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LOVE IN LEGAL REASONING: THE RIGHT TO LOVE AS AN ASPECT OF INDIVIDUAL AUTONOMY

Authored By- Ms. Shraddha Sataywan Choudhary

There is no formal recognition of a 'right to love' per se, whether in the Constitution of India, or in international human rights law instruments. Marriages may often be more about convenience than love, and love need not always result in marriage. Notwithstanding this, even if it is assumed arguendo that the right to marry implies a right to love, it is obvious from the wording of the instruments cited above, that the essence of the right to marry is the right to choose whom to marry. It is not as though every human being is entitled to a partner, regardless of whether another human being wants to marry them. The right has meaning only when two competent adults are willing to marry. By exclusion, therefore, it prevents third parties, such as the State, relatives, or despondent ex-lovers, from preventing such a marriage without reasonable cause. Therefore, what the right seeks to protect is the autonomy of the individual to choose whom to marry (and love).

This, precisely, has been the approach of the Supreme Court of India in a slew of recent cases.

In *Shafin Jahan v. Asokan*¹ ('Shafin Jahan'), the Court was hearing an appeal on the decision of the Kerala High Court, which granted custody of a 24 year old, adult, competent woman, Hadiya (Akhila before she married and converted to Islam), to her father. The High Court had also annulled her marriage to a Muslim man, Shafin Jahan, on the ground that she had been brainwashed into the marriage, despite her explicit statement to the contrary. Finding that Hadiya did not suffer from mental incapacity or coercion, the Supreme Court reversed the decision of the High Court of Kerala, observing that the right to choose was critical to the expression of individual identity. Chandrachud J., succinctly observed, "The right to marry a person of one's choice is integral to Article 21 of the Constitution... Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness."

¹ *Shafin Jahan v. Asokan*, (2018) 16 SCC 368.

In another instance, the writ petition in *Shakti Vahini v. Union of India*² sought directions to be given to state governments and the Central Government, requiring them to take preventive steps to combat honour killings, and deal with instances of honour killings seriously. The Court, expressing its horror at the practise of lynching couples who married outside their community or without the consent of their community, observed,

“If the right to express one’s own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation.”

Therefore, the ‘right to love’ as implicit in the right to marry, has repeatedly been affirmed by the Indian Apex Court as a function of the individual’s right to choose. It has not, however, been recognised for its symbolic, and constitutive role in an individual’s life.

In a familial sense, the ‘right to love’ is implicitly protected by rights against interference in established family or personal life. Even where the family is protected as a ‘unit of society’, there is no recognition of the symbolic and constitutive role of families and relationships (built on love) in shaping the individual’s identity and being.

In some cases, the ‘right to love’ comes attached with rights against discrimination, or a right to equality, whereby one class of persons cannot be denied the right to choose whom they love or have sexual relations with. The Delhi High Court in *Naz Foundation v. Govt. (NCT of Delhi)*³ (‘Naz Foundation’) declared s.377 of the IPC unconstitutional, in large part, because it treated those who identified as homosexual differently from those who did not, without any legitimate cause for the distinction.

This individual-autonomy-centric view that protects the individual’s right to love as a function of her liberty to choose a marriage or sexual partner, her right to express her autonomy and individuality, and her right to privacy, dignity and non-interference, was also a big part of the Supreme Court’s rationale in *Navtej Singh Johar*. For instance, Dipak Misra J. observed, “Dignity while expressive of choice is averse to creation of any dent. When biological expression, be it an orientation or optional expression of choice, is faced with impediment, albeit through any imposition of law, the individual’s natural and

² *Shakti Vahini v. Union of India*, (2018) 7 SCC 192.

³ *Naz Foundation v. Govt. (NCT of Delhi)*, 2009 SCC Online Del 1762,94:

constitutional right is denied.”⁴

LOVE IN LEGAL REASONING: A DEPARTURE FROM THE TRADITIONAL AUTONOMY-CENTRIC VIEW

While the individual autonomy-centric view of the right to love is necessary, I believe it is severely limited in its reach. On the theoretical plane, it ends with the recognition of the right of an individual to choose whom to have sex with, and in what manner, failing to extend to the emotional and spiritual value of companionship and connection that may often be intrinsic to a sexual relationship. As a result, it also falls short of acknowledging the role of love, sex, and companionship in shaping an individual's identity and, therefore, her choices.

