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LEGALISATION OF SAME SEX MARRIAGE: A WAY TOWARDS REMOVING HOMOPHOBIA FROM THE SOCIETY

AUTHORED BY - AAYUSHI SAXENA¹

Abstract

LGBTQ community is not alienating by Indian Ethos. Vedas have recognized three sexes: Male, Female and the third sex or tritiya prakriti. Also, The KamaSutra spoke about Lesbians, gays and the bisexuals. In the case of *Naz Foundation v. Government of NCT of Delhi* and Others the Delhi High Court Knock down the legal discrimination the LGBTQ community face, and the offence of carnal intercourse under section 377 Indian Penal Code struck down. Previous researches have shown that, there exists a difference between Gender identity and Sexual orientation. The concept of legal sex is linked with gender identity and sexual orientation. The following paper highlights the Psychological and Physical Perspectives on differences between Gender Identity and Sexual Orientation in relation to the concept of Marriage Equality. How Sexual Orientation and Gender Identity is related to various International and Human Rights Law? It further tries to answer the question that why the Right to Marriage should be given to the LGBTQ community? How the personal laws are challenged on the Constitutional Grounds? Why not granting the Right to Marry to the LGBTQ community would be the violation of fundamental rights manifestly exercised under Right to Equality, Discrimination on the basis of sex and Right to life.? This paper will further try to establish that How Right to Marry can be granted through the interpretation of definition of marriage constituted in the Special Marriage Act. Lastly, the paper gives the afterthought of what are the other rights that are to be put forth after the Recognition of the Same Sex Marriage and come to an end with a hope and aim to prove that same sex marriage would be a step towards safeguarding the LGBTQ community rights and removing the homophobia from the society.

Key Words: LGBTQ, Marriage, Law, Rights, Equality

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Introduction

While giving its judgement in *Naz Foundation v. Govt. of NCT in Delhi*² the Delhi High Court used the term, 'queer' (used as an insult in many English-speaking countries) which means 'strange' or 'odd' in the succeeding phrase: "When everything associated with homosexuality is treated as bent, queer, repugnant"³, "MSM" (men who have sex with men)⁴ is useful to prevent HIV transmission. But it ignores the reason of strong attraction between men and men and simultaneously woman and woman. Thus, these people are as "same-sex loving persons".⁵

Same Sex Marriage has become a widespread issue as it raises questions on the foundation of society and the traditional concept of family.⁶ It has been associated with the cultural and religious norms⁷ which shows contempt towards same sex marriage/union.⁸

The granting of the same legal status to cis-gendered people that is the unions that fall outside the traditional heterosexual marriage (i.e., "one man, one woman") with to those that fall within it is referred to as Marriage equality. Marriage Equality is both an easier and harder milestone to achieve. It is easier because discrimination is not on the basis of the desire to do a certain act but on the basis of sexual orientation. It is hard because marriage as a social institution is celebrated as a union between opposite-sex marriages. *In simple words, religion is asked to celebrate and recognise the things that are happening behind closed doors and not to simply ignore and refuse the same.*⁹

The way the term marriage is defined as the union of two people of the opposite sex can be challenged at a constitutional level, that is, in violation of Right to choose life partner/ Right to life with dignity/

² Naz Foundation v Government of NCT of Delhi, (2009) 111 DRJ 1.

³ Law Reports of the Commonwealth, 2009, pp.838 at 883.

⁴ Sachit Bhogle. "The Momentum of History- Realising Marriage Equality in India." 12 NUJS L. Rev. 3-4, 2019.

⁵ Robert Wintemute. "Same-Sex Love and Indian Penal Code Sec. 377: An Important Human Rights Issue for India." 4 NUJS L. REV. 31, 2011.

⁶ Weisbrod. "Family, Church, and State: An Essay on Constitutionalism and Religious Authority." 26 Journal of Family Law 754 (1988), http://digitalcommons.uconn.edu/law_papers/146; K. Hossain, "In Search of Equality: Marriage Related Laws for Muslim Women in Bangladesh" 5(1) Journal of International Women's Studies, 2003, pp. 97.

⁷ Stellina Jolly, Ritika Vohra. "Recognition of Foreign Same- Sex Marriage in India: A Legal Exploratory Analysis, Journal of the Indian Law Institute" July – September 2017, Vol. 59.3, pp. 302-326.

⁸ P. D. Young. "Religion Sex and Politics: Christian Churches and Same-Sex Marriage in Canada" Fernwood Publishing, 2012, pp. 60.; L. D. Wardle. "Marriage and Religious Liberty: Comparative Law Problems and Conflict of Laws Solutions" 12 Journal of Law & Family Studies, 2010, pp.333.

⁹ Sachit Bhogle. "The Momentum of History- Realising Marriage Equality In India", 12 NUJS L. Rev. 3-4 2019.

