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UNRAVELLING THE FUNDAMENTAL RIGHT TO MARRY WITH SPECIAL REFERENCE TO SAME SEX MARRIAGE IN INDIA

AUTHORED BY - RAGINI SINGH¹

1. INTRODUCTION

“Equality means more than passing laws. The struggle is really won in the hearts and minds of the community, where it really counts.”

- Barbara Gittings²

India is a democratic country which is inclusive of political as well as social democracy. The fundamental principles enshrined in our Constitution which recognizes equality, liberty and fraternity forms a union of trinity which cannot be treated as a separate items and without divorcing them one from the other, they are the means to achieve social democracy. Taking the word in its concrete sense, “Liberty consists in the ability to choose”³. When the person’s physical frame is treated with absolute indignity in the name of class honour, the ability to choose is crushed and a chilling effect dominates over the brains and bones of the society at large. In the name of class honour, howsoever perceived, the sea of liberty and the ingrained sense of dignity under our compassionate Constitution cannot smother the choice of an individual in exercising their choice to get married which he or she is entitled to enjoy and this entitlement of liberty deserves to be protected and guarded continually and zealously so that it can flourish and pave the smooth path for liberty giving way to the new order with changing circumstances⁴. Since the adoption of the Indian Constitution, the gap between political and social democracy can still be seen from the view point of principle of one man one value which though gets recognition in the former case but gets actively denied in the latter one and is purely substituted with the principle of graded inequality. When our Constitution speaks for ‘Equality’ which derives its existence from the golden triangle of Article 14, 19 and 21, it protects the interest of every individuals right from all kinds of encroachment. The unenumerated rights introduced by the apex court through its role of

¹ Advocate.

² American activist for LGBT equality (July 31, 1932 – February 18, 2007).

³ Conor Cruise O’Brien, The Anti-Politics of Simone Weil, The New York Review (May 12, 1977 Issue).

⁴ Shakti Vahini v. Union of India (2018) 7 SCC 192.

judicial activism opens the gate for equal opportunities and fair justice prohibiting arbitrary actions of the government. One such unenumerated right discovered by the Indian Judiciary in our fundamental right under Part III of the Constitution is the right to get marry by the person of his/her own choice. Through its transformative and progressive jurisprudence, the Supreme Court of India has evolved this concept in a series of landmark judgments interpreting the marriage right under Article 21 of the Constitution. **Lata Singh vs Union of India**⁵ is one of the landmark judgment of 2006 in which the apex court upheld the freedom to choose partner under right to marriage irrespective of their caste. Another landmark judgment is **Justice KS Puttaswamy (retired) vs Union of India**⁶ in which the Supreme Court in its 9 judges bench unanimously held that, within the ambit of right to privacy is included the vital personal choices related to marriage and dignity of an individual under Article 21 of the Constitution. Consensually choosing life partners is guaranteed under Article 19 and Article 21 of the Constitution and except according to just and reasonable procedure established by law, the right to marry a person of one's own choice cannot be curtailed⁷. By reading down Section 377 of the Indian Penal Code, 1860, the Supreme Court decriminalized homosexuality in the landmark verdict of **Navtej Singh Johar vs Union of India**⁸. It held that consensual and private sexual activity between adults of same sex is not against the order of the nature and constitutes an essential part of right to privacy. In this case, the idea of an individual's sexual autonomy and the concept of freedom to choose life partner was by and large based on the decision of *Shafin Jahan and Shakti Vahini* earlier.

2. RIGHT TO MARRIAGE AND INTERNATIONAL LAW

Apart from the above cited precedents, right to marry is a human right under Universal Declaration of Human Rights (UDHR) to which India is a signatory⁹. The International Covenant on Civil and Political Rights (ICCPR) recognizes and reaffirms this right under Article 23(2)¹⁰ as well. Having said that, though the fundamental right to marry is implied in a series of landmark judgments of the Supreme Court backed by international covenants, this question was never answered by the Court specifically even in *Navtej Singh Johar* case, in which the Court refrained from addressing the necessary issues such as how the rights of the homosexuals would apply in other matters like marriage, succession, guardianship, maintenance, etc. And finally when Court had the occasion to substantiate on this point, it unanimously declared right to marriage as not a fundamentally

⁵ 2006 (5) SCC 475.

⁶ (2017) 10 SCC 1.

⁷ *Shafin Jahan v Ashokan K.M.* [2017 (10) SCC 1].