The practical implication of its limited reach is that while a right to non- interference can be built upon this approach, it cannot be the basis for the development of positive rights. Positive rights, to found families that are not necessarily bound by orthodox social paradigms, such as heterosexuality, sex, marriage or procreation, and which challenge hegemonic social structures such as gender roles, need a more profound conception of love in legal reasoning. In this section, I shall demonstrate how the decision in *Navtej Singh Johar* laid the foundation for such a conception, which I shall refer to, for lack of a better term, as the jurisprudence of love.

The jurisprudence of love, in the broadest terms, refers to the operationalisation of ‘love’ to further the ends of justice. Of the several aspects that such jurisprudence might have, I believe three merit some discussion: the transformative potential of love, the power of love to break down oppressive structures, and the role of love in the lives of individuals.

A. THE TRANSFORMATIVE POTENTIAL OF LOVE

The transformative potential of love means, first, as Martha Nussbaum painstakingly demonstrates, that love can prompt good behaviour, and thereby lead to a more just society. This may take a number of forms, but, “the loves that prompt good behaviour are likely to have some common features: a concern for the beloved as an end rather than a mere instrument; respect for the human dignity of the beloved;

⁴ Dipak Misra C.J., *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1,144.

a willingness to limit one's own greedy desires in favour of the beloved.”⁵

As regards legal systems, specifically, the transformative potential of love, by accommodating mercy and compassion, can elevate legal decision-making to justice. In the immortal words of Shakespeare, “And earthly power doth then show likest God's, When mercy seasons justice.” A most relevant, contemporary example of the application of this transformative potential in legal systems across the world is the growth of restorative justice as an alternative to punitive criminal justice. Aside from its focus on reformation and closure, restorative justice incorporates and operationalises the transformative potential of love by emphasising human connection, empathy and remorse.

Research has shown that restorative justice interventions, where appropriately carried out can reduce recidivism. When compared to other forms of intervention in the criminal justice system, restorative justice conferences appear to be nearly doubly as effective in preventing reoffending, at least insofar as youth offenders are concerned. Most importantly, restorative justice measures prevent the victim from feeling alienated from her own narrative, silenced, and isolated in her efforts to get justice, an experience that the majority of victims associate with a traditional criminal justice approach.

In *Navtej Singh Johar*, the use of the transformative potential of love as a jurisprudential tool is most evident in the apology issued to the members of the LGBTQ+ community by Indu Malhotra J.,

“History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality.”⁶

The apology, while legally unnecessary, humanised the decision, placing it within the historical context of injustice perpetrated by the legal system, emphasising the need to make amends. In doing so, the Supreme Court of India went beyond a simple application of constitutional principles to meet the infinitely more elegant goal of delivering justice.

⁵ MARTHA NUSSBAUM, POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE 382 (2013).

⁶ Indu Malhotra J., *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1,20.

B. LOVE THAT BREAKS DOWN OPPRESSIVE STRUCTURES

Another sense in which love can further the ends of justice is by breaking down oppressive structures. Constitutional scholar David Richards has illustrated, through a number of case-studies, how the practice of loves that violate 'Love Laws' (the term he employs for laws which are meant to preserve patriarchal hierarchies) leads to the erosion and reshaping of the social structures of power⁷. Though Richards' argumentation is somewhat circuitous, his central thesis, that love, when it transgresses social orthodoxy, challenges oppressive hierarchies and triggers justice, is simple and intuitive.

It can better be understood in light of Bell Hooks' idea that the practice of love can lead to the breakdown of the patriarchy, which relies on a masculinity devoid of emotion and afraid of human connection. Acceptance of mature human emotions, and the development of safe spaces to express love and cultivate relationships, has the potential to replace anger, aggression and the struggle for power, upon which the patriarchy is built, with love, empathy and compassion.⁸

The decision in Navtej Singh Johar is, in the truest sense, a shining example of the power of love to break down oppressive structures. To begin with, the petition, in addition to relying on solid arguments in constitutional and criminal law, privacy, feminism and queer theory, brought the lived experiences of homosexual individuals in India before the court.

Another instance of the breakdown of oppressive structures through the practice of love is the decision of the High Court of Madras in Arun kumar v. The Inspector General of Registration⁹ ('Arun kumar'). In this case, Justice Swaminathan held that a marriage between a man and a transwoman, both Hindus, would be valid under s.5 of the Hindu Marriage Act, 1955, notwithstanding that the term 'bride' in the provision had hitherto been interpreted to mean a biological female. In coming to this decision, the court observed, "By holding so, this Court is not breaking any new ground. It is merely stating the obvious. Sometimes to see the obvious, one needs not only physical vision in the eye but also love in the heart."

