
BREAKING BARRIERS: THE COURTS & THE FIGHT FOR SAME-SEX MARRIAGE

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ABSTRACT

“Race, gender, religion, sexuality, we are all people and that’s it. We’re all people. We’re all equal.”

~ Connor Franta

It is a general rule that law is not only what is made by the sovereign but also what is accepted by the society as a whole. Religion is one of those significant aspects of society which binds people together, and when that expresses its views on a particular topic, it becomes a norm. A norm becomes the perception and perception turns to behaviour, which is what law regulates.

Historically, religious scholars have condemned and termed homosexuality as something sinful, immoral and unnatural, mostly receiving negative perception from, Jewish, Christianity and Islamic religions. The indulgence in these acts was seen as an offence, for example in the United Kingdom, “The Statute of 1533” also known as the “Buggery Act”, enacted by King Henry VIII, made the offence of sexual acts between two males (sodomy) punishable by death. This statute continued to function for further 300 years before being repealed and “Offences against Person Act, 1828” was enacted.

The Britishers brought the sodomy rules with them when they came to the Indian sub-continent. They criminalized homosexual relationships and non-reproductive sex. Their ideologies of homosexuality being something unnatural and a disease got ingrained into the Indian society. When Thomas Babington Macaulay drafted the Indian Penal Code, 1860, section 377 was inserted in the legislation under the heading of “Unnatural Offences” which reads as the following – “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with transportation for life*, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence describes in the section.” This section penalized all non-reproductive sex between two males, two females (homosexual) or intercourse with animals, also called bestiality.

Even in the United States of America, during the colonial rule, European countries had introduced their sodomy laws which continued to function even well after the “Revolutionary War” and freedom of American States. During the beginning of the 19th century, nearly in 1837, many state legislatures started repealing the capital punishment for sodomy. The process of complete decriminalization started in the mid 20th century and was completely repealed after the case of *Lawrence vs Texas*¹ in 2003.

Along with the lack of legal rights and penalization of intra-sex relationships, homosexual couples have also faced severe societal condemnation majorly due to the opinion formed on the same for hundreds of years. This article covers the evolution of rights, its decriminalization and fight for legalizing intra-sex marriages in the context of Indian law. It also talks about whether the Constitution of India considers right to marry as a Fundamental Right. All the aforementioned sub-topics shall be covered with the help of relevant Hon’ble Supreme Court and High Court judgements.

Chapter One – History & Religious Opinion on Homosexuality

Judaism & Christianity

‘Homosexuality has been a taboo, which had its origins in the Judeo-Christian heritage. It developed during the great period of Jewish nationalism, when the Hebrews undid their existing cultural norms, which previously regarded homosexuality as something natural and acceptable. During their early nationalistic period, the Jewish tribes were small and surrounded by large and powerful neighbors. Survival depended upon rapid population growth. This can account for their sexual attitudes and the decision to taboo the expression of homosexuality, birth control and other forms of non-reproductive sexual acts. Homosexuality was equated to idolatry, proscribed, and penalized by death. Later, during the early years of Christianity, Paul linked homosexual behavior with “outsiders”, the Greeks and the Romans. By the thirteenth century homosexuality and unorthodoxy had become so closely related that a single English word, “buggery”, applied to both heresy and sodomy. During both the Catholic inquisition and the Protestant witch hunts, “heretics” and “sodomist” were interchangeable charges.

Homosexuality, like heresy, was a religious offense, until Henry VIII took over the church and made sodomy a separate civil infraction, a felony carrying death sentence, “The Statute of

¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

*The words “transportation for life” were substituted by “imprisonment for life” by the Act 26 of 1955, section 117.

1533” or the “Buggery Act”.

At least, since the rise of the utilitarian concept of law, there has been some question whether the state has the right to legislate private morality and to judge private consensual behavior of adults. Quite logically, this has led to the questioning of the sodomy laws. However, due to the social inertia, the influence of the religious right, and the timidity of the mainstream religion, homosexuality remains an essentially unacceptable sexual orientation.²

The Book of Leviticus, or The Third Book of Bible, clearly states Christianity’s stand on homosexuality. It’s Chapter 20, verse 13 reads as, “If a man has sexual relations with a man as one does with a woman, both of them have done what is detestable. They are to be put to death; their blood will be on their own heads.”

The above cited material shows how homosexuality came to be a taboo in the Judeo-Christian heritage, becoming proscribed in Christianity, and down the lane, these religious laws were the basis for sodomy laws enacted in the early thirteenth and fourteenth centuries in England, which only further snowballed over the time.

