
RIGHT TO MARRIAGE: AN UNEQUAL OPPORTUNITY

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ABSTRACT

Despite the Legislative and Judiciary's approach towards normalising the homonormative culture through decriminalisation, the sexual apartheid still exists in the name of social morality in our country. The social systems, traditions, and norms directly or indirectly supporting heterosexuality stigmatized the fundamental rights of homosexuals. Even though the right to privacy and personal liberty is conferred by our constitution, the change in the attitude of society is vital for normalising gender equality in its true sense. Marriage equality is a contemporary legal issue after decriminalising Homosexuality in *Navtej Singh Johar v. Union of India*, India is currently faced with the question of legalising same-sex marriages. This article is an attempt to bring a change by examining the international perspective on Gender Inclusivity, the violations of the fundamental rights faced by the LGBTQIA+ community along with the repercussions of delay in the legalising of same-sex marriage in India.

“Social morality cannot be used as a tool to violate the fundamental rights of an individual, for the substratum of constitutional morality breathes in the validation of multifariousness of the society.”

INTRODUCTION

Same-Sex marriages have always been a topic that has been in the dark. Even though many countries made attempts at the legalisation of Homosexuality and same-sex marriages, only a few managed to survive. Now, why so many debates around Homosexuality one may ask, while there isn't a pinpoint answer to that, through various observations we can say that cultural practices and religion play a key role. Many religions look at homosexuality as a sin, while a few look at it as an Individual choice. Marriage Equality is a humanitarian Issue. India being the largest Democratic Country in the world is an advocate for Human rights and personal liberty. Democracy is the very foundation of India and is known for its great decisions pertaining to the Fundamental Rights of an Individual. *Navtej Singh Johar, Maneka Gandhi, and Justice K.S.Puttaswamy* cases are evident proof that India holds Fundamental Rights as the pinnacle of the Constitution.

Indian constitution incorporated the quintessential aspects of the United States constitutionalism one of such aspects is its Fundamental Rights. In the case of *Lawrence v. Texas*¹, the SCOTUS held that state laws banning sodomy violate a person's Fundamental right to privacy.

At present, around 32 countries in the world recognise same-sex marriage. Netherlands was the first-ever country to legalise same-sex marriages in the year 2000 after that followed several other European Countries. Currently, as various countries are trying to evolve few countries still choose to think conventionally. Few countries consider homosexuality as a societal smirch.

When looked at extensively 69 countries still have not legalised homosexuality which usually is a practice that originated during colonial times and inherited the same since then. Countries like Iran, Yemen, Saudi Arabia, etc even punish with the death penalty for same-sex acts.

HOMOSEXUALITY AND MARRIAGE EQUALITY IN THE USA

Homosexuality has always been there throughout history but it was never talked about out in

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

the open. The United States began its struggle for legalising homosexuality during the 1800s itself. William Dorsey was the first person to openly recognise himself as a drag queen. He was the first American to take action and fought for the LGBTQIA+ (lesbian, gay, bisexual, transgender, questioning, queer, intersex, asexual, pansexual, and allies) community's Right to assemble. Subsequently from the 19th century, LGBTQIA+ acceptance slowly started to grow as more and more public figures openly identified themselves as being homosexual. Due to this the idea of Homosexuality started getting normalised.

One of the Major changes to bring equality for homosexuals was made by the landmark decision of striking down the sodomy law. Sodomy law made it illegal for two consenting adults to have sexual intercourse with the same gender. The Supreme Court of the US in its decision in *Bowers v. Hardwick*² held that the Due Process clause in the 14th Amendment of the constitution fails to provide citizens with the fundamental right for homosexuals to engage in consensual sexual activity. However, it was later struck down by the Supreme Court in its landmark judgment in the case of *Lawrence v. Texas (Supra)*. The Supreme Court observed that the Sodomy Law violated the personal liberty of people which is protected by the due process clause. It further said that the law was controlling the personal relationship of two people who have the liberty to act within their interests. The US Government later declared sodomy laws unconstitutional in the year 2003. Even though homosexuality was decriminalised in the year 2003 the struggle for equality for all still had a long way to go.