⁷ See generally DAVID A.J. RICHARDS, WHY LOVE LEADS TO JUSTICE: LOVE ACROSS THE BOUNDARIES (2015).

⁸ See generally BELL HOOKS, THE WILL TO CHANGE: MEN, MASCULINITY AND LOVE (2004).

⁹ Arunkumar v. The Inspector General of Registration, 2019 SCC OnLine Mad 8779.

C. LOVE AS AN ANCHOR OF INDIVIDUAL IDENTITY

The third and final sense in which love can be a jurisprudential tool is through the acknowledgement of the role of love in constituting individual identity. Plato, speaking in different voices in his seminal text ‘Symposium’ describes what love is, and in doing so, also touches upon what love can do. This, I believe, is the best way to understand and explore the role that love can play in an individual’s life.

According to Erixymachus, “...the love, more especially, which is concerned with the good, and which is perfected in company with temperance and justice, whether among gods or men, has the greatest power, and is the source of all our happiness and harmony, and makes us friends with the gods who are above us, and with one another.”¹⁰

Agathon, describing Eros, the God of love, says he is the source of courage, temperance, justice and wisdom, and the inspiration for all art and beauty,

“... at the touch of him every one becomes a poet, even though he had no music in him before; this also is a proof that Love is a good poet and accomplished in all the fine arts; for no one can give to another that which he has not himself, or teach that of which he has no knowledge...”

The arts of medicine and archery and divination were discovered by Apollo, under the guidance of love and desire; so that he too is a disciple of Love. Also the melody of the Muses, the metallurgy of Hephaestus, the weaving of Athene, the empire of Zeus over gods and men, are all due to Love, who was the inventor of them. And so Love set in order the empire of the gods... I say of Love that he is the fairest and best in himself, and the cause of what is fairest and best in all other things.”¹¹

Socrates, dismissing Agathon’s conception, echoes Diotima. According to him, love is essentially a longing or desire for the ultimate good, or the good from which all other goods, such as beauty and wisdom, derive. Reproducing his dialogue with Diotima, he says,

“... ‘Then,’ she said, ‘the simple truth is, that men love the good.’ ‘Yes,’ I said. ‘To which must be added that they love the possession of the good?’ ‘Yes, that must be added.’ ‘And not only the possession, but the everlasting possession of the good?’ ‘That must be added too.’ ‘Then love,’ she said,

¹⁰ PLATO, THE SYMPOSIUM (translated by Alexander Nehamas & Paul Woodruff, 1989).

¹¹ Id.

‘may be described generally as the love of the everlasting possession of the good?’ ‘That is most true.’”¹²

Each of these expositions indicates the overwhelming role of ‘love’, whether romantic or spiritual, specific or universal, in human life. As a source of inspiration or a driver of action, as aspiration or experience, ‘love’, and the connections we form out of love, shape our characters and anchor our identities.

In the case of Shafin Jahan, the Indian Supreme Court briefly touched upon the link between personhood and identity on the one hand, and the choice of life partner on the other,

“The Constitution recognises the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects which define one’s personhood and identity. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual.”¹³

However, it was not until Navtej Singh Johar, that this link was explicitly acknowledged. The judges repeatedly referred to the definition of ‘sexual orientation’ in the Yogyakarta Principles, which goes far beyond merely sexual preference to include “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.”¹⁴

Justice Chandrachud, quoting Justice Leila Seth at the very outset of his judgement, observed “What makes life meaningful is love. The right that makes us human is the right to love. To criminalize the expression of that right is profoundly cruel and inhumane.” Recognising the right asserted by the petitioners as the right to lead full lives, and not just to have their sexual orientation constitutionally respected on par with heterosexuals, he placed human connection and relationships at the heart of individual identity,

“Consensual sexual relationships between adults, based on the human propensity to experience desire must be treated with respect. In addition to respect for relationships based on consent, it is important to foster a society where individuals find the ability for unhindered expression of the love that they experience towards their partner. This “institutionalized expression to love” must be considered an

¹² Id.

¹³ Shafin Jahan v. Asokan, (2018) 16 SCC 368,19.