Common Law Regarding Sodomy In The Early Centuries

The legislative history indicates that the first records of sodomy as a crime at Common Law in England were chronicled in the Fleta, 1290, and later in the Britton, 1300. Both texts prescribed that sodomites should be burnt alive. Acts of sodomy later became penalized by hanging under the Buggery Act of 1533, which was re-enacted in 1563 by Queen Elizabeth I, after which it became the charter for the subsequent criminalization of sodomy in the British Colonies. Oral-genital sexual acts were later removed from the definition of buggery in 1817. And in 1861, the death penalty for buggery was formally abolished in England and Wales. However, sodomy or buggery remained as a crime "not to be mentioned by Christians."³

Islam

Like Christianity and Judaism, Islam strongly prohibits illicit sexual intercourse which includes same-sex relationships. The justification for this prohibition is based on the fact that these

²Arthur K. Berliner, *Sex, Sin, and the Church: The Dilemma of Homosexuality*, 26(2) JOURNAL OF RELIGION AND HEALTH 137, 138 (1987).

³ Naz Foundation v. NCT of Delhi, (2009) 160 DLT 277 (India).

relationships operate outside the marriage contract, which makes them illegal according to Islamic law. Prohibitions against homosexuality are more firmly pronounced in the *Hadith*, collection of sayings uttered by *Prophet Muhammad*. One *Hadith* of the Prophet Muhammad stated, “whenever a male mounts another male the throne of God trembles; the angels look on in loathing and say, Lord, why do you not command the earth to punish them and the heavens to rain stones upon them?” (Bellamy, 37). *The Prophet* warned his community against the practices of sodomy in several *Hadith* according to *Ibn Jawzi*, a conservative *Hanbali* jurist from the twelfth century. *The Prophet Muhammad* was also reported saying, “Indeed my community will suffer punishment if men go with men and woman with woman.”⁴

Hinduism

‘Hinduism is the world’s oldest living religion. Hindu communities foster a wide range of philosophy and practice, and revere thousands of texts as sacred. Variations in gender and sexuality have been discussed in Hindu texts for over two millennia; same-sex love flourished in precolonial India, without any extended history of persecution. Like the erotic sculptures on ancient Hindu temples at *Khajuraho* and *Konarak*, sacred texts in Sanskrit constitute irrefutable evidence that the whole range of sexual behaviour was known to ancient Hindus.

Though Hindu law books like *Manusmriti* and *Arthshashtra*, dating from the first to the fourth century CE, categorize *ayoni* or nonvaginal sex as impure and imposed minor fines for punishment, the sacred epics and *Puranas* (compendia of stories of the Gods, dating from the fourth to the fourteenth centuries) seemingly contradict the law books; they depict Gods, sages, and heroes springing from *ayoni* sex. This is because, unlike the Christian category of sodomy, *ayoni* sex is not so much sinful or evil as forbidden or taboo. Like other taboos, it may be broken by special beings or in special contexts, and is broken in secret by ordinary beings too. Unlike sodomy, *ayoni* sex never became a major topic of debate or an unspeakable crime.

Medieval Hindu texts narrate how the God *Ayyappa* was born of intercourse between the Gods *Shiva* and *Vishnu* when the latter temporarily took a female form. A number of fourteenth century texts in Sanskrit and Bengali also narrate how the hero, *Bhagiratha*, who brought the sacred river *Ganga* from heaven to earth, was miraculously born to two co widows, who made

⁴ SANDS, K. M., HOMOSEXUALITY, RELIGION, AND THE LAW in HOMOSEXUALITY AND RELIGION: AN ENCYCLOPEDIA 3-18 (2007).

love together with divine blessing.

The fourth century *Kamasutra*, also a sacred Hindu text, emphasizes pleasure and joy as aims of intercourse. It nonjudgmentally categorizes men who desire other men as a “third nature,” and describes in detail oral sex between men, also referring to long-term unions between men. Hindu medical texts dating from the first century AD provide a detailed taxonomy of gender and sexual variations, including different types of same-sex desire.