Right to autonomy or discrimination on the basis of sexual orientation.¹⁰

The terms Sexual Orientation and gender identity means the characteristics that every human being possessed. It was always known by society that some people have physical disabilities and most people have a religion. However, the concept of sexual orientation and gender identity does not exist for years. The reason for the non-recognition for the same was the presumption that every individual is born heterosexual or to be non-transgender.¹¹ As the cases of minority sexual orientation or gender identity are rising, it becomes essential to describe both these terminologies.

The orientation is concern with to the choice of sex of partner for sexual activity and the long-term sexual couple emotional relationships whereas Gender Identity not merely have reference to the person's recognition as a male or female but to their physical or biological or birth sex conformity. It also refers to their ways of physical expressions and characteristics including their hairstyle, dress, makeup, voice and mannerism.

The concept of legal sex linked the concept of gender identity and sexual orientation. One cannot determine the sexual orientation of a transsexual, transgender, or intersex person, for legal purposes unless they have been assigned a legal sex. The conformity with psychological sex would be brought by changing their legal sex and will, therefore, their sexual orientation will also be going to change. For example, a person who is born a male and is heterosexual (attracted to a woman) might identify her gender identity as female but remain attracted to women after alteration from male to female. On condition this happens, then, she will be identified out of a heterosexual man to identifying publicly as a transsexual lesbian woman. Due to the above-established linkage, section 377 become an issue for transgender, transsexual and intersex persons in India. The sexual activity of a male with another male was legally caught by section 377, even though, they might contemplate themselves engaging in legal female-male sexual activity according to their gender identity. Thus, it was decriminalised. However, *Same Sex Marriage still remains a Research Issue in India.*

With reference to the same this paper is further divided into five parts and will answer the following three *Research Questions.*

¹⁰ *Ibid.*

¹¹ Decriminalisation of Same Sex Sexual Activity.

- 1) *How Sexual Orientation and Gender Identity is related to various International and Human Rights Law?*
- 2) *Why the Right to Marriage should be given to the LGBTQ community? How the personal laws are challenged on the Constitutional Grounds?*
- 3) *Why not granting the Right to Marry to the LGBTQ community would be the violation of Article 14, 15 and 21 of the Constitution of India?*

(I) HOW SEXUAL ORIENTATION AND GENDER IDENTITY IS RELATED TO VARIOUS INTERNATIONAL AND HUMAN RIGHTS LAW?

Human rights Law and International Law have started commonly using both the terms sexual orientation and gender identity on regular basis. The person who identifies themselves as heterosexual rarely finds it necessary to describe their sexual orientation. In simple words, they are considered as normal and therefore the term heterosexual is considered equivalent to non-controversial. However, the term bisexual, lesbian, gay remains controversial and have become a problem in most of the countries of Global South Asia including India. Still, in most country sexual activity remains unwilling to discuss the sexual activity. However, the first decriminalisation did not criminalise adult sexual activity (private or consensual) in the US state of Illinois in 1961.¹²

Countries which acknowledged LGBTQ conjugal rights.

The significance of constitutional rights for lesbian and gay persons was highlighted in the judgement of *National Coalition for Gay and Lesbian Equality v Ministry of Justice (1998)*¹³ The South African transitional and final constitutional adopters, therefore, recognised discrimination based on race and discrimination based on sexual orientation.¹⁴

South Africa was further followed by several countries like Fiji Islands in 1997¹⁵, Ecuador in 1998¹⁶,

¹² William, Eskidge. "Dishonorable Passions: Sodomy Laws in America." 2008, pp. 118-127.

¹³ National Coalition for Gay and Lesbian Equality and Another v Ministry of Justice and Others, 1999 (1) SA 6.

¹⁴ Edwin Cameron. "Sexual Orientation and the Constitution." *South African Law Journal*, vol.450, 1993, pp. 468-69.

¹⁵ Constitution Amendment Act 1997, § 38(2)(a).

¹⁶ Constitution, 1998, Article 23(3), replaced by Constitution, 2008, Articles 11(2), 66(9), 83(14).

Portugal in 2004¹⁷ and Bolivia in 2009¹⁸. There are several states or territories in various federal countries like Brazil¹⁹, Germany²⁰ and Argentina²¹ that have adjoined sexual orientation or a similar ground to the non-discrimination articles of their constitutions.

The European Convention on Human Rights (November 4, 1950) is supplemented by the Charter of Fundamental Rights of the European Union (December 7, 2000) under Article 21(1) which provides:²²“Any discrimination based on any ground such as sex, race, religion...or sexual orientation shall be prohibited.”

Under the new Article 6(1) of the Eu Treaty, the Charter becomes legally binding and enforceable by the EU’s highest court (The Court of Justice of the European Union, based in Luxembourg) on December 1, 2009.

A strict justification test for the cases necessitating discrimination based on sexual orientation and has been established by The European Court of Human Rights in Strasbourg (France).²³

In other way analogies have been drawn by the Court between sexual orientation religion, race and sex.

