



Conundrum of Same - Sex Relationships in India

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Abstract

The lexicon of privacy, autonomy, and constitutional morality has been crafted by the Supreme Court in recent times. This evolution has led to the recognition of various entitlements such as the right to privacy and the right to select a life partner. In the *Navtej Singh Johar v. Union of India* case, which upheld the decriminalization of same-sex relationships, the Supreme Court delineated a detailed account of the right to intimate relations. The current study posits that the subsequent logical progression should be the establishment of marriage equality, where same-sex marriage/relationships are acknowledged on an equitable basis with traditional opposite-sex marriage. The essential legal components for such acknowledgment are already in position. The study argues that confining marriage to 'one man, one woman' constitutes impermissible sex discrimination under Articles 14 and 15, 19 & 21 of the Indian Constitution, and is evidently arbitrary. Furthermore, the article recognizes the notion of constitutional morality, which supersedes social or popular morality when construing public morality as a constraint on fundamental rights. This notion can be utilized to counter arguments that same-sex marriage undermines the sanctity of traditional opposite-sex marriage. The study also contends that 'one man, one woman' violates the right to privacy and autonomy, as well as the right to a life with dignity under Article 21. It also encroaches upon the freedom of expression, which encompasses the expression of sexual orientation. Even in instances where personal laws do come into effect, marriage equality should not be perceived as a transgression of religious freedom based on the significantly weakened 'essential religious practices' test.

Introduction

The judgement in the case of *Navtej Singh Johar v. Union of India*¹, commonly known as *Navtej Johar*, is a historically significant milestone towards achieving substantial equality for the LGBTQA+ community. However, it can be argued that this achievement is primarily attributed to the efforts made by the LGBTQA+

¹ (2018) 10 SCC 1.

community to raise awareness about their cause, rather than being solely derived from legal arguments. This is evident from the time period between the Supreme Court's unfortunate decision in *Suresh Kumar Koushal v. Naz Foundation*² (hereafter Koushal) and the present day, during which the LGBTQA+ community actively worked to create awareness. It is worth noting that the Supreme Court in the Koushal case had the advantage of considering the well-reasoned judgement of the Delhi High Court in *Naz Foundation v. Government of NCT of Delhi* (hereafter Naz Foundation) before making its decision. The Petitioners in the Naz Foundation case not only persuaded the Supreme Court to entertain a curative petition against the Koushal decision that was only the fifth time such a petition was entertained since its evolution in *Rupa Hurra v. Ashok Hurra*³ (hereafter Rupa Hurra) - but also successfully advocated for an open court hearing rather than a decision by circulation. The Supreme Court, despite its imperfect human rights record, has in recent years recognized certain rights as Fundamental Rights under Part III of the Constitution, including the right to privacy, the right to choose a life partner, and now the decision to decriminalize gay sex. This significant decision was reached by a five-judge bench. The impact of this decision is already being felt, as at least two high courts have protected couples engaged in consensual same-sex relationships from criminal proceedings that were maintainable solely due to the criminalization of homosexuality. It is fundamental, therefore, that we do not lose the momentum of history and solidify the rights of the LGBTQA+ community, as these rights may not be guaranteed by future courts and governments.

Marriage equality refers to the concept of granting the same legal status to unions that do not conform to the traditional heterosexual marriage between cissexual individuals (i.e., "one man, one woman") as it is accorded to those that fall within this traditional definition. Achieving marriage equality is both a more feasible and a more challenging milestone to attain compared to the decriminalization of sexual intercourse between same-sex partners. It is more feasible because it is easier to recognize that the discrimination lies in the orientation of individuals, rather than solely in their desire to engage in a particular act (as argued by the parties supporting Section 377 in the Naz Foundation, Koushal, and Navtej Johar cases). However, it is also more challenging due to the central role of marriage in religion, both as a social institution and as a ceremonial and solemnized event. Essentially, advocating for marriage equality requires religion to not only overlook what occurs behind closed doors but also to acknowledge and celebrate same-sex relationships in the public sphere, just as it does with opposite-sex marriages.

The concept of marriage being defined as a union between one man and one woman can face challenges both at a constitutional level, such as for violating Article 21 which pertains to the right to choose a life partner, right to life with dignity, and right to autonomy, or Article 14 which addresses discrimination based on sexual orientation apart from Article 19(1)(a) that specifically talks about right to express sexual orientation via various means. Alternatively, it can also be challenged at a sub-constitutional level by arguing that marriage equality can be incorporated into existing personal laws. This analysis also explores whether the union of

² (2014) 1 SCC 1

³ (2002) 4 SCC 388.

one man and one woman can be considered an 'essential practice' of any religion and whether marriage equality can be inferred from existing statutes. Curtails the right to express sexual orientation under Article 19. Furthermore, it concludes that marriage equality should not be seen as a violation of religious freedom, and that, in any case, the Hindu Marriage Act and Special Marriage Act can be interpreted to allow for same-sex marriage.

