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# **EXPANDING HORIZONS OF ARTICLE 21 AND ARTICLE 14: A JUDICIAL ANALYSIS OF SAME-SEX MARRIAGE IN INDIA**

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## **ABSTRACT**

This paper examines the judicial expansion of constitutional rights under Articles 14 and 21 of the Constitution of India, with particular emphasis on their relevance to LGBTQ+ law and the legal questions surrounding same-sex relationships. It demonstrates how the Indian judiciary has progressively expanded the definition of equality, personal liberty, dignity, and privacy, moving from a limited and strictly procedural interpretation to a broad-based, rights-oriented constitutional approach. The paper highlights the judiciary's role to make the constitution more inclusive through their interpretation of the law by examining significant cases that recognize gender identity, declare the right to privacy as an essential component of individual autonomy, and legalize consensual same-sex relationships. It also explores on the Supreme Court's 2023 decision on same-sex marriage and the judiciary's approach to the issue within existing legal and constitutional frameworks. The research provides a side-by-side comparison of the recognition of same-sex relationship in the US, UK, and Japan, demonstrating India's comparatively progressive stance on advanced rights for the LGBTQ+ community while simultaneously refusing to legalize same-sex marriage. In the conclusion, the report argues that while significant progress has been made through legal interpretation, true equality requires the adoption of legislation, societal acceptance, and policies that are inclusive. The final declaration highlights the need to amend the Special Marriage Act or create new legal frameworks that will maintain the fundamental values of equality, dignity, and non-discrimination while granting LGBTQ+ people the same marital rights.

**Keywords:** Constitutional Rights, LGBTQ+ Community, Same-Sex Marriage, Judicial Interpretation.

## CHAPTER 1

### INTRODUCTION

#### 1.1. OVERVIEW

This paper outlines the expansion of the horizons of Article 14 and Article 21 of the Constitution of India. The objective is to elucidate the constitutional provisions pertaining to equality and personal liberty, as well as the judicial interpretations of these principles that connect with the case leading to recognition of same-sex marriage. The paper entails analysing seminal judgements that influenced India's legal system regarding LGBTQ+ rights and the country's present legal position on homosexual marriages. The paper also delves into the study of the status of homosexual marriages in three of the prominent G7 countries. By assessing the impact of judicial decisions on societal norms and legal processes, the paper provides that the judiciary plays a crucial role in expanding the horizons of fundamental and constitutional rights, leading to the landmark judgements.

#### 1.2. STATEMENT OF PROBLEM

The phrase “Love is Love” is frequently used to support homosexual relationships. Though the judiciary has constructed various rights under “Right to Equality and Right to Life and Personal Liberty” to address the rights of LGBTQ+, the recognition of homosexual marriages is still a debatable issue. This study aims to examine how the courts have interpreted Article 14 and 21 of the constitution of India in relation to LGBTQ+ rights. It will focus on how the evolving understanding of these articles has affected the legal recognition of same-sex relationships, the right to choose a life partner, and the protection of personal freedom and dignity. The research will also look at how these rights connect with broader principles like equality and privacy, and assess the potential for further strengthening these constitutional protections in response to changing social and legal trends.

#### 1.3. RESEARCH OBJECTIVES

- To analyse Article 14 and Article 21 of the Constitution of India.
- To assess how the judiciary has integrated constitutional principles such as equality, dignity, and privacy in relation to the legal status of LGBTQ+ individuals.

- To Investigate Judicial Approaches towards Same-Sex Marriage Recognition in India.
- To Compare Global Judicial approach in Expanding Rights to LGBTQ+ Individuals.

#### **1.4. RESEARCH QUESTIONS**

- What are the provisions dealing with “Right to Equality and Right to Life and Personal Liberty” under the constitution of India?
- In the context of LGBTQ+ rights in India, how has the judiciary's interpretation of Article 14 and Article 21 changed over time, especially in respect to the acceptance of same-sex marriage and relationships?
- How does the Indian legal framework for LGBTQ+ rights compare with international legal standards?

#### **1.5. RESEARCH METHODOLOGY**

1. Research Method- Doctrinal Research Methodology
2. Secondary Sources- Online Articles, Books, Journals, Legal Research Papers
3. Citation Method: Oxford University Standard for Citation of Legal Authorities (OSCOLA), 4<sup>th</sup> edition.

#### **1.6. SCOPE OR LIMITATION OF STUDY**

The focus of this study can be clearly defined by considering the following limitations. The research is primarily limited to the constitutional provisions and landmark cases related to same-sex marriage. This paper is purely analytical, meaning it does not involve the collection of primary data, nor are the findings based on fieldwork or sampling, as it is non- empirical.