In *Smith & Grady v United Kingdom* (September 27, 1999), the Court held that the expulsion of all lesbian and gay members of the armed forces cannot be legitimize by the hostility of their heterosexual colleagues towards them.²⁴

Further, the Court held in the case of *Mouta v Portugal* (December 21, 1999) that the gay father sexual orientation could not be treated as a negative factor in deciding whether or not to award him custody of his daughter from a prior marriage to a heterosexual woman.²⁵

¹⁷ Constitution, 2004 (amendment), Article 13(2)

¹⁸ Constitution (approved by referendum on 25 Jan. 2009), Article 14. II.

¹⁹ Mato Grosso, Constitution, 1989, Art. 10. III; Sergipe, Constitution, 1989, Art. 3.11 Federal District, Organic Law, 1993, Article 2; Alagoas, Constitution, 2001 (amendment), Art. 2-I; Santa Catarina, Constitution, 2002 (amendment), Art. 4-IV; Par, Constitution, 2007 (amendment), Art. 3-IV.

²⁰ Berlin, Constitution, 1995, Article 10(2), Brandenburg, Constitution, 1992, Article 12(2), Bremen, Constitution, 1947 (as amended on 4 Sept. 2001), Article 2; Saarland, Constitution, 1947 (as amended in Feb. 2011), Article 12; Thuringia, Constitution, 1993, Article 2(3).

²¹ Autonomous City of Buenos Aires, Constitution, I October 1996, Article 11.

²² See http://vvAwwwr.europarl.europa.eu/charter/pdf/text_en.pdf.

²³ All cited judgments of the Court are available at <http://vXww.echr.coe.int>.

²⁴ *Smith & Grady v United Kingdom* (1999) 29 EHRR 493.

²⁵ *Salgueiro da Silva Mouta v Portugal* (no. 33290/96), 1999.

In *S.L. v Austria* (January 9, 2003)²⁶, the Court concluded that just like the differences [in treatment] based on sex, differences [in treatment] based on sexual orientation require particularly serious reasons by way of justification... and vividly stated that the concept of sexual orientation is protected under Art. 14. [the provision of non-discrimination of the Convention].”

In *Egan v Canada* (1995) the Supreme Court of Canada held (9-0) that under section 15(1) of the Canadian Charter of Rights and Freedoms, sexual orientation is an analogous ground, and discrimination based on race, religion and sex is prohibited by section 15(1).

Gradual Elimination of Discrimination Based on Sexual Orientation

The five steps to gradually evolve the society from a stance of persecuting and rejecting its gay and lesbian minority to the one of respecting and accepting them as equal citizens and human beings are

- i. Repeal of the death penalty for same sex sexual activity
- ii. No punishment for such activity
- iii. Removal of all discrimination from the criminal law against such activity
- iv. Discrimination based on sexual orientation should be prohibited.
- v. Family Law reforms.

Although, France completed all five steps in 2011, after decriminalising it 220 years back, every country's national government may take these steps at its own pace. The fifth step in England and Wales started with the conclusion of the Adoption and Children Act, 2002²⁷ and the Civil Partnership Act, 2004 and continued with the enactment of the Human Fertilisation and Embryology Act, 2008.²⁸ However, the same-sex couples are still not able to marry in England and Wales.²⁹

(II) WHY THE RIGHT TO MARRIAGE SHOULD BE GIVEN TO THE LGBTQ COMMUNITY? HOW THE PERSONAL LAWS ARE CHALLENGED ON THE CONSTITUTIONAL GROUNDS?

There are majorly three purposes served by the union of two people which is known as Marriage. The three purposes are:

²⁶ *S.L. v Austria* (Application no. 45330/99), 2003.

²⁷ §49-51 and §144(4)

²⁸ §42-47 and §53-54.

²⁹ *Ferguson & Others v. United Kingdom*, Application No. 8254/11.

- (1) Marriage is recognised as a symbolic gesture between the parties: To be married to someone and being recognised in society has an intrinsic value in one's life. However, two people are not prevented from living together in the same manner as married spouses even when they are not legally recognised, e.g., by living together and forswearing other intimate relationships.³⁰
- (2) Marriage is essential for the acceptance of the relationship in society as a whole: In short of the married status, couples face obstacles moving together in public showing intimacy and even being not recognised as a normal respectable member of society.³¹ Same-sex marriage recognition would be the step towards social acceptance.³²
- (3) Being married makes it easier to adopt the legal rights and obligations associated with the marriage. - With the solemnisation of marriage comes the recognition of various legal rights, for example, maintenance and protection from domestic violence; inheritance rights, etc. These rights are not recognized for unmarried partners.

Challenging the personal laws on constitutional grounds.