The United States received marriage equality in the year 2015 when the Supreme Court in its landmark (5-4) decision in *Obergefell v. Hodges*³ granted marriage equality and same-sex couples the right to equal recognition in all 50 states. The Supreme Court was faced with the question of recognition and marriage in this case i.e., the constitutionality of same-sex marriage and the legality of bans on same-sex marriage. It was held that the Right to marry is a fundamental right and comes under the liberty of the individual. The due process of law protects the citizen's life, liberty, and property. It was further held that marriage right is also protected under the Equal Protection Clause, which prohibits the state from denying any person the Equal protection of the law.

Later came many changes which are essential for fully acquiring equality for homosexuality such as repealing the Defense of Marriage Act, DOMA 1996 signed by President Bill Clinton

² *Bowers v. Hardwick*, 478 U.S. 186 (1986) (U.S)

³ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (U.S)

which is an act that prohibited same-sex marriages to receive benefits as other married couples. The Supreme Court in its decision in *Obergefell v. Hodges (Supra)* made the last remaining provision of DOMA unenforceable and RFMA i.e. The Respect for Marriage Act, signed by President Joe Biden replaced the DOMA act. Through the RFMA all states and territories are required to recognise same-sex, inter-racial civil marriages and protect the religious liberty of people.

It took the United States a decade to recognise same-sex marriages after decriminalising homosexuality legalising the same came with a lot of struggles filled with overcoming Homophobia, fighting for equal treatment to all through setting up various unions, protests, movements, and making laws for protecting personal liberty of people out of which the most important step was to decriminalise homosexuality itself as it is the foundation step which moulded the present outcome and the present outcome of marriage equality were its continuous efforts into creating equality for sexual minorities.

INDIA

Even though Homosexuality in itself has always been an under-the-table conversation in India the judiciary seems to have a broader approach. The Supreme Court of India in its 2018 landmark judgment *Navtej Singh Johar v. Union of India*⁴, a Five judge bench of the Honourable Supreme Court struck down Section 377 of the IPC which criminalised Homosexuality. While we continue to see more liberal and wider changes since the decriminalisation of section 377 of the IPC which marked a new beginning and a major win for the LGBTQIA+ community, we are currently faced with the question of the legalisation of same-sex marriages in India. The Supreme Court of India has recently transferred all petitions regarding the legalisation of same-sex marriages from the High courts of Delhi and Kerala.

VIOLATION OF FUNDAMENTAL RIGHTS

The legal standing of same-sex marriages depends upon the social and civil rights of individuals in a community, and it also plays a significant role in establishing a constitutional morality for the protection of the fundamental rights of the LGBTQIA+ community. Though marriage can be regulated by various laws and legislations, its recognition as a fundamental right was only developed through judicial decisions, and depriving the legal recognition of the marriage of

⁴ Navtej Singh Johar v. Union of India, AIR 2018 SC 4321 (India)

same-sex individuals violates the same fundamental rights under the constitution and denying the same shows discrimination and distinctness against a community in the society

India being a secularist and democratic country promotes and strives for the protection of people by bestowing them with Fundamental Rights which cannot be encroached upon. Having said that, few of the Fundamental Rights cannot be suspended even during an emergency especially the Right to Life and personal liberty i.e., Article 21⁵ which very well falls under the purview of marriage equality. The state has a responsibility to treat all of its citizens equally and the LGBTQIA+ community being a minuscule population of our country being deprived of the same right which is offered to heterosexuals.