When European Christians arrived in India, they were shocked by Hindu practices and vast acceptance, which they termed idolatrous, and by the range of sexual practices, including same-sex relations, which they labelled licentious. When the British colonized India they inscribed modern homophobia into education, law, and the polity. Homophobic trends that were marginal in premodern India thus became dominant in modern India. Indian nationalists, including Hindus, imbibed Victorian ideals of heterosexual monogamy and disowned indigenous traditions that contradicted those ideals.’⁵

Shift in the Indian Society due to Colonialism and Western Influence

With the study of the above references, it is blatantly visible that in the ancient Indian society, homosexuality was a part of the of the regular society and even if Hindu Laws penalized homosexual acts, it was a minor fine and not outright ostracization and persecution of people involved in those acts. *Hindu Puranas and Kamasutra* also recognize the desire between homosexuals.

On the other hand, the colonizers and western countries brought along with them, specially Europeans, their set of ideologies which awarded capital punishment for homosexuality and was considered as something unnatural, sinful, immoral, idolatrous and proscribed according to their religion; namely Christianity and Islam. Even after attaining freedom from the colonial rule, both India and United States of America, retained the Christian Sodomy laws, which though now did not provided capital punishment, but still penalized homosexuals and banned homosexual relationships under section 377 of the Indian Penal Code, 1860.

This issue not only posed a direct conflict to Article 21 of the Constitution of India i.e. Right

⁵ SANDS, K. M., HOMOSEXUALITY, RELIGION, AND THE LAW in HOMOSEXUALITY AND RELIGION: AN ENCYCLOPEDIA 3-18 (2007).

to Life and Personal Liberty but was also violative of Right to Privacy, Article 14 i.e. Right to Equality, Article 15 as discrimination against sex is prohibited and sexual orientation is ground analogous to sex and Article 19 as people were unable to express themselves freely. As it is, homosexuals were heavily discriminated, ostracized and humiliated by the Indian society, retaining the colonial ideologies of Europeans. Further, the Indian Legislature also did not take a step to decriminalize or repeal the sodomy laws and since personal laws according to Article 13 of Constitution of India, falls outside the ambit of judicial scrutiny, the situation was completely unfavourable towards homosexuals and the LGBTQ community as they were not left with any recourse.

Chapter Two – The Decriminalization of Homosexuality

The first attempt at decriminalizing the section 377 of Indian Penal Code was made in the case of *Naz Foundation v. NCT of Delhi*⁶ in 2009, where the constitutionality of the aforementioned provision was challenged on the grounds that it was violative of Article 14, 15, 19 and 21 of the Constitution of India. The High Court of Delhi, ruled in favour of the petitioners and struck down section 377 to the extent of consensual adult sexual relations while retaining, non-consensual acts (rape), bestiality, and sexual activities involving minors. This was the first time Indian Courts recognized LGBTQ rights under the Indian Constitution and laid the foundation for the case of *Navtej Singh Johar v. Union of India*⁷.

The Delhi High Court found that personal autonomy and dignity are essentials of Article 21, and that sexual orientation is a part of the identity of the person. It also established that popular morality or public disapproval does is not a valid justification for restriction of fundamental rights under Article 21. The same is stated in paragraph 79 of the judgment and is cited below – “Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent

⁶ *Naz Foundation v. NCT of Delhi*, (2009) 160 DLT 277 (India).

⁷ *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791 (India).

Assembly.”⁸

The petitioners contend that a Criminal Code penalizing various forms of sexual conduct between men violated the ICCPR (International Covenant on Civil and Political Rights) and that the statute with reference to “sex” in its Article 2, paragraphs 1 of 26, includes sexual orientation. They also cited reference to international judgements, like the Canadian case law where the Canadian Supreme Court held sexual orientation is ground analogous to sex.

The court took these arguments into account and in paragraph 104 of the judgement stated – “We hold that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15. Further, Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. In our view, discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15.”⁹

Hence, on the following grounds with the aforementioned reasoning, the Delhi High Court excluded consensual adult sexual relationships and acts from the ambit of section 377 of Indian Penal Code, 1860. Reference to paragraph 132 of the judgement is given below –

“We declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By 'adult' we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act.”¹⁰

This judgement received its fair share of outrage, especially from religious groups and scholars.

‘A vast number of petitioners had lined up in opposition to the Delhi High Court decision, appealing the judgment before the Supreme Court of India. The first of these was Suresh Kumar Koushal, an astrologer, followed in quick succession by religious organizations ranging from the Apostolic Churches Alliance to the All India Muslim Personal Law Board. The Delhi

⁸ Naz Foundation v. NCT of Delhi, (2009) 160 DLT 277 (India).

⁹ Naz Foundation v. NCT of Delhi, (2009) 160 DLT 277 (India).