### **CHAPTER 2**

#### **THEORITICAL FRAMEWORK**

##### **2.1. CONSTITUTIONAL PROVISIONS**

### 2.1.1. INTRODUCTION

Consisting of 448 Articles, 25 Chapters and 12 Schedules, “*The constitution of India was established to tackle the contentions in the law and order of the country and to develop an ideal nation for the people to exist.*”<sup>1</sup> A number of laws are included in the constitution of India to deal with circumstances in which opinions diverge. In these situations, it becomes crucial for the government and judiciary to manage all factors that can incite unrest or jeopardize national peace while simultaneously ensuring that people's rights are upheld. These rights are known as fundamental rights and are enshrined in Part III of the constitution of India, from Article 14 to Article 32.<sup>2</sup>

### 2.1.2. ARTICLE 14: RIGHT TO EQUALITY

Article 14 of the constitution of India deals with “Equality before law”. It provides. “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”<sup>3</sup> Thus, Article 14 basically deals with two concepts i.e., equality before law and equal protection of law.

#### 2.1.2.1. Equality Before Law

Equality before the Law is the core feature of the Constitution. “The concept of ‘Equality before law’ is of British origin and connotes:

- a) The absence of any special privilege in favor of any person
- b) The equal subjection of all persons to the ordinary law of land administered by the ordinary law courts.

No person (whether rich or poor, high or low, official or non-official) is above the law.” Thus, the concept of ‘Equality before law’ is a negative concept and forbids the government from treating people unfairly and from passing laws that discriminate against them.<sup>4</sup>

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<sup>1</sup> Archisman Chakraborty, ‘The Golden Triangle of the Indian Constitution’ [2022] Jus Corpus Law Journal <<https://www.juscorpus.com/wp-content/uploads/2022/08/195.-Archisman-Chakraborty.pdf>>.

<sup>2</sup> ibid.

<sup>3</sup> Constitution of India 1950.

<sup>4</sup> M. LAXMIKANTH, *INDIAN POLITY* (MC GRAW HILL INDIA).

Dr. Ivor Jennings explains, “Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike.”<sup>5</sup>

### 2.1.2.2. Equal Protection of Law

The concept of “Equal Protection of Law” has been taken from the first section of the 14<sup>th</sup> amendment of the American Constitution. “This concept is a positive concept and connotes:

- a) The equality of treatment under equal circumstances, both in the privileges conferred and liabilities imposed by the laws.
- b) The similar application of the same laws, to all persons who are similarly situated.
- c) The like should be treated alike without any discrimination.”<sup>6</sup>

In *Srinivasa Theatre v. Govt. of Tamil Nadu*<sup>7</sup>, the Supreme Court held that “the expression “equality before law” and “equal protection of laws” in Article 14, did not mean the same thing, even though there was much in common between them. The court explained that the term “law” in the former expression was used in a generic sense, a philosophical sense, whereas in the latter expression, the word “laws” denoted specific laws in force.”<sup>8</sup>

### 2.1.3. ARTICLE 21: RIGHT TO LIFE AND PERSONAL LIBERTY

One of the most important provisions that guarantees the fundamental right to life and personal liberty is Article 21 of the Constitution of India. This right is regarded as the most fundamental of all human rights and has been acknowledged by the UN. The way Article 21 is interpreted in India has changed over time, and its implementation has had a big influence on the nation's efforts to protect individual rights.<sup>9</sup> It states “No person shall be deprived of his life or personal liberty except according to procedure established by law.”<sup>10</sup>

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<sup>5</sup> DR. NARENDRA KUMAR, *CONSTITUTIONAL LAW OF INDIA* (8th ed., Allahabad Law Agency).

<sup>6</sup> M. LAXMIKANTH (n 4).

<sup>7</sup> *Srinivasa Theatre v Government of Tamil Nadu* [1992] AIR 1992 SC 999 (Supreme Court of India).

<sup>8</sup> *ibid.*

<sup>9</sup> Admin, ‘Admin, Article 21 of the Indian Constitution: A Comprehensive Analysis of the Right to Life and Personal Liberty’ (*Century Law Firm*) <<https://www.centurylawfirm.in/blog/article-21-of-the-indian-constitution/>>.

<sup>10</sup> Constitution of India.

### 2.1.3.1. Right to Life

As per Article 21 of the Constitution of India, the Hon'ble Apex Court has given a broad and liberal interpretation to the term “life.” Over time, the phrase was given a broad interpretation by the Honorable Supreme Court. Under Article 21 of the Indian Constitution, the Hon'ble Apex Court ruled in the landmark case of *Francis Coralie v. Union of India*<sup>11</sup> that the term “life” has more concrete meanings than merely referring to a physical or animal existence. It concerns the right to live with the highest dignity possible. In the *Shantisar Builders v. Narayanan Khimalal Totame* case<sup>12</sup>, the Hon'ble Apex Court further affirmed that the Indian Constitution's Article 21 guarantees the right to life, which includes the right to food, clothing, a good environment, and an acceptable place to live. As a result, the definition of “life” under Article 21 has been expansively interpreted in recent years, implying a wide range of Fundamental Rights under Part III.<sup>13</sup>

### 2.1.3.2. Right to Personal Liberty

In the past, when Article 21's interpretation was still being developed, the term “personal liberty” had a very specific meaning. In the case of *A.K. Gopalan versus State of Madras*<sup>14</sup>, the Hon'ble Supreme Court interpreted it to mean nothing more than freedom of the body, freedom from arrest and detention, and freedom from wrongful confinement or false imprisonment. In other words, the Hon'ble Apex Court believed that personal liberty related to an individual's person or body in the Gopalan case. According to the Hon'ble Apex Court's ruling in *Kharak Singh's case*<sup>15</sup>, personal liberty encompasses all the rights that may be granted to an individual, aside from those covered by Article 19(1) of the Constitution. It is not restricted to physical restraint or imprisonment.