⁸ AIR 2018 SC 4321, (2018) 10 SCC 1.

⁹ Article 16(1) of the UDHR, 1948.

¹⁰ The right of men and women of marriageable age to marry and to found a family shall be recognized.

guaranteed right¹¹. Making a narrow distinction it further held that the cases laid before the court as precedents dealt with the right to choose partner and not right to marry.

3. TRACING THE ORIGIN OF SAME-SEX MARRIAGE IN INDIA

In India, the status of same sex marriages or civil unions is unrecognized. Homosexuality is a term taken from the Greek word homos, meaning “the same”. As opposed to the gender identity, it is a sexual orientation between people of the same sex. From Ancient Greece to Rome to Victorian England, virtually every civilization since has had some record of the presence of homosexuality right up to the present day. One of the oldest universal social institution, Marriage in our society is viewed as a sacred light when entered between men and women of legal age and sound mind but when it is entered between people of same sex is considered as sacrilege on a notion that it is an acquired trait rather than something that has been originated in nature. Opposing this view, there are many examples of homosexual relationships existing within the nature. Ranging from co-parenting to carnal relations, over 1000 species of animals including lions, giraffes, sheep, bonobo apes and many species of birds according to a study show homosexual behaviours¹². Responding to an archaic claim of homosexuality being a mental disorder, scientific studies have refuted such claim and propose that sexual preference is innate to a person and an effect of various gene variants¹³. Another contention is that, among a majority in our country it is a general opinion that Indian religion and culture condemn and punishes homosexuality but the reality is far from the truth. Deities having queer, homosexual and intersexual characteristics in Hindu mythology and epics are the various prominent examples. Unifying male and female natures, Lord Shiva is sometimes portrayed as “Ardhanarishvara”, a half male and half female deity. Mainly worshipped in South India, Lord Ayyappa is another prominent example who is considered to be the son of male deities Lord Shiva and Lord Vishnu¹⁴. Marriage is considered as a union of souls in Hinduism and souls are believed to not have a gender. Because of their sexual orientation, it is very clear from these examples that Hinduism does not discriminate between individuals. Therefore, In India, one can trace the concept of homosexuality since the Early Vedic period or the Rig Vedic period which dates back to 1500 BC.

¹¹ Supriyo Chakraborty v Union of India, 2023 INSC 920, W.P.(C) No. 1011/2022 Diary No. 36593/2022.

¹² Juanita Bawagan, Scientists explore the evolution of animal homosexuality, Phys.org (May 2, 2009), <https://phys.org/news/2019-05-scientists-explore-evolution-animal-homosexuality.html>.

¹³ Nicola Davis, Scientists quash idea of single 'gay gene', The Guardian (Aug. 29, 2019, 19.00 BST), <https://www.theguardian.com/science/2019/aug/29/scientists-quash-idea-of-single-gay-gene>.

¹⁴ Madhuri Shekar and Hari Venkatachalam, Tradition: Same-Sex Marriage and Hinduism, Hinduism Today (Jan. 1, 2016), <https://www.hinduismtoday.com/magazine/january-february-march-2016/2016-01-tradition-same-sex-marriage-and-hinduism/>.

4. UNDERLYING ISSUE WITH THE SAME-SEX MARRIAGE IN INDIA

Recently under the Hindu Marriage Act 1955, Special Marriage Act, 1954 and Foreign Marriage Act, 1969, three PIL's were filed demanding legalization of same sex marriage in 2020¹⁵. The Centre limiting the recognition of marriage to person of opposite sex opposed the plea on the ground of "legitimate state interest" and "societal morality". It seems that the concept of individual freedom embodied in the constitution by way of the right to choose within the permissible walls of freedom is not being allowed to be realized in the manner as it was intended. And the recent verdict on same sex marriage in the case of **Supriyo Chakraborty v Union of India**¹⁶ paves way for further discrimination since marriage continues to be the tag for social recognition. As the apex court has denied them the right to marry, it would leave an impression that queer couples are "not fit for marriage". The miserable part is that the judgment comes from the same court which once recognised the right of homosexuals in the famous Navtej Singh Johar case. In Supriyo case the main issue was, if the special marriage act was discriminatory? But the unanimity decision apart from denying LGBTQIA+ persons right to marry under Special Marriage Act held that there is no fundamental right to marry. Together with the homosexuals, the impact of this decision as a precedent will affect everybody in future at large.