ARTICLE 14&15

According to Articles 14⁶ & 15⁷ of the constitution talks about equality and forbid discrimination on the grounds of sex, race, religion, etc., While examining the case of *NALSA v. Union of India*⁸, the Apex Court held that self-identity, freedom, and personal integrity are also part of the fundamental rights which must be guaranteed and protected by the state. The court also made it coherent that acquired gender is also included in the term sex. So, Breaching the expression of self-identified gender infringes the fundamental rights, and prohibiting same-sex marriages also infringes Article 15 guaranteed by the constitution

ARTICLE 19

Article 19 (1)(a)⁹, i.e., freedom of speech and expression, in the case of *NALSA (Supra)*, it was well defined that acquired gender is also a part of a fundamental right. Freedom of speech and expression extends this right to express one's gender as it is their own choice. One can with the help of speech or expression identify themselves as their acquired gender. It is prominent to note that the freedom of such expression is not just limited to heterosexuals. The state cannot restrict one's choice of marrying a person they love; it is their own personal choice and the state shall not interfere in their life. The freedom to express one's own identity cannot be restricted on the grounds of morality or public decency. Society due to their long practice of following heterosexuality subconsciously became repugnant to homonormative culture and this should

⁵ India Const. art. 21

⁶ India Const. art. 14

⁷ India Const. art. 15

⁸ *NALSA v. Union of India*, (2014) 5 SCC 438 (India)

⁹ India Const. art. 19, cl. 1 (a)

be deterred immediately as it discriminates homosexual community. India being a modern country should not engage with such practices.

ARTICLE 21

As quoted by Justice D.Y.Chandrachud, “The right to privacy is intrinsic to liberty, central to human dignity and the core of autonomy. These values are an integral part of the right to life under article 21 of the constitution. A meaningful life is a life of freedom and self-respect and is nurtured in the ability to decide the course of living”

Article 21 of the constitution i.e., the fundamental right to life and personal liberty is defined in the case of *Justice K.S. Puttaswamy v. Union of India*¹⁰ where the Supreme Court of India held that the Right to marry a person of one’s choice is integral to article 21 of the constitution. Furthermore, the right to marry also confers to homosexuals. It is an inherent freedom of choice/liberty enshrined in Article 21 to every person regardless of their identity. Arbitrary restrictions placed upon a person’s liberty create legal barriers to a community.

A person’s right to marry someone of their choice falls within their personal liberty. In the case of *Lawrence v. Texas (supra)*, the SCOTUS held that the state shall not by virtue of state-infringed legislation deprive a person of their personal liberty which is protected by the due process clause. Marrying a person of their choice is a part of the right to privacy and the state should not interfere. The same shall be applied to our constitution as Fundamental Rights are borrowed from the United States of America.

In the case of *Bandhua Mukti Morcha V. Union of India*¹¹, the court observed that living a life with human dignity is a fundamental right enshrined in the Article 21 of our constitution, and choice of marrying a person that you love falls under a person’s fundamental right to personal liberty.

RIGHT TO DIGNITY

The right to life and personal liberty includes the right to live with dignity and the right to dignity being an integral part of our constitution secures the evolution of individuals in moving freely and intermingling with other individuals in the society. Marriage being a social

¹⁰ K.S. Puttaswamy & Anr. vs. Union of India & Ors (2017) 10 SCC 1 (India)

¹¹ Bandhua Mukti Morcha V. Union of India, (1997) 10 SCC 549 (India)

institution, paves the path for associating and intermingling with fellow human beings. Recognition of one's sexual identity lies in the essence of the fundamental right to dignity moreover citizen is a social being who expresses themselves in diverse forms, whether it be mingling with the same gender or opposite genders. Thus, barring same-sex marriages shall be treated as a violation of the right to live with dignity further infringing Article 21 of the constitution

The natural sexual identity and choice shall not cross the boundaries of the law though it cannot curtail the intrinsic right rooted in an individual under Article 21 of the Indian constitution

The right to privacy is a pivotal facet of the fundamental right to life and liberty. Infringement of such a right is unappealing to the highly esteemed object of freedom and expression of choice especially to such a secularist and democratic country like India where fundamental rights are paramount to all. Sexual minorities require more protection in this society than that of heterosexuals, have a right to live with equal dignity without any fear or apprehension as of any heterosexual beings and they shall not be discriminated by the state in exercising their social, civil, and constitutional rights openly in multifarious ways

Article 1 of the Universal Declaration of Human Rights provides that persons are born free and are equal in dignity and rights. Members of the U.N. also confirmed that the right to equality between all human beings must be promoted by the state. Any kind of discrimination which violate this declaration such as discrimination against the LGBTQIA+ community by the state is a complete failure on part of the state in protecting the rights and interests of an individual.