However, in landmark decision in *Maneka Gandhi v. Union of India*<sup>16</sup> the Hon'ble Apex Court gave a new dimension to the interpretation of Article 21. It was held by the Hon'ble Apex Court that the expression “Personal Liberty” in Article 21 is of widest amplitude and it covers a variety of rights which constitutes the personal liberty of the man and some of them have

<sup>11</sup> *Francis Coralie v Union Territory of Delhi* [1981] AIR 1981 SC 746 (Supreme Court of India).

<sup>12</sup> *Shantisar Builders v Narayanan Khimalal Totame* [1990] AIR 1990 SC 630 (Supreme Court of India).

<sup>13</sup> Bobby Jain and Bhavinee Singh, ‘ARTICLE 21: WIDENING HORIZONS’ 2 Law Mantra Online Journal <<https://journal.lawmantra.co.in/wp-content/uploads/2015/05/15-edited.pdf>>.

<sup>14</sup> *AK Gopalan v State of Madras* [1950] AIR 1950 SC 27 (Supreme Court of India).

<sup>15</sup> *Kharak Singh v State of Uttar Pradesh & Ors* [1962] AIR 1963 SC 1295 (Supreme Court of India).

<sup>16</sup> *Maneka Gandhi v Union of India* [1978] AIR 1978 SC 597 (Supreme Court of India).

raised to the status of distinct fundamental rights and given additional protection under Article 19 of the Constitution of India.<sup>17</sup> The Hon'ble Court held that there should be a requirement to satisfy the principles of natural justice and the fairness in an action, demands that an opportunity of being heard should be given to the person affected. The Hon'ble Apex Court in the said case held that the right under this Article is not confined to mere physical existence but includes the right to live with the human dignity.<sup>18</sup><sup>19</sup>

### 2.1.3.3. Procedure Established by Law

“Procedure established by law” refers to the legality of a law that has been properly passed, even if it goes against the values of equity and justice. Strictly adhering to “procedure established by law” could put people's lives and personal freedoms at risk because of unfair legislation created by the legislative branch. As a result, “procedure established by law” shields the individual from the capricious actions of only executive.<sup>20</sup>

However, “due process of law” is used in the American Constitution rather than “procedure established by law”. The principle of “due process of law” not only determines whether a law exists that restricts someone's life and personal freedom, but it also determines whether the rule is reasonable, fair, and not capricious. The court will declare a statute to be void if it determines that it is unfair.<sup>21</sup>

The case of Maneka Gandhi served as a catalyst for the start of the process of changing the Apex Judiciary's perspective on Article 21 and shifted the perspective from “Procedure established by law” to “due process of law”.<sup>22</sup>

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<sup>17</sup> Kavyansh Jain, ‘A STUDY ON EXPANDING HORIZONS OF ARTICLE 21 OF THE CONSTITUTION OF INDIA’ IV Indian Journal of Law and Legal Research <[https://3fdef50c-add3-4615-a675-a91741bcb5c0.usrfiles.com/ugd/3fdef5\\_dflf62ecc8114772885b87e4827cf69f.pdf](https://3fdef50c-add3-4615-a675-a91741bcb5c0.usrfiles.com/ugd/3fdef5_dflf62ecc8114772885b87e4827cf69f.pdf)>.

<sup>18</sup> Admin (n 9).

<sup>19</sup> Kavyansh Jain (n 17).

<sup>20</sup> M.P. Jain, *Constitutional Law* (LexisNexis).

<sup>21</sup> *ibid.*

<sup>22</sup> Bobby Jain and Bhavinee Singh (n 13).

## 2.2. JUDICIAL INTERPRETATION: INTERSECTION BETWEEN LGBTQ+ RIGHTS and CONSTITUTIONAL PRINCIPLES

### 2.2.1. TRANSGENDERS AS A ‘THIRD GENDER’

In the case of *NALSA v. Union of India*<sup>23</sup>, The Hon’ble Supreme Court upheld the right of all persons to self-identify their gender. It also said that Eunuchs and Hijras can legally identify as “third gender.” According to the Court, gender identity is “an innate perception of one's gender” rather than referring to biological traits.

According to the Court, “dignity” under Article 21 of the Constitution encompasses a person's diversity in self-expression, enabling them to live a life of dignity. Gender identity was positioned within the parameters of Article 21's fundamental right to dignity.