5. INSTITUTIONAL LIMITATIONS OF THE COURT

LGBTQIA+¹⁷ community In India constitutes around 135 million people, meaning around 10% of India's population belong to the LGBTQIA+ community. However, due to the societal pressure, only 2% of the population accept that they are gay¹⁸. On the other hand, 53% of adult Indians are in favour of legalising same-sex marriage according to a recent survey conducted by Pew Research Center in 2023¹⁹. Recently the Supreme Court of India denied marriage right to same sex couple on the ground that right to marry is not a fundamental right. Citing it as a legislative function, the court unanimously agreed that it cannot grant LGBTQIA+ community the right to marry. On question whether this court can expand marriage laws to include queer unions was left up to the

¹⁵ Mathur Aneesha, centre opposes pleas to recognise same sex marriage under Special Marriage Act, India Today (Feb. 25, 2021, 9:03 IST), <https://www.indiatoday.in/india/story/centre-opposes-pleas-to-recognise-samesex-marriage-under-special-marriage-act-1773007-2021-02-25>.

¹⁶ 2023 INSC 920.

¹⁷ lesbian, gay, bisexual, transgender, intersex, queer/questioning, asexual.

¹⁸ Priyadarshini Goenka, Years after decriminalization of homosexuality, inclusivity is still a dream for the LGBTQ community, The Times of India (Feb. 14, 2023, 18:43 IST), <https://timesofindia.indiatimes.com/readersblog/alcoholabuse/years-after-decriminalization-of-homosexuality-inclusivity-is-still-a-dream-for-the-lgbtq-community-50482/>.

¹⁹<https://thewire.in/lgbtqia/53-of-adults-in-india-support-legalisation-of-same-sex-marriages-finds-pew-research-center> (last visited July 20, 2024).

Parliament to decide. Chief Justice DY Chandrachud reiterated that this court can only interpret and can't make law²⁰. The manner this court has held the right to marry is not a fundamental right raises concerns not only in terms of its equality jurisprudence which have made a great strides from recent historical judgments of Navtej Singh Johar case to Joseph Shine²¹ to many more but at the same time, it definitely have created lack of consistency on institutional limitations of the court. The quasi federal structure of India upholds the doctrine of separation of powers in which the legislature, executive and judiciary operates within their institutional limitations along with check and balance system and one should not encroach upon the working of other body. Apart from this, Article 50 of the Constitution separates the function of the judiciary from executive which defines independency of justice system in India. On the one hand there are cases when there was a complete absence of law and the Supreme Court has framed guidelines²² and then there are cases like **Supriyo vs Union of India**²³ on the other hand, where the apex court being the guardian of the constitution and protector of fundamental rights constrained itself in terms of its institutional limitations. Having no consistent jurisprudence, one cannot imagine what the position of the court is going to be in the future. In today's time, mere discrimination on the sole basis of sexual orientation stands being unjustified. If we compare worldwide, same-sex marriage is legal in around 36 countries out of which 25 countries legalized it through legislation, 10 countries legalized it through court decisions and 2 countries legalized it after courts mandated them to enact legislation on the same. In Asia, Taiwan became the first country to enact legislation on same-sex marriage in May, 2019²⁴. Apart from being a contractual relationship, marriage is a partnership which allows partners to obtain legal advantages and privileges. Therefore, regardless of their sexual orientation, gender identity and other grounds, the urgent need of the hour is to provide inclusive equality to all persons overreaching legislative enactments and judicial pronouncements. The judgment of the apex court though refused to grant legal recognition to the non-heterosexual couples within the ambit of Special Marriage Act 1954, the bench however was divided in its opinion on the issue of benefits which arises out of such union.

²⁰ Krutika Pathi, India's Supreme Court declines to legalize same-sex marriage, saying it's up to Parliament, Pbs News (Oct. 17, 2023, 2:43 PM EDT), <https://www.pbs.org/newshour/world/indias-supreme-court-declines-to-legalize-same-sex-marriage-saying-its-up-to-parliament>.

²¹ Joseph Shine vs Union Of India, 2018 SC 1676.

²² Vishakha and others v State of Rajasthan (1997) 6 SCC 241).

²³ 2023 INSC 920.

²⁴ <https://www.hrc.org/resources/marriage-equality-around-the-world> (last visited July 20, 2024).