¹⁴ International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, Introduction to the Yogyakarta Principles (March 2007).

important element in the full actualisation of the ideal of self-respect.”¹⁵

D. REFORMING SOCIAL INSTITUTIONS THROUGH THE JURISPRUDENCE OF LOVE

The jurisprudence of love, thus, articulated in the judgement, has the potential to kickstart a journey towards the integration of alternate sexual identities and family forms into society, while simultaneously reforming existing social structures and institutions to make them more egalitarian and inclusive. This potential was explicitly recognised by the Supreme Court when it placed enforced heteronormativity on a continuum of repressive practices perpetrated by society, all of which can effectively begin to be challenged by recognising a right to love,

“The order of nature that Section 377 speaks of is not just about nonprocreative sex but is about forms of intimacy which the social order finds ‘disturbing’... What links LGBT individuals to couples who love across caste and community lines is the fact that both are exercising their right to love at enormous personal risk and in the process disrupting existing lines of social authority. Thus, a re-imagination of the order of nature as being not only about the prohibition of non-procreative sex but instead about the limits imposed by structures such as gender, caste, class, religion and community makes the right to love not just a separate battle for LGBT individuals, but a battle for all.”¹⁶

In fact, the Apex Court’s use of ‘love’ in its reasoning aspired to the loftier aim of a society unfettered by the repressive gender norms and prescriptions through which it is currently ordered. The attack on s.377 was mounted not only on the ground of the indignity it caused to homosexuals as a class, but additionally on the basis of its role in creating hierarchies, both within and amongst relationships,

“Relationships which question the [male/female] divide are picked up for target and abuse. Section 377 allows this. By attacking these gender roles, members of the affected community, in their move to build communities and relationships premised on care and reciprocity, lay challenge to the idea that relationships, and by extension society, must be divided along hierarchical sexual roles in order to function.”¹⁷

Arguably, the move towards democratising social institutions through the jurisprudence of love has

¹⁵ Chandrachud J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶ 67.

¹⁶ Id.

¹⁷ Id.

already begun. Ruth Vanita, writing in 2011 had stated that same- sex couples or couples in which one partner was transgender, did frequently enter into customary marriages in India.

The illegality of same-sex marriage, however, meant that such unions could not be registered, and such couples were consequently deprived of the legal and social protection and validity available to cisgendered, heterosexual couples. A significant shift from this position is observable after the decision in the decision in Arun kumar discussed earlier. Ordering the registration of a marriage between a transwoman and a man under s.5 of the Hindu Marriage Act, 1956, the Madras High Court in that case held,

“Seen in the light of the march of law, the expression ‘bride’ occurring in Section 5 of the Hindu Marriage Act, 1955 will have to include within its meaning not only a woman but also a transwoman. It would also include an intersex person/transgender person who identifies herself as a woman. The only consideration is how the person perceives herself.”¹⁸

A conception of love as intimacy rooted in privacy demands non-interference, because privacy, in its typical liberal iteration, is a right to be left alone. It does not require the recognition of the relationships that result from love, and can, in fact, serve as an argument against recognition. Yet the idea of love as constitutive of individual identity, and a challenge to oppressive social structures, read in conjunction with the declaration of the transformative goals of the Indian Constitution, demands positive action. I would argue, therefore, that there is now an obligation upon legislative and judicial authorities to extend full citizenship and rights at par with heterosexuals, to the LGBTQ+ community. If the right to love is, indeed, essential to an individual’s self-respect and her aspirations of self- actualisation, as the discussions above would indicate, a failure to give full recognition to every expression of the said love is an infringement of the right.

A counter-argument to the effect that decriminalisation of consensual non- heterosexual activity under s.377 of the IPC is recognition enough, and there is no need for formal recognition of same-sex relationships, much less of their right to be parents, is foreseeable. In response, I would draw attention to the fact that the Supreme Court of India expressly held that while intimate, sexual relations were an aspect of LGBTQ+ identity, the issue at hand required a more holistic perspective, allowing the acceptance of LGBTQ+ persons as full members of society. In other words, though reading down s.377

¹⁸ Arunkumar v. The Inspector General of Registration, 2019 SCC OnLine Mad 8779, ¶ 16.

was necessary to recognise the right of the LGBTQ+ community to love, it would not be sufficient. Moreover, as previously discussed, by recognising love, and relationships based in love, as the anchor of individual identity, the Indian Supreme Court has made the ability to enter into such relationships, and have them recognised and sanctified by law, a crucial aspect of personhood. For most people, marriage, commitment, children, and family are not abstract legal concepts, but stages of human development and aspiration which give meaning to their personal lives.