It also mentioned that the Constitution's gender-neutral language, “all persons,” was used to frame the right to equality (Article 14) and freedom of expression (Article 19(1)(a)). Therefore, transgender people would have the same rights as everyone else, including the freedom of expression and equality.<sup>24</sup>

### 2.2.2. RIGHT TO PRIVACY

Privacy is considered to be that area of someone's life that no reasonable person with the understanding of the needs of the community should invade. Even though there isn't any law Indian constitution that explicitly provides the right to privacy, article 21 included this right after *Puttaswamy v Union of India*<sup>2526</sup>. In the case of *Navtej Singh Johar v Union of India*<sup>27</sup>, it was held that not granting the right to privacy to the homosexual community just because they are a minority is violating their fundamental right to live with dignity.<sup>28</sup>

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<sup>23</sup> *National Legal Services Authority (Nals) V Union Of India & Ors* [2014] AIR 2014 SC 1863 (Supreme Court of India).

<sup>24</sup> ‘NATIONAL LEGAL SERVICES AUTHORITY (NALSA) VS. UNION OF INDIA’ (CLPR- SOUTH ASIAN TRANSLAW DATABASE) <<https://translaw.clpr.org.in/case-law/nalsa-third-gender-identity/>>.

<sup>25</sup> *Justice KSPuttaswamy(Retd) vs Union Of India* [2018] 2019 (1) SCC 1 (Supreme Court of India).

<sup>26</sup> Libertatem News Network, ‘Decriminalization of Homosexuality Vis a Vis Article 14, 15, 19, and 21 of the Indian Constitution’ (Libertatem, 6 August 2021) <<https://libertatem.in/blog/decriminalization-of-homosexuality-vis-a-vis-article-14-15-19-and-21-of-the-indian-constitution/>>.

<sup>27</sup> *Navtej Singh Johar & Ors v Union of India & Ors* [2018] AIR 2018 SC 4321 (Supreme Court of India).

<sup>28</sup> Abhay Kumar and Ganesh Prasad Pandey, ‘TRANSFORMATIVE CONSTITUTIONALISM AND THE EXPANSION OF LGBT RIGHTS IN INDIA: A HUMANISTIC ANALYSIS’ VII Rostrum’s Law Review

### 2.2.2.1. Choice of Marriage Partner of any Gender as a Facet of The Right to Privacy and Autonomy<sup>29</sup>

In K.S. Puttaswamy v. Union of India<sup>30</sup>, the Supreme Court unanimously upheld the Fundamental Right to Privacy, which includes the freedom to make personal and intimate decisions. Sexual orientation was specifically mentioned by the plurality in Puttaswamy as a crucial element of the right to privacy, as well as of Articles 14, 15, and 21 of the Constitution. In the context of same-sex relationships, the Court has held that the Constitution protects “fluidities of sexual experience” and a “diversity of cultures” as opposed to ‘closed categories’ of sexuality.<sup>31</sup>

### 2.2.3. RIGHT TO DIGNITY

According to the ruling in the Maneka Gandhi v. Union of India case<sup>32</sup>, the right to human dignity is a part of the right to life guaranteed by Article 21. Homosexuals lead lives just as respectable as those of any other Indian citizen.

Furthermore, it is evident that human dignity is not a rigid concept. Rather, it encompasses those liberties and rights that allow an individual to maintain their safety, dignity, and self-respect throughout their life. Every individual has the right to live with dignity under Article 21, regardless of gender identity. Therefore, The Court, in the case of Navtej Singh Johar v. Union of India<sup>33</sup>, implementing the belief of personal satisfaction, declared that Section 377 of the Indian Penal Code was contradictory to Articles 14, 15, 19, and 21 of the Constitution of India to the degree that it forbids consensual physical acts of adults in private.<sup>3435</sup>

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<<https://www.rostrumlegal.com/transformative-constitutionalism-and-the-expansion-of-lgbt-rights-in-india-a-humanistic-analysis/>>.

<sup>29</sup> Satchit Bhogle, ‘THE MOMENTUM OF HISTORY – REALISING MARRIAGE EQUALITY IN INDIA’ 12 NUJS Law Review <<https://nujslawreview.org/2020/02/22/the-momentum-of-history-realising-marriage-equality-in-india/>>.

<sup>30</sup> Justice K.S. Puttaswamy(Retd) vs Union Of India (n 25).

<sup>31</sup> Satchit Bhogle (n 29).

<sup>32</sup> *Maneka Gandhi v. Union of India* (n 16).

<sup>33</sup> *Navtej Singh Johar & Ors. v. Union of India & Ors.* (n 27).

<sup>34</sup> Nisha Gandhi, ‘EXPANDING AND EVOLVING THE AMBIT OF ARTICLE 21 OF THE CONSTITUTION OF INDIA WITH THE DEVELOPING SCENARIO’ II Indian Journal of Integrated Research in Law <<https://ijirl.com/wp-content/uploads/2022/07/EXPANDING-AND-EVOLVING-THE-AMBIT-OF-ARTICLE-21-OF-THE-CONSTITUTION-OF-INDIA-WITH-THE-DEVELOPING-SCENARIO.pdf>>.