The practice of religion includes acts incidental to religion apart from religious beliefs and purely religious rites.³³ Personal laws in India cover adoption and succession to property, marriage and divorce and has separate 'personal laws' applicable to different religions.

History of Personal Laws

Before the advent of British colonisation, the laws existed on the basis of local customs in the form of sastras and sutras. Warren Hastings' Regulations of 1772 provided the genesis of the separate personal laws which bring forth the cases of marriage, inheritance, caste, and religious usages or institutions, the "*law of the Koran with respect to Mahometans and those of the Shaster with respect to Gentoos*" would be have to do with.³⁴

³⁰ Ruth Vanita. "Democratising Marriage: Consent, Custom and the Law in Law Like Love: Queer Perspectives on Law", 338, 347, 352 (Arvind Narrain & Alok Gupta), 2011, pp. 338,347,352.

³¹ Aditya Menon, "*Delhi Landlords Will Not Rent Homes To Muslims, Live-In Couples, India Today*", October 1, 2012, available at <https://www.indiatoday.in/india/north/story/delhi-landlords-will-not-rent-homes-to-muslimslive-in-couples-117469-2012-10-01>; Monalisa Das, "*No Law Prohibits Unmarried Couples From Staying Together, Still Hotels Refuse, The News Minute*", May 19, 2015, available at <https://www.thenewsminute.com/lives/507>, Ananya Bhattacharya, "*Married Couples Only: Conservative India's Moral Policing Extends To Airbnb, Quartz India*", July 18, 2017, available at <https://qz.com/india/1030463/married-couples-only-conservative-indias-moral-policing-extends-to-airbnb>.

³² Sachit Bhogle. "The Momentum of History- Realising Marriage Equality In India", 12 NUJS L. Rev. 3-4 2019.

³³ Commissioner, Hindu Religious Endowments, Madras v Shri Lakshmindra Thritha Swamiar of Sri Shirur Mutt, (1954) SCR 1005; Ratilal Panachand Gandhi v State of Bombay, AIR 1954 SC 388.

³⁴ M.P. Singh. *Outlines of Indian Legal & Constitutional History*. 118 (Universal Law Publishing Co., 8th ed., 2006; Nandini Bhattacharya-Panda. "Appropriation and Invention of Tradition: The East India Company and Hindu Law in

The pre-colonisation tradition of variegated customs was not restored post-independence but was amalgamated and supplemented into a Uniform Hindu Code. The Uniform Civil Code was founded on socio-political reflection rather than religious foundations; thus, the Hindu Code represents a break from the sastras.³⁵

In *State of Bombay v Narasu Appa Mali*³⁶ the court while criminalising bigamy among Hindus notably note that Article 13 does not constitute personal law of the Constitution.³⁷ Further, Justice Gajendragadkar, vividly stated in his opinion that the validity of personal laws is derived from the scriptures and not from the legislature.³⁸ Chief Justice Chagla while giving the judgement stated that ‘Hinduism’ does not include bigamy. Gajendragadkar, J. held that bigamy was not obligatory but only permissive.³⁹ The primary thrust of his reasoning was that a distinction had to be made between ‘legitimately religious’ matters and other matters.⁴⁰

The concept of the essential religious practices from Commissioner, *Hindu Religious Endowments*⁴¹, *Madras v Shri Lakshmindra Thritha Swamiar of Sri Shirur Mutt*⁴² to *Sardar Syedna Taher Saifuddin Saheb v State of Bombay*⁴³ to *Commissioner of Police v Acharya Jagdishwarananda Avadhuta*,⁴⁴ the courts have analyse laws prohibiting or restricting religious practices by scrutnizing whether the practice is an ‘essential’ or ‘integral’ part of the religion.⁴⁵ In *Kantaru Rajeevaru v Indian Young Lawyers Association*⁴⁶ amongst several questions the Supreme Court agreed to refer the credibility of the essential religious practices test to a larger bench.⁴⁷

Early Colonial Bengal” 2007.

³⁵ Saptarshi Mandal. “Do Personal Laws Get their Authority from Religion or the State: Revisiting Constitutional Status” 51(50) Eco. & Pol. Weekly, 2016.

³⁶ State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.

³⁷ *ibid.*

³⁸ *Id.*, 90 (per Gajendragadkar, J.).

³⁹ *Id.*, 94 (per Gajendragadkar, J.).

⁴⁰ *Id.*, 94.

⁴¹ Commissioner, Hindu Religious Endowments v Shri Lakshmindar Tirtha Swamiyar of Shri Shirur Mutt, 1954 AIR 282.

⁴² Sardar Syedna Taher Saifuddin Saheb v State of Bombay, AIR 1962 SC 853.

⁴³ Sardar Syedna Taher Saifuddin Saheb v State of Bombay, AIR 1962 SC 853.

⁴⁴ Commissioner of Police v Acharya Jagdishwarananda Avadhuta, (2004) 12 SCC 770.