¹⁰ Naz Foundation v. NCT of Delhi, (2009) 160 DLT 277 (India).

Commission for Protection of Child Rights joined a crowded fray which also included all the parties in the lower court judgment.¹¹

The case of Naz Foundation was directly overruled by its appeal; *Suresh Kumar Koushal v. Naz Foundation*¹². The Supreme Court of India laid out four principles while deciding upon the constitutionality of an impugned statute –

- I. The High Courts and the Supreme Court are empowered to declare a law void, irrelevant of its enactment prior or after the Constitution, till the extent of the inconsistency with the Constitution.
- II. There is a presumption of Constitutionality for laws prior and after the enactment of the Constitution. The burden of proof lies on the petitioner.
- III. Doctrine of Severability should be applied keeping in mind the scheme and purpose of the law along with the intention of the legislature.
- IV. The court can resort to reading down a law in order to save it from being unconstitutional. Declaring a law unconstitutional should be the last resort.¹³

Stating this, the Hon'ble Court said that self-restraint should be exercised and the analysis should be guided by the presumption of constitutionality. After the 2013 amendments in IPC regarding sexual offences, the 172nd Law Commission Report specifically recommended the deletion of section 377 and the same was brought up a lot in the debates. However, the legislature has not repealed or amended the law in question.¹⁴

The judgement iterated the following –

“Nonetheless in light of the plain meaning and legislative history of the section, we hold that Section 377 Indian Penal Code would apply irrespective of age and consent. It is relevant to mention here that the Section 377 Indian Penal Code does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute

¹¹ Danish Sheikh, *The road to decriminalization: Litigating India's anti-sodomy law*, 16 *Yale Hum. Rts. & Dev. L.J.* 104 (2013).

¹² *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1 (India).

¹³ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1 (India).

¹⁴ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1 (India).

an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation.”¹⁵ The Hon’ble Court in this part shifted the interpretation from the discrimination on the basis of sexual orientation to the criminalization of particular acts that the law aims to curb. The same reasoning was used to nullify the High Court’s decision in declaring section 377 ultra vires to Article 14 and 15 of the Constitution of India; the same is iterated below.

The Supreme Court made the following observations while deciding whether the Hon’ble High Court of Delhi was correct in declaring section 377 ultra vires to Article 14 and 15 –

“Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the later category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification. What Section 377 does is merely to define the particular offence and prescribe punishment for the same which can be awarded if in the trial conducted in accordance with the provisions of the Code of Criminal Procedure and other statutes of the same family the person is found guilty. Therefore, the High Court was not right in declaring Section 377 Indian Penal Code ultra vires Articles 14 and 15 of the Constitution.”¹⁶

It also further said in paragraph 43 of its judgement that – “While reading down Section 377 Indian Penal Code, the Division Bench of the High Court overlooked that a miniscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence under Section 377 Indian Penal Code and this cannot be made sound basis for declaring that section ultra vires the provisions of Articles 14, 15 and 21 of the Constitution.¹⁷ If we take a look at Article 14 and its subsequent Articles 15 and 16, they are termed as extensions or manifestations of Article 14. Article 14 states – “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”¹⁸ This particular provision also considers protecting and uplifting the parts of population who have been suppressed and are not at par with the rest of the population, like, women, children, SCs/STs. Thus, it considers reasonable classification of people based on (i) intelligible differentia and (ii) rational nexus to the objective of legislation so proposed. Hence,

¹⁵ Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 (India).

¹⁶ Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 (India).

¹⁷ Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 (India).

¹⁸ INDIA CONST. art. 14.

their rights are protected in Articles, 15 and 16 via reservation for SCs/STs in educational institutions and government jobs and a savings clause in Article 15, clause (3) which states – “Nothing in this article shall prevent the State from making any special provision for women and children.”¹⁹ Therefore, if the Constitution uplifts these communities, the reasoning of the court that the rights of a “miniscule fraction of LGBTQ and a very few number of prosecutions of them over the years” does not stand for the ground of Constitutional morality.

Further, The Hon’ble Court was of the opinion that the contention provided by respondents, against the section 377, that this particular provision was being used as a harassment tool to blackmail and torture the people from the LGBTQ community is neither mandated nor condoned by this section and the mere fact that the provision is being misused by the police authorities does not render it ultra vires to the Constitution.²⁰

Thus, based on the aforesaid reasoning, the Hon’ble Supreme Court of India reversed the impugned judgement and found that the High Court of Delhi had erred in holding the impugned provision ultra vires to the Constitution. This judgement of the Supreme Court was met with many criticisms for its conservative and callous approach towards the rights of the LGBTQ community and also for its lack of empathy and overturning a well-reasoned judgement. Many Indian actors and public figures also commented against the ruling.