<sup>35</sup> *ibid.*

## 2.2.4. RIGHT TO CHOOSE LIFE PARTNER

In the case of *Shakti Vahini v. Union of India*<sup>36</sup>, the Supreme Court reaffirmed Right to choose life partner is a fundamental right. The Supreme Court ruled in this judgement, “When two adults choose each other as life partners consensually, it is a manifestation of their choice recognized under Article 19 and 21 of the Constitution.”

## CHAPTER 3

### LANDMARK CASES

#### 3.1. FROM NAZ TO NAVTEZ

In India, the issue of LGBT rights has faced significant challenges. A key moment came when a group of celebrities, including Vikram Seth, supported the legal challenge to Section 377, a law that criminalized homosexuality.<sup>37</sup>

The case of *Naz Foundation v. NCT of Delhi*<sup>38</sup> marked the most important advancement in LGBT rights. Decades of legal challenges to the restriction culminated in 2001 when the Delhi High Court heard a WP brought by the Naz Foundation contesting the constitutionality of Section 377. The Delhi High Court dismissed their suit in 2004 on the grounds of locus standi. The Delhi High Court's ruling was then appealed to the Supreme Court of India in 2006. The result favoured them, and their petition was upheld. At the Delhi High Court, Section 377 was read down and ruled unlawful in a historic ruling, in this case.<sup>39</sup>

During a difficult period, this decision gave the LGBT community hope. However, this was short-lived as the Delhi High Court's ruling was overturned by the Supreme Court in 2013. The Supreme Court has ruled that Parliament must decide whether to decriminalise homosexuality and that Section 377 cannot be read down.<sup>40</sup>

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<sup>36</sup> *Shakti Vahini vs Union Of India* [2018] AIR 2018 SUPREME COURT 1601 (Supreme Court of India).

<sup>37</sup> Abhay Kumar and Ganesh Prasad Pandey (n 28).

<sup>38</sup> *Naz Foundation vs Government Of Nct Of Delhi And Others* [2009] 2009 (6) SCC 712 (Delhi High Court).

<sup>39</sup> R.A.Aswin Krishna, D.Amirthavarshini, and Jemima Christy Rebekah, 'LGBTQ RIGHTS AND LEGISLATION IN INDIA: THE STATUS QUO' III Indian Journal of Integrated Research in Law <<https://ijirl.com/wp-content/uploads/2023/03/LGBTQ-RIGHTS-AND-LEGISLATION-IN-INDIA-THE-STATUS-QUO.pdf>>.

<sup>40</sup> *ibid.*

Later, In NALSA v. Union of India<sup>41</sup>, The Supreme Court observed “dignity” under Article 21 of the Constitution encompasses a person's diversity in self-expression, enabling them to live a life of dignity. Gender identity was positioned within the parameters of Article 21's fundamental right to dignity.<sup>42</sup>

Following that, in the 2017 case of K.S. Puttaswamy v. Union of India<sup>43</sup>, the Supreme Court rendered a landmark ruling, concluding that the right to privacy cannot be violated “even if a minute percentage of the population is harmed.”<sup>44</sup>

The Court decided that the right to privacy includes the rights to express one's gender identity and sexual orientation as well as the freedom to have personal relationships with anybody one chooses.<sup>45</sup> Two prior major decisions, in NALSA and KS Puttaswamy, paved the way for this progressive ruling in Navtej.

The Chief Justice presided over the five-judge Supreme Court bench in the Navtej Johar Singh Case<sup>46</sup>, which unanimously decided that Section 377 was unconstitutional since it forbids any kind of adult-to-adult consensual contact.<sup>47</sup>

### 3.2. PUSH FOR SAME SEX MARRIAGE RECOGNITION

Initially, the focus was on decriminalizing sexual acts. However, this by itself won't stop the prejudice experienced by people who have committed, long-term relationships with people of their own sex. Long-term relationships between people of the same gender would need to be legally recognized on par with heterosexual marriages.<sup>48</sup>

In the wake of the Johar case, a number of petitioners filed motions seeking LGBTQIA+ couples' right to marriage before several High Court. According to the petitions, the refusal to recognise these marriages violated their constitutionally guaranteed fundamental rights and amounted to discrimination. Identifying the “right to marry” as a fundamental right that ought

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<sup>41</sup> *National Legal Services Authority (Nalsa) V. Union Of India & Ors.* (n 23).

<sup>42</sup> ‘NATIONAL LEGAL SERVICES AUTHORITY (NALSA) VS. UNION OF INDIA’ (n 24).

<sup>43</sup> *Justice K.S.Puttaswamy(Retd) vs Union Of India* (n 25).

<sup>44</sup> R.A.Aswin Krishna, D.Amirthavarshini, and Jemima Christy Rebekah (n 39).

<sup>45</sup> *ibid*.

<sup>46</sup> *Navtej Singh Johar & Ors. v. Union of India & Ors.* (n 27).