⁴⁵ Mohd. Hanif Quareshi v State of Bihar, AIR 1958 SC 731.

⁴⁶ Kantaru Rajeevaru v. Indian Young Lawyers Assn., 2019 SCCOnline SC 1461, ¶¶ 5, 7.

⁴⁷ *ibid.*

MARRIAGE EQUALITY AND ITS CONSTITUTIONAL FOUNDATIONS

Sex Discrimination on the cornerstone of Sexual Orientation

Article 15 does not explicitly indicate sexual orientation as a forbid ground for discrimination. Nevertheless, while also providing conceptions of constitution application in specific cases, a common feature of a constitutional concept is providing by the constitution.⁴⁸ Thus, the Right to Equality and freedom from non-discrimination is broadly stated under Article 14, while Article 15 underlines five specific grounds stating non-discrimination and one particular form of discrimination, i.e. untouchability is prohibited under Article 17.⁴⁹ Therefore, Article 14 provides for more enumerated grounds for the non-discrimination principle than Article 15.

In *National Legal Services Authority of India v Union of India (NALSA)*,⁵⁰ Article 14 which includes the term 'person' is gender-neutral and includes all genders.⁵¹ It further stated that under Article 15 in the context of discrimination, "sex" includes "gender identity" and therefore, both Article 14 and Article 15 encompasses discrimination on the basis of gender identity and sexual orientation.⁵²

The Court propounded that sexual orientation is indivisible from sex: a gay man is gay conforming to the fact because he is attracted towards men however, his right to marry has been denied solely because he is a man and wants to marry a man.⁵³ The heteronormative institution of marriage necessitates that men will marry women and vice versa. Therefore, it classifies men into two categories: those who want to marry men and those who want to marry women, where, one group of men could marry and the other group of men's rights have been denied.⁵⁴ Same is the case goes with the women who want to marry men and who want to marry women only. Marriage has always been

⁴⁸ Gautam Bhatia, supra note 42, 65. See also Gautam Bhatia, supra note 42, 91-92 (commenting on the holding in *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310 that Article 16(4) permitting the State to make special provisions for the reservation of appointments or posts for underrepresented groups is a facet of, and not an exception to, the rule in Article 16(1) prohibiting discrimination on specified grounds).

⁴⁹ Id., 48.

⁵⁰ *National Legal Services Authority of India v Union of India*, (2014) 5 SCC 438.

⁵¹ Id., ¶82.

⁵² *National Legal Services Authority of India v Union of India*, (2014) 5 SCC 438, ¶¶82-82.

⁵³ Andrew Koppelman. "Why Discrimination Against Gay Men and Lesbians is Sex Discrimination." 69(2) NYU L. REV. 197 (1994).

⁵⁴ Categories like "men" and "women" are used for simplicity's sake. Sexual orientation, like gender identity, exists on a spectrum and defies neat categorisation as "attracted to men" and "attracted to women" in the same manner in which gender identity is not limited to "identifies as a man" and "identifies as a woman".

heteronormative in India. This classification can be challenged on three grounds under the provisions of the Competition. That the following classification constitutes sex discrimination under Article 15, That the following classification is permissible class legislation and arbitrary under Article 14 and That the following classification does not comply with the Yogyakarta principles incorporated under the Constitution.

The legitimisation of sexuality within the conjugal boundaries for begetting alone by the state has been held to be outdated and unreasonable.⁵⁵

In addition, if the ultimate motive of the espousal is procreation, then the alliance involving impotent/infecund individuals an individual at a loss to procreate would be void. Also, post Navtej Johar's decision it cannot be said that one is natural and the other is unnatural.⁵⁶ Hence, the notion of marriage as one man, one woman fails under the standard formulation of the non-discrimination principles stated underneath Articles 14 and 15. Lastly, Yogyakarta principles recognize the universal enjoyment of human rights, notwithstanding of gender identity and sexual orientation and also the rights against discrimination whose foundation is gender identity and sexual orientation⁵⁷ and the right to equal opportunity, equity and justice before the law⁵⁸, with regard to family and home⁵⁹ the right to privacy and the right to found family in its distinct forms.⁶⁰ Thus, same-sex partners are entitled of all the rights as regards to the acknowledgement of marriage and all its connected rights as opposite-sex partners.

(III) WHY NOT GRANTING THE RIGHT TO MARRY TO THE LGBTQ COMMUNITY WOULD BE THE VIOLATION OF ARTICLE 14, 15 AND 21 OF THE CONSTITUTION OF INDIA?

'One Man, One Woman' Marriage by virtue of Constitutional Morality

Constitution Morality is an independent ground for challenging the constitutionality of enactment

⁵⁵ Navtej Singh Johar v Union of India, (2018) 10 SCC 1, ¶478 (per Chandrachud, J.).

⁵⁶ Id., ¶418 (per Chandrachud, J.).

⁵⁷ The Yogyakarta Principles, Principle 1.