Skipping a few years, in 2018, the Koushal verdict was overruled by the case of *Navtej Singh Johar v. Union of India*²¹, which reinstated the *Naz Foundation v. NCT of Delhi*²² verdict and decriminalised the provision of section 377 of the Indian Penal Code, finally putting an end to the penalization of homosexual relationships in India and was also a significant landmark in the progressive nature of legal rights.

The Hon’ble Supreme Court also discussed the Suresh Koushal’s judgement and disregarded the reasoning of “minuscule population” in the case of *Justice K.S. Puttaswamy v. Union of India*²³. The same was reiterated in the Navtej Singh’s judgement. The particular paragraph has been reproduced below –

¹⁹ INDIA CONST. art. 15, cl. 3.

²⁰ Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1 (India).

²¹ Navtej Singh Johar v. Union of India, (2018) 1 SCC 791 (India).

²² Naz Foundation v. NCT of Delhi, (2009) 160 DLT 277 (India).

²³ Justice K.S. Puttaswamy v. Union of India, (2017) INSC 801 (India).

“Neither of the above reasons can be regarded as a valid constitutional basis for disregarding a claim based on privacy Under Article 21 of the Constitution. That "a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" (as observed in the judgment of this Court) is not a sustainable basis to deny the right to privacy. The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion.”²⁴

The Supreme Court further termed the reasoning of Suresh Koushal’s judgement as an inappropriate construction of the privacy based claims of the LGBT population, and that their rights are not ‘so-called’ but are real rights founded on the constitutional doctrine. They inhere the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom. Equal protection demands protection of the identity of every individual without discrimination.²⁵

Thus, the Hon’ble Supreme Court in 2018, at last, held the provision of section 377 of the Indian Penal Code, 1860 as ultra vires to the Constitution of India, at least to the extent of consensual adult relationships, both heterosexual and homosexual.

The Parliament of India, enacted the *Bharatiya Nyaya Sanhita* in 2023 as the substantive criminal law for the state after repealing the Indian Penal Code, which was given effect from the 1st of July 2024. This new criminal substantive law does not contain the provision for “Unnatural Offence”, i.e. section 377. Hence, consensual adult homosexual relationships are finally not criminalized in India.

Chapter Three – The Fight for Legitimizing Homosexual Marriages

Even though decriminalization of sodomy, is in itself a great milestone in the Indian jurisprudence, another issue that springs up is that the state does not recognize marriages between homosexual partners.

The civil law for marriages between two people is recognized only for heterosexual couples,

²⁴ Navtej Singh Johar v. Union of India, (2018) 1 SCC 791 (India).

²⁵ Justice K.S. Puttaswamy v. Union of India, (2017) INSC 801 (India).

i.e., between a man and a woman. No law in India, let alone personal codified laws, like The Hindu Marriage Act, 1955, The Muslim Personal Law (Shariat) Application Act, 1937, Indian Christian Marriage Act, 1872 and The Parsi Marriage and Divorce Act, 1936 or a secular marriage law, like, Special Marriage Act, 1954, recognizes marriages between homosexuals.

The judgement of *Navtej Singh Johar v. Union of India*²⁶ did not address the issue of whether the Constitution recognizes the right to marry. The issue of legalization of homosexual marriages in India has been challenged by the contention that “Right to Marry” is a fundamental right in the Constitution of India, and not recognizing homosexual marriages is ultra vires to the Constitution. This chapter shall first focus on the argument of whether, right to marry in India is a fundamental right or not and then shall cover the judgements delivered by the Hon’ble courts regarding legalizing homosexual marriages.

Right to Marry – A Fundamental Right or Not?

The Indian Constitution does not expressly recognise right to marry as a fundamental or a constitutional right. It is through judicial interpretation that the freedom of choice in marriage has been recognised as an inherent aspect of Article 21 of the constitution.²⁷ Marriage is an extremely significant aspect under the Indian social context which provides further impetus to the discourse on civil rights especially after decriminalization of homosexuality. The absence of the binding union of marriage results in denial of legal and economic privileges which follow marital status. Legal benefits and rights like inheritance, succession, maintenance, pensions rights, health benefits are denied to homosexuals couples.²⁸

Further, internationally, 30 countries have legalised same-sex marriages in an effort to promote progress in the rights of the LGBTQ community.²⁹ Same-sex and queer marriages are not given a similar recognition under the Indian legal regime. However, despite the lack of any clear legal acknowledgement, the judiciary has played a proactive role in the matter.³⁰ The Madras High

²⁶ *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791 (India).