<sup>47</sup> Satchit Bhogle (n 29).

<sup>48</sup> Nayantara Ravichandran, ‘Legal Recognition of Same Sex Relationships in India’ 5 Manupatra <<https://docs.manupatra.in/newsline/articles/Upload/B07BDF52-0AA4-4881-96AC-C742B9DB217D.pdf>>.

to apply to non-heterosexual couples was the main point of contention in this case. Acknowledging the violence and discrimination experienced by the LGBTQIA+ community in India, the Supreme Court took suo moto cognizance of the instances.<sup>49</sup>

In the case of *Supriyo @ Supriya Chakraborty and Anr. vs. Union of India*<sup>50</sup>, the Supreme Court unanimously held that there was no unqualified fundamental right to marry under the Constitution and the court cannot intervene. Despite the fact that all five judges agreed that it was time to stop discriminating against same-sex couples, they were unable to agree on whether to grant queer couples the status of a legally recognized “civil union.” Three judges held that a law must be passed in order for such a union to have any legal standing.<sup>51</sup>

In addition to refusing to acknowledge the rights that result from intimate relationships, the majority was adamant that the “right to relationship” was protected “under Article 21.” They interpreted that these included the freedom to “choose a partner, cohabit and enjoy physical intimacy with them, to live the way they wish to, and other rights that flow from the right to privacy, autonomy, and dignity,” according to the LGBTQIA+ community.<sup>52</sup>

### 3.3. CURRENT LEGAL LANDSUPREME COURTAPE

In 2018, the Supreme Court of India ruled against Section 377 of the Indian Penal Code, which decriminalised homosexuality. This was a significant win for LGBTQ+ rights in the nation.<sup>53</sup> Further, in 2023, Supreme Court gave a landmark judgement while determining the issue of right to marry of heterosexual couples. Because of the verdict, Indians will have the freedom to have same- sex relationships with the assurance that they will be protected under the constitution. But, same-sex marriage is still prohibited. However, the court left the discretion to Parliament or state legislature on the same matter.<sup>54</sup>

<sup>49</sup> ‘Supriyo @ Supriya Chakraborty & Anr. vs. Union of India’ (NLUD-Privacy Law Library) <<https://privacylibrary.cgnlud.org/case/supriyo-supriya-chakraborty-anr-vs-union-of-india>>.

<sup>50</sup> *Supriyo @ Supriya Chakraborty & Anr vs Union of India* [2023] 2023 INSC 920 (Supreme Court of India).

<sup>51</sup> Sudipta Datta, ‘Why Did the Supreme Court Not Allow Same-Sex Marriage?’ *The Hindu* (India, 23 October 2023) <<https://www.thehindu.com/news/national/why-did-the-supreme-court-not-allow-same-sex-marriage-explained/article67446993.ece>>.

<sup>52</sup> Arvind Narraian, ‘Supreme Court’s LGBTQIA+ Rights Verdict Ignites Debate on Justice and Equality’ [2023] *Frontline* <<https://frontline.thehindu.com/the-nation/lgbtqia-queer-community-marriage-supreme-court-verdict-supriyo-vs-union-of-india/article67461341.ece>>.

<sup>53</sup> *Navtej Singh Johar & Ors. v. Union of India & Ors.* (n 27).

<sup>54</sup> *Supriyo @ Supriya Chakraborty & Anr. vs. Union of India* (n 50).

Thus, currently homosexual marriages are not legal in India.

### 3.4. JUDICIAL CONSTRUCTION

One of the major social and legal developments in India has been the recognition of same-sex couples via judicial construction in which the Indian judiciary played the pivotal role in promoting and upholding LGBTQ+ Rights. The Delhi High Court's ruling in Naz Foundation case where Section 377 was held unconstitutional was start of the judicial interpretation. However, this historical judgement was overturned by Supreme Court in Koushal Case.<sup>55</sup>

Later, the Supreme Court's ruling in Navtej Singh Johar v. Union of India<sup>56</sup> decriminalized Section 377 of Indian Penal Code which is violative of the fundamental rights of LGBTQ+ community. The way the judiciary interprets homosexuality has changed from criminalization to recognition based on fundamental rights. The right to privacy, equality, and dignity under Articles 14, 15, and 21 of the Indian Constitution were highlighted in the Supreme Court's 2018 ruling.

However, the issue of same-sex marriage remained untouched. In 2023, while determining the same issue, Hon'ble Supreme Court of India observed that there is no right to marry under the Constitution of India.<sup>57</sup> It is neither the constitutional right nor the fundamental right: it is a mere statutory right. The court stated that there is a distinction between Fundamental Right to choose a partner and right to marry and they are not same. However, the court recognized same-sex relationships in this case and affirmed that the right to privacy, autonomy, and choice guaranteed by Articles 15 and 21 of the Constitution were not impeded by the non-recognition of LGBTQIA+ marriage. This Court confirmed LGBTQIA+ people's right to personal autonomy and physical integrity, which gives them the freedom to choose their own lives and relationships.<sup>58</sup>

The Court emphasized the importance of privacy, equality, and freedom from discrimination, noting that sexual orientation is an intrinsic part of a person's identity. This decision marked a significant shift from previous judicial positions that criminalized homosexual acts,

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<sup>55</sup> *Suresh Kumar Koushal & Anr vs Naz Foundation & Ors* [2013] AIR 2014 SUPREME COURT 563 (Supreme Court of India).