⁵⁸ The Yogyakarta Principles, Principle 2.

⁵⁹ The Yogyakarta Principles, Principle 6

⁶⁰ The Yogyakarta Principles, Principle 24.

from the “inherent elements in the constitutional norms and the conscience of the Constitution.”⁶¹ It compels the state to promote and advance constitutional order of values.”⁶² The case *Navtej Singh Johar v Union of India* ruled for the primacy of constitutional morality over well-liked morality.⁶³

On the notions of “evolving social morality”⁶⁴ the Supreme Court has recognised that social revulsion with regard to relationships which are opposite to customary marriage is not a ground for intrusion with personal autonomy.⁶⁵ In this regard, the Court scrutinises the constitutionality of a law when it is called upon to interpret it not by the ethics of the time in which it was validated. Nonetheless, Constitutional morality goes a step further disregarding the social morality of the present and asking not what is moral today but what ought to be moral all time.

Chief Justice Misra vividly held in his judgement that while testing the constitutional validity of the impugned provisions of law, the said provisions have to be declared unconstitutional, if a constitutional court is of the view that the impugned provision falls foul to the precept of constitutional morality.⁶⁶ It was further echoed by Justice Chandrachud, who manifestly stated that the right to privacy, “away from the glare of societal expectation, enables an individual to exercise his or her autonomy.”⁶⁷ Further, it was held that society could not dictate the expression of sexuality between consenting adults and constitutional morality will impact upon any law which deprives LGBT individuals of their entitlement to full and equal citizenship. Any culture or tradition will be superseded by Constitutional morality.⁶⁸ Thus, marriage between same-sex individuals cannot be denied on the foundation of any customs or values and should be protected as an expression of sexuality under the Constitution.

In *K.S. Puttaswamy v Union of India*⁶⁹, the Supreme Court without exception proclaimed the

⁶¹ Govt. of NCT of Delhi v Union of India, (2018) 8 SCC 501, ¶ 63.

⁶² Navtej Singh Johar v Union of India, (2018) 10 SCC 1, ¶ 459 (per Chandrachud, J.).

⁶³ Navtej Singh Johar v Union of India, (2018) 10 SCC 1, ¶¶ 128 (per Misra, C.J.), 349, 351-352 (per Nariman, J.), 459 (per Chandrachud, J.). Malhotra, J. did not refer to constitutional morality. Instead, she relied on *S. Khushboo v Kanniammal*, (2010) 5 SCC 600, ¶ 46, which states that social morality, being inherently subjective, cannot be the basis for criminal law that unduly interferes with personal autonomy (*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶641.3).

⁶⁴ John Vallamattom v Union of India, (2003) 6 SCC 611, ¶¶33, 36.

⁶⁵ *S. Khushboo v Kanniammal*, (2010) 5 SCC 600, ¶46.

⁶⁶ Navtej Singh Johar v Union of India, (2018) 10 SCC 1, ¶136 (per Misra, C.J.).

⁶⁷ Navtej Singh Johar v Union of India, (2018) 10 SCC 1, ¶474 (per Chandrachud, J.).

⁶⁸ Navtej Singh Johar v Union of India, (2018) 10 SCC 1, ¶¶93-99, 106, 190, 201-203 (per Misra, C.J.).

⁶⁹ *K.S. Puttaswamy v Union of India*, (2017) 10 SCC 1.

Fundamental Right to privacy, including autonomy over personal and intimate choices. In Puttaswamy it was explicitly stated that the Right to privacy includes the right of individuals to take decisions about their life to communicate themselves to choose or not to choose which activities to take part in⁷⁰ and vividly asserted that sexual orientation is a key element of the right to privacy and as the matter of fact of Article 14, Article 15 and Article 21 of the Constitution.⁷¹

The legal foundation for marriage equality was also expressed in general terms by Justice Chandrachud for marriage equality⁷² by stating that the right to intimacy emerge from an individual's entitlement to share in sexual relations on their own terms.⁷³ Individuals have the freedom to enter into relationships unbridled by the binary of sex and gender and receive the necessary institutional acknowledgement to consummate their relationships and therefore are restricted neither by religion nor by tradition to enter into such relationships.⁷⁴ Thus, the right to marry a significant other of the same sex as the dimension of the right to privacy and self-determination has been recognised by the Honourable Supreme Court.

Marriage confined to Man and Women As a Practice Indispensable To Religion.

Marriage is held sacred in various religions and is considered to be a part of personal laws. Without question and beyond doubt, that the definition of marriage forms a fundamental part of personal law. However, marriage is within the boundaries of Constitutional scrutiny. The practice of triple talaq was struck down in the case of *Shayara Bano v Union of India*.⁷⁵

1. Same-Sex marriage under Hindu Law

If certain conditions are met, Section 5 of the Hindu Marriage Act provides that the marriage can be solemnised between “any two Hindus”. On its face, this provision does not limit the marriages between a man and a woman.