6. WAY FORWARD

On July 10, 2024, a five bench of judges headed by the Chief Justice of India, D.Y. Chandrachud was set to hear the review petitions of its October 2023 Judgment²⁵ wherein the apex court refused to grant recognition of same-sex marriage right. Considering the public interest involved in the issue, the petitioners urged the CJI to have an open court hearing for the review petitions but the demand was refused by the CJI. Generally the review petition²⁶ of a case before the Supreme Court if accepted happens in the Judge's chamber through circulation. An oral hearing of the review matters however is allowed sometimes in exceptional cases. In the present case, the review petitions have contended that there are several grounds in which the majority judgment contradicts itself such as²⁷:

- On the one hand, the Constitutional bench recognised marriage as an institution under the Special Marriage Act, 1954 conferred by the Parliament. But on the other hand, the same court in its judgment considers status of marriage independent of the State. And therefore the petitioners urged the apex court to allow same-sex marriage under the 1954 Act.
- An adult's fundamental right to marry cannot be curtailed by a forceful State action or through contract and therefore emphasised marriage as a fundamental right under its review petitions.
- The petitioners contended that, unless the judiciary intervenes to review its own judgment, the ideals of equal participation, fraternity and dignity remain fallacious for the queer community.
- The plea said, the majority judgment had fallen short of its constitutional obligations towards queer couples as it was the same court which once decriminalised homosexuality.

Queerness is not an urban, or elitist concept which the court recognised in its 2023 judgment and for such couples, the State has a duty to ascertain protection against all kind of atrocities. The question that divided the opinion of the bench was how far a court can go to legalise same-sex marriage under the law which prima facie doesn't consider such union. The right to enter in to a union by queer couples is a constitutionally protected right as maintained by the CJI and Justice Kaul. And the State has an obligation to recognise such civil unions as well as grant benefits to such couples arising out of different laws such as right to adoption, inheritance, etc. This view

²⁵ Supriyo Chakraborty v Union of India, 2023 INSC 920.

²⁶ Article 137 of the Constitution.

²⁷ <https://www.thehindu.com/news/national/cji-to-consider-requests-for-open-court-hearing-of-same-sex-marriage-verdict-review/article68383847.ece> (last visited July 20, 2024).

was on the another hand opposed by the other three judges of the Constitutional bench²⁸.

7. CONCLUSION

The right to choose partner of one's own choice is very fundamental to the right to privacy which the State should protect and denial of such right is violative of Article 14, 15, 19 and 21 of the Constitution. There are numerous religious academics which truly considers homosexuality in ancient Indian culture. Many people are unaware of the fact due to the post-colonial changes which has led many to declare that such partnerships are alien and against Indian culture. The opportunity to take part in the marriage institution which is valued so highly in India are denied to same-sex couples due to the absence of legal as well as social recognition of same-sex marriage and because of this they are unable to assimilate into Indian culture. Legalising same-sex marriage will offer certain legislative privileges equally to homosexuals such as inheritance, maintenance, retirement rights, financial advantages under various legislations and so on. The destruction of the images of homosexual expression and sexual expression in general became more systematic with the start of British colonization. The Victorian puritanical value system got reflected in the statutes drafted and adopted during that period in India such as Section 377²⁹ of the Indian Penal Code of 1860. It has to be pointed out that all Indian individual laws on marriage such as Hindu Marriage Act of 1955, the Indian Christian Marriage Act of 1872, and the Shariat Act of 1937 for Muslim personal laws seems to visualize marriage as just a hetero association. Section 4(c)³⁰ of the Special Marriage Act, 1954 which recognizes legal age of marriage between two persons as 'male' and 'female' to be altered to include a specific arrangement so that the same-sex relational unions are allowed. The Special Marriage Act need to be corrected to accord a similar acknowledgment to the people belonging from different religions regardless of whether individual laws are altered to perceive same-sex relational unions.

²⁸ Utkarsh Anand, Same-sex marriage review petitions: Decision delayed as SC judge recuses, Hindustan Times (July 10, 2024, 4:16 PM IST), <https://www.hindustantimes.com/india-news/samesex-marriage-review-petitions-decision-delayed-as-sc-judge-recuses-101720608381267.html>.

²⁹ Section 377 of Indian Penal Code, 1860 (45 of 1860) reads:

Of Unnatural Offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or imprisonment of either description or a term which may extend to ten years, and shall also be liable to fine.

³⁰ The male has completed the age of twenty-one years and the female the age of eighteen years.