WHY THE DELAY IN LEGALISATION

Marriage is an essential part of an individual's life and in the society. Pre-requisites of a valid marriage under the marital laws in India in no way specified the prohibition of marriage for homosexuals. Why is the LGBTQIA+ community still not being granted the same right provided to heterosexuals?

For any law to satisfy a reasonable classification, the differentiation must have a rational nexus to the object of the legislation. The legislation and the laws in our country are more lenient towards a heteronormative society, hence it does not define or provide a reasonable classification between heterosexual and homosexual people and therefore it is immaterial whether the marriage is between the same sexes or the opposite. The provisions of the marriage

law in India regulate marriages of the citizens in and outside of India, caste or community between heterosexuals only. So, there is no reasonable nexus in classifying or differentiating homosexual and heterosexual couples. With the absence of homonormative laws in the country, sexual minorities are being deprived of their fundamental right of getting married by virtue of Article 21. This culture of denying the LGBTQIA+ community of their basic rights by imposing restrictions further violate article 14 i.e. Right to Equality of the constitution.

Another Reason for denying the LGBTQIA+ Community their rights is their inability to procreate but the desire or the promise to procreate is not a requisite for a valid marriage in India. Procreation is not a guaranteed phenomenon even in heterosexual couples. Though they have the ability to procreate does not ensure an offspring. When two consenting adults are well aware of the fact that procreation is not possible in their relationship and are still willing to marry each other, then the state should not in any way restrict them from doing so. Such restriction infringes a person's right to personal liberty.

A STEP FORWARD

Classifying the LGBTQIA+ community with heterosexuals shows discrimination between two sets of people. It is no different than sexism which imposes limits to what one can and cannot do. Such differentiation leads to creating a stereotype. Even if the state recognises same sex marriages there is still a long way to go for fully applying the same benefits such as marital benefits offered to heterosexuals. Such an act is unreasonable and arbitrary which in-turn infringes the right to equality before the law. Heterosexuals are given various rights in the society such as transfer of property of the deceased spouse, adoption, surrogacy rights etc.

NORMALISING

The LGBTQIA+ community must be treated naturally along with other citizens of the society. They must neither be sensitised towards their plight nor be victimized. Them being deprived of their rights shows clear-cut discrimination against them which further curbs their dignity. Hence a person's exercise of choice in selecting their partner should be a basic feature of dignity guaranteed under Articles 19 & 21 of our Constitution. The social systems, norms, and traditions directly or indirectly support heterosexuality which oppressed sexual minorities. They are being forced to live a life of anonymity leading to Sexual Apartheid which established the idiosyncrasy of homosexuality. LGBTQIA+ community faces a lot of discrimination and is often questioned by the society which leads to oppression. We should try to look at this in a

more humane way and support the community and not inflict them with societal pressures and religious beliefs.

Throughout the period of time there are various religious practices which are now being treated as social evils. For example, the Sati system, Untouchability, Dowry, child marriages etc. to name a few in the Indian society. It is high time for the society to recognise that homosexuality is also one such practice followed since ages and is hence deep-rooted in the minds of the people and there is no harm to normalise it. India being the largest democracy should ensure that everyone is treated equally and put an end to any such practices which acts as a barrier to achieving equality. Hence the legislature, judiciary and executive should work hand in hand and strive to provide a greater future without any such oppression for a modern India.