⁷⁰ Anuj Garg v Hotel Association of India, (2008) 3 SCC 1, ¶¶34-35.

⁷¹ K.S. Puttaswamy v Union of India, (2017) 10 SCC 1, ¶¶144-145, 298 (per Chandrachud, J., speaking for himself, Khehar C.J., Agrawal J., and Nazeer J.), ¶645, 647 (per Kaul J.).

⁷² An explicit statement to the effect that same-sex marriage was legalised, with the consequent and necessary changes to the various statutes governing marriage, would be obiter dictum, given that Navtej Johar was restricted to the question of §377 IPC.

⁷³ Navtej Singh Johar v Union of India, (2018) 10 SCC 1, ¶479 (per Chandrachud, J.).

⁷⁴ Id., ¶482 (per Chandrachud, J.).

⁷⁵ Shayara Bano v Union of India (2017) 9 SCC 1.

The gender-neutral terms ‘party’ and ‘parties’ have been followed except in subsection (iii) which states that this subsection requires that “the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage”. Similarly, the statute uses the words ‘bride and bridegroom’ or ‘husband and wife’ elsewhere to describe the parties to a marriage.⁷⁶ This concludes that the act does not contemplate marriage except between a man and a woman.⁷⁷

The definition of “degrees of prohibited relationship” under section 5(iv) read with section 3(g)(iv), for instance, includes brother-sister, uncle-niece, and aunt-nephew pairings, therefore, not contemplating similar pairings with both parties being of the same-sex. Such a prohibition is to prevent inbreeding which is obviously not a consideration for same-sex couples.

Performance of the customary rites of either party can solemnise a Hindu Marriage.⁷⁸ The *saptapadi* (seven steps or circuits around the sacred fire) and *datta homa* (invocation before the sacred fire)⁷⁹ are though not performed by all the Hindu communities, but are the customary practices to solemnise a Hindu marriage. The Hindu priest believes that Hindu marriage is between two souls, which are not bound to any particular gender⁸⁰, thus, there is no bar under the law.

2. Muslim and Christian Personal Laws views on Same Sex Marriage

The Shariat predominantly not exclusively guide the personal law for Indian Muslims under ‘The Muslim Personal Law Application Act, of 1937’. However, for instance, the apostasy of a wedded Muslim woman impulsively nullifies her espousal; certain readings of the Shariat have been codified.⁸¹

Marriage Equality is not as a matter of course recognised under Muslim Law;⁸² Unequivocally, after the detailed study of the position of Islamic law, the Quran regards such unions of same-sex marriage

⁷⁶ The Hindu Marriage Act, 1955, §§7(2), 9, 13(2), 24.

⁷⁷ Thomas John, *Liberating Marriage: Same-Sex Unions and the Law in India* in *LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW* 355, 361 (Arvind Narrain & Alok Gupta ed., 2011). *Arunkumar v. Inspector General of Registration*, AIR 2019 Mad 265.

⁷⁸ The Hindu Marriage Act, 1955, §7.

⁷⁹ *S. Nagalingam v Sigagami*, (2001) 7 SCC 487.

⁸⁰ Ruth Vanita. “Democratising Marriage: Consent, Custom and the Law in Law Like Love: Queer Perspectives on Law”, 338, 347, 352 (Arvind Narrain & Alok Gupta), 2011, pp. 338,347,352.

⁸¹ *Dissolution of Muslim Marriages Act, 1939*, §4.

⁸² Junaid Jahangir. “Same-Sex Unions in Islam.” 24(3) *Journal of Theology and Sexuality* 157, 2018.

as ‘culprits’ those who seek delight outside an Muslim marriage.⁸³

The law holding Christians, accompanied by Hindus, is to a large extent supplemented by act, viz., the Indian Christian Marriage Act, 1872. However, like to Holy Quran, the Bible regards homosexuality as sin⁸⁴ (though most Christians believe that it is not the correct interpretation of the Christianity.).⁸⁵

The Indian Christian Marriage Act, of 1872 lay out that a nuptial can be formalize in the middle of two Christians or uniting one Christian and one non-christian⁸⁶, certainly, it does not include same-sex marriages. The parties to the marriage are referred to as “the man and the woman” or “husband and wife” therefore, not contemplating same-sex marriages.⁸⁷

Thus, there is a need to resort to constitutional arguments to realise marriage equality under the Muslim and Christian Laws by striking down the prohibition of same-sex marriage in the law.

HOW RIGHT TO MARRY CAN BE GRANTED THROUGH THE INTERPRETATION OF DEFINITION OF MARRIAGE CONSTITUTED IN THE SPECIAL MARRIAGE ACT.

Seeking refuge under the Special Marriage Act.