<sup>56</sup> *Navtej Singh Johar & Ors. v. Union of India & Ors.* (n 27).

<sup>57</sup> *Supriyo @ Supriya Chakraborty & Anr. vs. Union of India* (n 50).

<sup>58</sup> *'Supriyo @ Supriya Chakraborty & Anr. vs. Union of India'* (n 49).

reaffirming the importance of recognizing the dignity of LGBTQ+ individuals.

However, while the *Navtej* judgment was a landmark in decriminalizing homosexuality, the issue of same-sex marriage remains unresolved. In 2023, the Supreme Court began hearing petitions to recognize same-sex marriages under Indian law, with advocates arguing that the right to marry is a fundamental right that should extend to all couples, irrespective of gender. The petitioners contend that denying legal recognition to same-sex marriages violates the principles of equality and non-discrimination.<sup>59</sup>

## CHAPTER 4

### LEGAL STATUS OF SAME SEX RELATIONSHIP: COMPARATIVE STUDY

#### 4.1. UNITED STATES

One of the most well-known and well-documented campaigns for marriage equality is in the United States. After the Stonewall riots of 1969, the homosexual rights movement exploded onto the American political Supreme Court scene in the early 1970s.<sup>60</sup>

The 1993 Hawaii case of *Baehr v. Lewin*<sup>61</sup> was the first lawsuit to specifically address marriage equality.<sup>62</sup> However, In 2015, in the case of *Obergefell v. Hodges*<sup>63</sup>, the US Supreme Court made same-sex marriage legal. The court ruled that the right to marry is a vital and basic right that falls within individual liberty, which is discussed in the Due Process and Equal Protection Clause of the Fourteenth Amendment.

During that time, there was no law that permitted same-sex marriage. The *Obergefell* ruling mandated that all states in the nation recognize same-sex marriages that were performed in compliance with the laws of the other states. It has effectively granted a same-sex couple full legal recognition, together with all the associated rights and obligations that a heterosexual

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<sup>59</sup> Arvind Narra (n 52).

<sup>60</sup> Michael J. Klarman, 'How Same-Sex Marriage Came to Be: On Activism, Litigation, and Social Change in America' [2013] *Harvard Law Today* <<https://hls.harvard.edu/today/how-same-sex-marriage-came-to-be/>>.

<sup>61</sup> *Baehr v Lewin* [1993] 852 P2d 44 (Haw 1993) (Hawaii Supreme Court).

<sup>62</sup> JAE WON SHIN, 'COMING OUT OF THE CLOSET: A COMPARATIVE ANALYSIS OF MARRIAGE EQUALITY BETWEEN THE EAST AND WEST' 49 *NYU Journal of International Law and Politics* <<https://nyujilp.org/wp-content/uploads/2017/11/NYI404.pdf>>.

<sup>63</sup> *Obergefell v Hodges* [2015] 576 US 644 (2015) (United States Supreme Court).

marriage has in terms of inheritance, tax advantages, and parental rights.<sup>64</sup>

In terms of comparison, the US strategy is in stark contrast to the state of affairs in India at the moment. The prescriptivism that was particularly apparent in several marriage equality rulings was predicated on rulings from the U.S. Supreme Court for constitutional protection, whereas in India, the Supreme Court has been subordinate to Parliament in bringing about such profound social change.<sup>65</sup>

#### 4.2. UNITED KINGDOM

The UK approached this problem in a different way. The nation established a distinct procedure for recognizing same-sex relationships rather than processing them in the same manner as heterosexual marriages.

In 2004, civil partnerships received their first official recognition, stating unequivocally that same-sex couples' roles should be recognised in the same context as marriage. Following this was the more current statute, the Marriage Act 2013 for England and Wales, which permitted same-sex marriage. In 2020, Northern Ireland proceeded with same-sex marriage despite strong opposition from the courts and civil society politics, while Scotland followed in 2014.<sup>66</sup>

In terms of comparison, Indian Parliament denied embracing same-sex marriages and criticized the same while UK Parliament played the pro-active role and made the legislation for the same.

#### 4.3. JAPAN

As of right now, Japan is the only G7 nation that does not completely accept same-sex couples or provide them with explicit legal protection. Although same-sex partnership certificates are issued by a number of Japanese towns and prefectures and give certain advantages, they do not confer equal legal recognition.<sup>67</sup>

In terms of comparison, India acknowledges LGBTQ+ rights, their relationship and offers them

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<sup>64</sup> Tridha Gosain and Kartik Shrivastava, 'Understanding The 2023 Indian Same-Sex Marriage Judgment From A Comparative Perspective' (TSCLD) <<https://www.tsclld.com/india-same-sex-marriage-comparative-analysis>>.

