

Putting the free back in free love

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Debates on marriage, like debates within marriage, are rarely dispassionate. Maharashtra's proposal to 'recognise' live-in relationships and the law commission releasing two recent reports dealing with marital laws, have led to howls from both sides. But my interest here is limited to evaluating the role of a liberal democratic state in regulating 'marital relationships' — including all consensual, long-term, sexual relationships.

Why do marital relationships require state regulation? Surely it cannot merely, or even primarily, be for the symbolic importance of state recognition of marriage. Several social institutions, including friendship, have flourished for millennia and continue to do so, without any need for a helping hand from the state. We don't think that the state is disrespecting the institution by not enforcing the obligations of friendship. Marital relationships, like friendships, will not wither away without state recognition. Symbolic recognition becomes an issue mainly when a select group (like inter-caste, inter-faith and same-sex couples) are denied free and equal access to the institution. So is there a role for the state to play in marital relationships? Relationship issues are so fundamental to an individual's well-being that the primary role of the state must be to ensure that they are entered into freely. This should include the freedom to choose one's partner, the freedom not to be in a relationship, the freedom to leave a relationship and the freedom to choose the rules that will govern the relationship while it continues and in the event of its breakdown. Secondly, the state must ensure that these governing rules comply with basic norms of justice so that the vulnerability of a person is not exploited. These rules must recognise that people make deep physical, emotional and material contributions, often without conducting a rational cost-benefit analysis like those in business partnerships.

This freedom-and-justice framework helps us make sense of some of the current debates and developments on marital relationships. The law commission has recently recommended, in its 212th Report, that the Special Marriage Act 1954 be amended so that all inter-faith marriages take place under it. The proposed amendments seek to do away with those portions of the legislation which make it unattractive to non-Hindus. They also seek to drop the term 'special' and make this regime of civil marriage a genuine alternative, not just to inter-faith couples but also to secular couples who don't want a religious marriage under personal laws. Under the proposals, religion-based personal laws will continue to be available for same-faith couples if they prefer it to the civil alternative — thus the 'uniformity' debate is dodged.

Another freedom-related development concerns the ‘queer azadi’ march in Mumbai earlier this year, where a lesbian group made a strong demand for the prohibition of forced marriages. Indian feminism has generally focussed on justice in marital relationships, but has been surprisingly reticent on issues concerning freedom. This demand, which marks a welcome beginning, needs to be augmented with one for a prohibition on discrimination based on marital status. Thirdly, there have been recent reports of some Muslim women insisting upon additional terms in the nikahnama to safeguard their rights. Muslim law views marriage as a contract rather than a sacrament. As such, it gives the parties freedom to negotiate their respective rights and obligations, over and above the legal prescription. Any secular uniform civil code cannot but formulate marriage in a similar, contractual, fashion.

While these three developments underscore the importance of freedom in marital relationships, the Maharashtra proposal seeks to balance freedom with justice by granting basic maintenance rights to an unmarried long-term cohabitee. It is true that unmarried cohabiting couples have not consented to all the rights and obligations that follow marriage. Nonetheless, the proposal recognises the fact that unmarried cohabitees also contribute to each other’s lives by making sacrifices which need to be accounted for.

These developments seek to enhance freedom in the context of marital relationships, and temper it with justice where necessary. But they are being drowned out by regressive measures, typified by a recent report of the National Commission for Minorities on the dwindling birth-rate of Parsis. It called upon “Parsi community leaders [to] get together to resolve ... problems which cause the birth rate to slow down, namely, late and non-marriages ... out-marriages and separation-divorces.” Surely, a freedom-enhancing way of addressing dwindling numbers is to recognise the children from “out-marriages” as Parsis. But, citing what sounds suspiciously close to a purity-of-blood argument, the report says this “may increase the religion but not the community” (sic). Dr. Ambedkar had recognised long ago that the only way to democratise Indian society was by democratising marital relationships. It is time we took that vision seriously.

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