The definition of marriage varies according to different cultures, but it is principally an institution in which interpersonal relationships, usually intimate and sexual, are acknowledged. When defined broadly, marriage is considered a cultural universal. Marriage is an institution which can join together people's lives in a variety of emotional and economic ways. Cohabitation is not a pre-requisite of marriage. To consider live-in relationship and homosexuality legality would be as anathema by those who view institution of marriage as relevant and absolutely essential to hold together the social fabric today. Our country is known for its rich culture and heritage. Every effort should be made to stabilize the institution of marriage so that our future generation can stabilize their lives and wind it with morality. Their offspring's would get social status. It is for the youth to build a strong nation and maintain the rich decorum of our culture and heritage. And if live in relationship and homosexual marriages are legalized, then the very definition of marriage put forth in our personal laws needs to be amended or there may be no requirement to define marriage at all. It is to the legislature and the courts to look into the matter seriously and protect the institution of marriage and in the long run the institution of family which is the very basis of sound legal system.

**

References:-

1. Bahadur, K.P. *A History of Indian Civilization*, Vol.I (New Delhi: Ess Ess Publications, 1979) 211.
2. Baker, J.H., *An Introduction to English Legal History* (London: Butterworths London, 1979) 391.
3. Black's Law Dictionary, 6th ed., (1990) 972.
4. Diwan, Paras, *Law of Marriage and Divorce* (Delhi: Universal Publishing Co., 2002) 21.
5. Fyzee, A.A.A. *Outlines of Muhamadan Law* (Delhi: Oxford University Press, 1999) 89-90.
6. Jaiswal Puja, "Live-in Relationship and Law," *Nyayadeep*, Vol. XIII, Issue 3 (July 2012) 145.
7. Kane, P.V. *History of Dharamsastras*, Vol. II, Part I (Poona: Bhandarkar Oriental Research Institute Press, 1974) 428.
8. Kapadia, K.M. *Marriage and Family in India* (Bombay: Oxford University press, 1966) 169.
9. Kaushik, Shyam Krishan, "A Relationship in the Nature of Marriage- Hope and Disappointment," *Journal of Indian Law Institute*, Vol. 53, Issue 3 (July- Sept, 2011) 474.
10. Kumar, Vijender, "Live-in Relationship: Impact on Marriage and Family Institutions," *Supreme Court Cases Journal*, Vol. 4 (2012) 19.
11. Mahmood, Tahir, *The Muslim Law of India* (New Delhi: LexisNexis Butterworths, 2002) 53-55.
12. Mishra, Srikant, *Ancient Hindu Marriage Law and Praticce* (New Delhi: Deep and Deep Publications, 1994) 4-5.
13. Pollock and Maitland, *The History of English law*, Vol.2 (Cambridge: Cambridge University Press, 1968) 364.
14. Rashid, Syed Khalid, *Muslim Law* (Lucknow: Eastern Book Company, 2008) 55.
15. Sarkar, U.C., *Legal Research Essays*, Vol.I (Allahabad: Allahabad Law Agency, 1972) 191.
16. Sharma, Deepali and Shikha Rajpurohit, "Legal and Social Aspects of Live-in Relationship," *International Referred Research Journal*, Vol. III, Issue 28 (January 2012) 35.
17. Sharma, G. L. and Dr. Y. K. Sharma, "Live-in Relationship- A Curse or Need of the Hour," *International Referred Research Journal*, Vol.III, Issue 25 (October 2011) 57.