²⁷ SHRUTI BEDI, THE FUNDAMENTAL RIGHT TO MARRY IN INDIA: VIEWING SAME-SEX MARRIAGES THROUGH THE LENS OF CONSTITUTIONAL MORALITY, in LEGALISATION OF SAME-SEX MARRIAGE, 223.

²⁸ Shivam Garg, “Legal Recognition of Same-Sex Marriage Rights in India” (2020) 9 CNLU LJ 158, 160.

²⁹ Saurav Kumar, *A Spectrum of Pride: Recognising Same-Sex Marriage in India*, THE LEAFLET (June. 23, 2021, 3:39 PM), <https://theleaflet.in/analysis/a-spectrum-of-pride-recognising-same-sex-marriage-in-india>.

AFP, *Same-sex marriage now legal in 30 countries*, THE TICO TIMES (Sept. 27, 2021), <https://ticotimes.net/2021/09/27/same-sex-marriage-now-legal-in-30-countries>.

³⁰ SHRUTI BEDI, THE FUNDAMENTAL RIGHT TO MARRY IN INDIA: VIEWING SAME-SEX MARRIAGES THROUGH THE LENS OF CONSTITUTIONAL MORALITY, in LEGALISATION OF SAME-SEX MARRIAGE, 225.

Court by holding that the term “bride” under the Hindu Marriage Act, 1955 includes transwomen and intersex persons who identify as women, has paved the path for liberal interpretation of such provisions.³¹ The consequence being that a marriage solemnised between a male and a Hindu transwoman is given legitimacy. This widening of the interpretation of the provision has also strengthened the foundation for redefining same-sex marriage rights.³² This judgement was the result of the route set by the judgement of *Shafin Jahan v. Asokan K.M.*³³ which held that every person has the right to choose the person they wish to marry, and that this right is protected by Article 19 and 21 of the Constitution of India. Paragraph 53 and 54 of the judgement communicate the same and are reproduced below –

“It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible. Faith of a person is intrinsic to his/her meaningful existence. To have the freedom of faith is essential to his/her autonomy; and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow. It has to be remembered that the realization of a right is more important than the conferment of the right. Such actualization indeed ostracises any kind of societal notoriety and keeps at bay the patriarchal supremacy. It is so because the individualistic faith and expression of choice are fundamental for the fructification of the right. Thus, we would like to call it indispensable preliminary condition.

Non-acceptance of her choice would simply mean creating discomfort to the constitutional right by a Constitutional Court which is meant to be the protector of fundamental rights. Such a situation cannot remotely be conceived. The duty of the Court is to uphold the right and not to abridge the sphere of the right unless there is a valid authority of law. Sans lawful sanction, the centipedal value of liberty should allow an individual to write his/her script. The individual

³¹ Arunkumar v. The Inspector General of Registration, (2019) 4 ALLMR 86.

³² SHRUTI BEDI, THE FUNDAMENTAL RIGHT TO MARRY IN INDIA: VIEWING SAME-SEX MARRIAGES THROUGH THE LENS OF CONSTITUTIONAL MORALITY, in LEGALISATION OF SAME-SEX MARRIAGE, 225.

³³ Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368.

signature is the insignia of the concept.”³⁴

Justice D. Y. Chandrachud in his concurring opinion have shared the following reasoning –

“Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. They form the essence of personal liberty under the Constitution. In deciding whether Shafin Jahan is a fit person for Hadiya to marry, the High Court has entered into prohibited terrain. Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognising them. Indeed, the Constitution protects personal liberty from disapproving audiences.

The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable. 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.”³⁵

The issue of freedom of choice was also discussed in the Puttaswamy judgement³⁶, where it was established that “family, marriage, procreation and sexual orientation are all integral to the dignity of the individual”.

The same has been iterated in the case of *Shakti Vahini v. Union of India*³⁷ where the Court has discussed in detail the crime of honour killings and the role of Khap Panchayats in ordering the honour killing of the couple who marry outside of their caste or community. The Hon'ble Supreme Court has also laid down directions for the protection of couples who are under the threat of being killed. The court emphasized that families who do not support the marriage between two individuals, at most can sever social ties with them, but they cannot murder them by the reason of their reputations getting tarnished. The Court in this case also solidified that a person has the “right to choose the person they wish to marry without considering matters of faith, caste or community” and that this right is protected under the Article 19 and 21 of the Constitution of India.