<sup>65</sup> *ibid.*

<sup>66</sup> *ibid.*

<sup>67</sup> 'Japan: Groundbreaking Same-Sex Marriage Rulings a Long-Awaited Victory for LGBTI Rights' *Amnesty International* (14 March 2024) <<https://www.amnesty.org/en/latest/news/2024/03/japan-groundbreaking-same-sex-marriage-rulings-a-long-awaited-victory-for-lgbti-rights/>>.

legal protection after the 2023 ruling while Japan doesn't provide any. Though, both the countries are at par as they don't recognize same-sex marriages.

## CHAPTER 5

### CONCLUSION

#### 5.1. SUMMARY OF KEY FINDINGS

This paper explores the key developments in LGBTQ+ rights in India, focusing on important constitutional provisions and court decisions. It explains how "Article 14" ensures everyone is equal before the law, while "Article 21" protects the right to life, liberty, and dignity, which includes the freedom to live with autonomy and quality. The "right to privacy", as recognized in the K.S. Puttaswamy case<sup>68</sup>, protects personal decisions, such as sexual orientation and choosing a life partner. These rights were further reinforced in cases like Navtej Singh Johar<sup>69</sup> and NALSA v. Union of India<sup>70</sup>, which also recognized gender identity as a fundamental right. The courts have consistently upheld the importance of human dignity, including the right to choose one's partner, as seen in the Shakti Vahini case<sup>71</sup>. These rulings show a positive shift toward recognizing LGBTQ+ rights in India's legal system. The paper also covers significant legal milestones, such as the Naz Foundation case (2001)<sup>72</sup>, which led to the decriminalization of homosexuality in 2009, though it was briefly reinstated in 2013 before being fully decriminalized again in 2018 by the Navtej Johar case<sup>73</sup>. Despite this progress, the issue of same-sex marriage remains unresolved, with the Supreme Court ruling in 2023 that marriage is not a fundamental right and leaving the decision to Parliament. The paper also compares LGBTQ+ rights in other countries, noting that while nations like the US and the UK have legalized same-sex marriage, India has not, even though there have been significant advancements in other areas of LGBTQ+ rights.

The application of the "essential religious practices" criteria in Sabarimala and Shayara Bano leads to the conclusion that, despite marriage being a "core" component of personal laws, marriage equality should not be deemed to infringe religious freedom. In any event, same-sex

<sup>68</sup> *Justice K.S.Puttaswamy(Retd) vs Union Of India* (n 25).

<sup>69</sup> *Navtej Singh Johar & Ors. v. Union of India & Ors.* (n 27).

<sup>70</sup> *National Legal Services Authority (Nalsa) V. Union Of India & Ors.* (n 23).

<sup>71</sup> *Shakti Vahini vs Union Of India* (n 36).

<sup>72</sup> *Naz Foundation vs Government Of Nct Of Delhi And Others* (n 38).

<sup>73</sup> *Navtej Singh Johar & Ors. v. Union of India & Ors.* (n 27).

marriage may be permitted by interpretations of the Hindu Marriage Act and the Special Marriage Act.<sup>74</sup>

## 5.2. A WAY FORWARD

The creation of a committee to provide recommendations at the end of the ruling is a positive move, even though we still have a way to go until the existing social order is acknowledged.

- A workable solution is to create distinct laws or amend the Special marriage Act to address LGBTQ+ marital rights while maintaining constitutional harmony.<sup>75</sup>
- It will need a coordinated effort from the government, civil society, religious leaders, and the LGBTQIA+ community to legalise same-sex marriage. Everyone has the right to love and marry anyone they choose, regardless of gender, and this may be achieved by fostering a more inclusive culture.<sup>76</sup>
- A more inclusive society can be achieved by promoting social acceptance and raising understanding of the naturalness of homosexuality through smart and positive media discourse.<sup>77</sup>

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<sup>74</sup> Satchit Bhogle (n 29).

<sup>75</sup> Astha Jain and Dhanashree Kodape, 'Evolution of Recognition: Navigating LGBTQ+ Marriage Rights in India - A Holistic Perspective and Way Forward' [2024] Manupatra <[https://articles.manupatra.com/article-details/Evolution-of-Recognition-Navigating-LGBTQ\\_Plus\\_-Marriage-Rights-in-India-A-Holistic-Perspective-and-Way-Forward](https://articles.manupatra.com/article-details/Evolution-of-Recognition-Navigating-LGBTQ_Plus_-Marriage-Rights-in-India-A-Holistic-Perspective-and-Way-Forward)>.

<sup>76</sup> 'Indian Society Prev Next Same Sex Marriage in India' (Drishti IAS, 17 October 2023) <<https://www.drishtiias.com/daily-updates/daily-news-analysis/same-sex-marriage-in-india>>.

<sup>77</sup> Astha Jain and Dhanashree Kodape (n 75).

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