Same-sex marriages can be solemnised through the Special Marriage Act, of 1954, despite the fact, that the marriage equality cannot be place within the composition of existing personal law. Special Marriage Act permits marriages to be solemnised and celebrated by whatsoever means which would encompass customary religious ceremonies. The language referred to as “the male” and “the female” and living together as husband and wife⁸⁸ can be interpreted and read as to mean ‘a male’ or ‘a

⁸³ “The Quran.” Chapter 23, Verse 5-7.

⁸⁴ Bible Gateway, Leviticus 18:22, available at

<https://www.biblegateway.com/passage/?search=Leviticus+18%3A22&version=NIV> (Last visited on May 5, 2023).

⁸⁵ “Debating Bible Verses on Homosexuality.” New York Times, June 8, 2015, available at

<https://www.nytimes.com/interactive/2015/06/05/us/samesex-scriptures.html> (Last visited on May 6, 2023).

⁸⁶ The Indian Christian Marriage Act, 1872, §4.

⁸⁷ The Indian Christian Marriage Act, 1872, §60.

⁸⁸ See Special Marriage Act, 1954, §§ 4(c), 15(a).

female'⁸⁹, and “living together as husband and wife” can be read to mean living in the way of a husband and wife that is as spouses, with the associated civic and legitimate obligations. This interpretation can be further supported by the Apex Court judgement in *Danial Latifi v Union of India*⁹⁰ in which it was held that since Muslim Personal Law does not cover a condition where a divorced wife is not able to maintain herself, the lucrative furnishing of maintenance under Section 125 of the CrPC could be assist of even by Muslim women. Likewise, two Muslims may be able to get benefit from the Special Marriage Act even though Islamic Law broadly does not authorize the same-sex marriage.⁹¹

AFTERTHOUGHT: LEGAL REFORMS NECESSARY BEYOND THE RECOGNITION OF SAME-SEX MARRIAGE.

To attain considerable equality between the treatment of same-sex relationships and opposite-sex relationships following legal reforms are necessary for the coverage of same-sex relationships and opposite-sex relationships.

- (1) The concept of marriage for procreation is an antiquated concept. It must be clarified that same-sex marriage cannot be nullified for want of procreation. Therefore, a legislative change is necessary to statutes which proclaim impotency or failure to procreate as a ground for divorce.⁹² Thus, same-sex marriage cannot be nullified for want of procreation.
- (2) When considering the adoption of children same-sex couples should be seen and treated on an equal footing with opposite-sex couples.
- (3) Equal protection should be granted to same-sex partners under the Protection of Women from Domestic Violence Act, 2005 and the law providing for maintenance. The Domestic Violence Act only recognises domestic violence as committed by a man against a woman.⁹³ Thus, a man could never be an aggrieved person under the Domestic Violence Act. Simultaneously, a woman can be by

⁸⁹ Nayantara Ravichandran. “Legal Recognition of Same-sex Relationships in India.” 5 J. IND. L. & SOC. 95, 105, 2014.

⁹⁰ *Danial Latifi and Another v Union of India* (2001) 7 SCC 740.

⁹¹ Sachit Bhogle. “The Momentum of History- Realising Marriage Equality in India”, 12 NUJS L. Rev. 3-4 2019.

⁹² The Madhya Pradesh High Court has held that the inability to procreate alone is not a sufficient ground for nullifying a marriage, and must be accompanied by a mental disorder that would make it unreasonable for the petitioner spouse to live with the spouse having the mental disorder. *Alka Sharma v. Abhinesh Chandra Sharma*, AIR 1991 MP 205.

⁹³ The Domestic Violence Act, 2005, §§2(a).

virtue of her gender can be an 'aggrieved person', however, her spouse can never be a 'respondent.'⁹⁴ Therefore, these statutes should be amended to recognize the rights of same-sex couples.

CONCLUSION

A restriction on same-sex marriages is illegitimate under the law and the constitution as declared by the honourable Supreme Court of India as the existing law restrict itself to 'one man, one woman'. Nevertheless, significant laws have been passed to safeguard the rights of the LGBTQ community,

yet, consequent problems related to homophobia are still rampant in the country. The stigma related to Homophobia is still prevalent which have given rise to several social and legal problems. Although, marriage is an essential part of the religion, secular laws should be enacted recognising that the same sex partners have a right to marry The Hon'ble Supreme Court should not be prevented from proceeding with reformative laws due to the religious opposition. Also, to maintain India's international reputation, legislation should be pursued with regards to same sex marriage at the national level. The Hon'ble Supreme Court should not be prevented from proceeding with reformative laws due to the religious opposition.

⁹⁴ The Domestic Violence Act, 2005, §2(f). See also Indra Sarma v. V.K.V. Sarma, (2013) 15 SCC 755, ¶¶38.5 (observing, obiter, that a domestic relationship between same-sex partners does not amount to a "relationship in the nature of marriage" under the Protection of Women from Domestic Violence Act, 2005).