³⁴ Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368.

³⁵ Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368.

³⁶ Justice K.S. Puttaswamy v. Union of India, (2017) INSC 801 (India).

³⁷ Shakti Vahini v. Union of India, (2018) 7 SCC 192.

Therefore, the Supreme Court has recognised the “right to choose the partner” as a fundamental right but not “right to marry” as one. The courts have seen an increase in the number of petitions filed for legitimising same-sex marriages. Pleas have been filed by same-sex couples for registration of marriage under the Special Marriage Act and Foreign Marriage Act before the Delhi High Court.³⁸ The centre has opposed these petitions in the Delhi High Court while stating that judicial interpretation is not the way to recognise marriage equality as it falls under the power of the Parliament.³⁹

On 14th November, 2022, two homosexual couples filed a petition in the Supreme Court of India, seeking legalization of homosexual marriage under the Special Marriage Act, 1954.⁴⁰ They argued that not legally recognizing homosexual marriages discriminated against them by denying the same-sex couple benefits like, adoption, surrogacy, employment and retirement benefits and that refusing them the right to marry violated their fundamental rights under article 14, 15, 19 and 21 of the Constitution of India.

The Hon’ble Court while broaching the issue of whether or not Right to Marry is a fundamental right guaranteed under the Constitution, first, deliberated whether in previous judgements the Hon’ble Court has recognized right to marry or not. They referred to the judgements of *Shafin Jahan v. Asokan K.M.*⁴¹, *Shakti Vahini v. Union of India*⁴² and *Justice K.S. Puttaswamy v. Union of India*⁴³. They reached the same conclusion as stated above, the Indian Courts have not encountered the question of “Right to marry as a constitutional right” before in any of the aforementioned judgements. Thus, this case was the first time that the Courts have to decide if Constitution recognizes that right.

The Petitioners relied on US Supreme Court judgement of Obergefell (supra) in which the right to marry was recognised as a fundamental right. Justice Kennedy observed that the right to marry consists of the following four components: (i) the right of choice; (ii) the protection of intimate association by supporting the union of two persons; (iii) safeguards for children and

³⁸ Karan Tripathi, *Marriage Equality for Same-sex couples: The Delhi High Court says this is not an adversarial position*, LIVELAW (Oct. 14, 2020, 12:57 PM), <https://www.livelaw.in/news-updates/marriage-equality-for-same-sex-couples-the-delhi-hc-says-this-is-not-an-adversarial-petition-164444>.

³⁹ SHRUTI BEDI, THE FUNDAMENTAL RIGHT TO MARRY IN INDIA: VIEWING SAME-SEX MARRIAGES THROUGH THE LENS OF CONSTITUTIONAL MORALITY, in LEGALISATION OF SAME-SEX MARRIAGE, 226.

⁴⁰ *Supriyo v. Union of India*, (2023) INSC 920.

⁴¹ *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368.

⁴² *Shakti Vahini v. Union of India*, (2018) 7 SCC 192.

⁴³ *Justice K.S. Puttaswamy v. Union of India*, (2017) INSC 801 (India).

families, and (iv) cornerstone of social order because marriage is the basis for governmental rights, benefits, and responsibilities.⁴⁴

That being said, the Hon'ble Supreme Court delved into Articles 245 and 246 read with Entry 5 in List III of the Seventh Schedule of the Constitution, which confers powers to the Parliament and the State Legislatures to enact laws creating and regulating the socio-legal institution of marriage. Paragraph 182 of the judgement refutes the petitioners contention of judiciary creating a right to marry while Parliament and State Legislature has explicit powers for the same. The said paragraph has been reproduced below –

“In pursuance of the power conferred by Articles 245 and 246 read with Entry 5 of the Concurrent List, Parliament has enacted laws creating and regulating the socio-legal institution of marriage. The State legislatures have made amendments to such laws with the assent of the President, since the subject of marriage is in the Concurrent list. The Petitioners seek that the Court recognise the right to marry as a fundamental right. As explained above, this would mean that even if Parliament and the State legislatures have not created an institution of marriage in exercise of their powers under Entry 5 of the Concurrent list, they would be obligated to create an institution because of the positive postulate encompassed in the right to marry. This argument cannot be accepted.”⁴⁵