As Graeme Austin articulately argues, in withholding from the community, the ability to formalise their relationships, the law denies them access to symbols through which human beings order their lives, and envision relationships in their day to day existence. At a practical level, such recognition is important to extend ancillary rights which flow from it, such as the right to inherit property upon death of a partner, or to seek maintenance on divorce, or the right to seek civil and criminal redress in the event of domestic violence, among others. Therefore, whether viewed from a deontological or consequentialist perspective, the argument that the decriminalisation of consensual non- heterosexual acts is sufficient to give effect to the LGBTQ+ community's right to love does not hold ground.

The formal recognition of queer relationships has the potential to diversify current legal understanding of 'family' in another way. It can challenge conventional, heteronormative relationship scripts, breaking down gendered division of labour and departing from gender-specific norms through an active rejection of heteronormativity. This queering and diversification of relationships, as a whole, creates a roadmap for the reform of orthodox relationships. When same-sex relationships demonstrate that it is possible to function and flourish outside the bounds of gender norms steeped in inequality, opposite- sex relationships can also be imagined free of these shackles.

As previously discussed, the challenge to s.377 of the IPC, through the right to love, was also a challenge to hierarchising practices. The fall of s.377 is, then, the logical first step to the breakdown of unequal relationship practices. As concerns the law, this could offer a chance to make opposite-sex relationships more egalitarian. A relevant starting point might be to think about the way care-related activities, such as raising children, and tending to the sick and elderly, are currently organised in families. Overwhelmingly in the traditional family, these responsibilities in addition to other uncompensated household chores fall to women, even though society as a whole requires and benefits from them.

The Indian Supreme Court's use of 'love' in legal reasoning, therefore, has the potential to become a

driver of justice. The changes envisaged in the preceding paragraphs are indubitably tectonic, but they are no more than a logical corollary to the jurisprudence of love already established. I would argue that if the Indian legal system is more than an anarchical jumble of meaningless declarations, these tectonic shifts are inevitable. All we need is time.

CONCLUSION

I have argued that the Supreme Court of India in *Navtej Singh Johar v. Union of India*¹⁹, contributed to constitutional jurisprudence in two ways. Firstly, it reiterated its autonomy-centric view of the 'right to love', previously discussed in cases such as *Shafin Jahan v. Union of India*²⁰, and *Shakti Vahini v. Union of India*²¹, placing the right to love within the matrix of the right to privacy, dignity and the freedom of expression. Secondly, and more importantly, it employed love in legal reasoning, thereby articulating, for the first time, a 'jurisprudence of love' in India.

For the purposes of this paper, I defined the jurisprudence of love to mean the operationalisation of love to further the ends of justice. I discussed three aspects of such jurisprudence (the transformative potential of love, the practice of love that breaks down oppressive structures, and love as the anchor of individual identity), demonstrating how the decision in *Navtej Singh Johar* represented or articulated each of these aspects. In the final section of the paper, I argued that the jurisprudence of love, as established in the judgement has the potential to become the foundation for wide-ranging reforms in family law. With the decision in *Arun Kumar v. Inspector General of Registration*, it would appear that the process of diversification and democratisation of family law has already begun, and the Indian legal system is now obliged to carry the momentum forward. The complete recognition of personhood of the LGBTQ+ community requires access to methods of formal recognition of relationships and avenues of founding families on the same footing as opposite-sex relationships.

SUGGESTIONS

This is not to say that opposite-sex relationships should become the template for an exercise in integration. Instead, the aim to give the LGBTQ+ community access to symbols such of formal recognition (such as civil unions or marriage) and parenthood where they so desire, should become the

¹⁹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

²⁰ *Shafin Jahan v. Asokan*, (2018) 16 SCC 368.

²¹ *Shakti Vahini v. Union of India*, (2018) 7 SCC 192.

first step in the larger project of diversifying what ‘family’ means in law. This would mean challenging and reforming the sexist, and often discriminatory gender politics of traditional heteronormative relationships.

- The path to redefining established social institutions and demolishing oppressive social structures will undoubtedly be long and hard, but with the jurisprudence of love articulated in Navtej Singh Johar, the possibilities are endless.