Justice S. Ravindra Bhat in his judgement stated that there is no fundamental right to marry and that an entitlement to legal recognition of the right to union can only be enacted through law. Secondly, previous judgments of this Court have established that queer and LGBTQ+ couples too have the right to union or relationship (Under Article 21) - "be it mental, emotional or sexual" flowing from the right to privacy, right to choice, and autonomy. This, however, does not extend to a right to claim entitlement to any legal status for the said union or relationship. The challenge to SMA, 1954 on the ground of under classification is not made out and its provisions cannot be interpreted in a gender neutral manner.⁴⁶ Further, Justice P. S. Narasimha and Justice Hima Kohli's conclusions were in complete consonance with that of Justice Bhat.

Though, Chief Justice D.Y. Chandrachud and Justice Sanjay Kishan Kaul in their dissenting opinions held that – “the right to enter into a union could not be restricted on the basis of sexual

⁴⁴ Supriyo v. Union of India, (2023) INSC 920.

⁴⁵ Supriyo v. Union of India, (2023) INSC 920.

⁴⁶ Supriyo v. Union of India, (2023) INSC 920.

orientation. And that such a restriction would be violative of Article 15. Thus, freedom should be available to all persons regardless of sexual orientation.

Also, objective of the legislation of SMA, 1954 was deliberated over, where Justice Kaul observed that SMA provides a secular framework for solemnization and registration of marriage and that its objective was not to enable heterosexual marriages exclusively as expressed by Justice Bhat. The stated objective of the SMA was not to regulate marriages on the basis of sexual orientation.

They also said that if the intent of the SMA was to facilitate inter-faith marriages, then there would be no rational nexus with the classification it makes, i.e., excluding heterosexual relationships.”⁴⁷

In its entirety, the fulcrum of the judgement was that judiciary cannot overstep its ambit of powers and legislate something that was not validated by the appropriate legislatures of the Union or the State. Though the majority opinion did not hold that right to marry is a Fundamental Right or that the SMA provisions violate the Fundamental Rights of the non-heterosexual individuals, dissenting opinion of Chief Justice Chandrachud and Justice Kaul leave much for deliberation by the Parliament and State Legislatures.

Conclusion

Indian history has not been new to queerness or homosexuality. In fact, as discussed in Chapter I of this Article, Hinduism, the religion which was majorly followed by the population before colonial rule in India, recognized and accepted homosexuality as something natural. Further, even *Manusmriti* or *Arthshastra* imposed minor fines for homosexual acts, and did not condone ostracization or persecution of homosexuals. The *Puranas* and *Kamasutra* also nonjudgmentally categorizes men who desire other men as a “third nature”.

This aversion and societal disapproval of homosexuality stemmed from the colonial system in India and has continued even after 77 years of Independence. Though, in a society where people are discriminated and denied their inherent rights just because of their sexual orientation; independence just remains a term for formality. Even from the lens of humanity, criminalizing

⁴⁷ Supriyo v. Union of India, (2023) INSC 920.

someone for loving a person is something that should not be acceptable, not the other way round.

The Constitution's one of the basic and core principles outlined throughout its entirety is that of Equality. And the legislature, society or judiciary by denying humans their right to express themselves freely, their inherent right to love and be loved regardless of gender or sexual orientation is just like creating an open-air jail for the citizens of India. Article 19 gives everyone a freedom to express themselves freely, and if that freedom cannot be extended and guaranteed to people openly expressing their sexual orientation without facing ostracization and persecution, is a failure of the State's duty to protect its citizen's right.

Even the United Kingdom of Great Britain which introduced sodomy in India, has adopted the policy of same-sex marriages in the year 2014, and here India was still grappling with the conservative judgement of Suresh Koushal. The Naz Foundation judgement, Navtej Singh Johar judgement and Puttaswamy judgement have all recognized the rights of queer people.

Even in the *Supriyo @ Supriya Chakraborty* judgement, the dissenting opinion has recognized the discrimination against non-heterosexual couples. And yet, the legislature's utter silence and lack of action regarding the same is disheartening. Steps should be taken by the Parliament and State legislatures to create an atmosphere where Constitutional morality is given primacy rather than public morality. No matter how much of a minority queer people are, Constitution guarantees safety to every person and pays special attention to the minority to protect them from the majorities. Hence, this principle of the Constitution should be upheld against all odds and marriage for homosexual couples should be legitimized by law.