The notion of marriage

The question regarding the nature of marriage can be interpreted in both uncomplicated and intricate manners. According to the direct definition of marriage, as provided by the Oxford English Dictionary, marriage is described as “The condition of being a husband or wife; the relation between persons married to each other; matrimony”. However, the dictionary now recognizes that the term is occasionally employed in reference to long-term partnerships between individuals of the same gender. Numerous other definitions that were examined delineate marriage as a union between a male and a female. This suggests that the non-legal definition of marriage has been progressing at a leisurely pace. This simplistic perspective of marriage presents difficulties. The definition of marriage must be scrutinized in light of the societal context also. The meaning of marriage also undergoes shift when social elements such as religion and morality are assimilated within the definition of the substance and extent of marriage. When all such rudiments are taken into deliberation, the uncomplicated definition of marriage falls short. Contrary to popular belief, marriage is not a personal relationship. It is a social institution that is persistently evolving, and any opinion opposing popular attitudes on marriage is repressed. Of all the dynamics that influence marriage, sacred viewpoints on marriage carry more implication than any other element in how society identifies marriage. One of the most usual characteristics of conventional religions is the prescription of the rituals and codes of conduct for marriage. Hinduism, Islam, and Christianity, the three major religions in India, each prescribe their own descriptions and practices for marriage. None of them unambiguously provide for, or even recognise same-sex marriage. In Hinduism, marriage is defined as the union of two individuals for life. Hindu marriages are legally recognized and typically occur between members of the opposite sex. While there are numerous religious texts that bars on homosexuality, there are also numerous mythical tales that depict homosexual experiences as natural and joyful. However, there is no explicit mention of same-sex marriage in mythology. In Islamic jurisprudence, marriage is regarded as a legal contract or a “matrimonial contract” between two individuals. The bride must give her consent to the marriage of her own free will. A religiously valid Islamic marriage necessitates a formal, binding contract. In Islamic jurisprudence, there is a problem with accepting individuals of the same sex in sexually active relationships. Muhammad is said to have prescribed the death penalty for both active and passive participants in same-sex activities. The ethical or religious argument underlying this is that any person engaging in homosexual actions disorders the agreement of God's creation and thus one revolts against God.

Marriage through the prism of constitutional morality

In the context of constitutional morality, Constitutional morality refers to a method of interpreting the constitution that carefully examines laws based on the fundamental principles embedded within constitutional norms and the conscience of the Constitution. It also serves as an autonomous basis for questioning the constitutionality of a legislation, as it obliges the State to uphold and progress a system of values that aligns with the constitution. On the other hand, popular morality manifests itself through the democratic process and is transformed into law. However, it is important to note that the law cannot enforce morality solely because it enjoys popularity. As in the case of Navtej Johar, the plurality opinion emphasized the supremacy of constitutional morality over popular morality. The Supreme Court has previously acknowledged that societal aversion towards relationships and beliefs that deviate from traditional marriage norms should not serve as a basis for intruding on personal autonomy⁴. This principle was established in a series of prior Supreme Court rulings, which were based on the concept of growing social morality. In other words, a classification that was considered acceptable at the time of its inception may no longer hold true due to shifting social standards. The Court evaluates the constitutionality of a law not based on the prevailing morality at the time of its enactment, but rather on the prevailing morality at the time of its interpretation. However, constitutional morality takes this a step further by looking beyond current social norms and projecting into the future. It does not focus on what is considered moral today, but rather on what should be considered moral for all eternity. The sexual orientation of a person is protected by Article 14, 15, 17, 19 and 21 of the Indian Constitution as it is not expressly identified as a prohibited basis for discrimination in Article 15. Nevertheless, the Constitution of India typically establishes a constitutional principle, along with explanations of its implementation in particular instances. Consequently, Article 14 establishes the general entitlement to equality and freedom from discrimination, whereas Article 15 specifically highlights non-discrimination based on five specific criteria. Article 17 on the other hand prohibits a specific type of discrimination, namely untouchability. Therefore, the principle of non-discrimination outlined in Article 14 extends beyond the specified categories in Article 15. In the case of *National Legal Services Authority of India v. Union of India*⁵ (hereafter NALSA) case reached a significant conclusion regarding the treatment of sexual orientation in relation to discrimination under Article 14 of the Indian Constitution. The Supreme Court determined that sexual orientation should be considered on par with sex as a prohibited ground for discrimination. In its ruling, the Court emphasized that the term “person” in Article 14 is inclusive of all genders and is not limited to a specific gender. Furthermore, the Court clarified that the concept of “sex” in the context of discrimination, as outlined in Article 15, encompasses “gender identity” and is not confined to a binary understanding of male and female. Instead, it recognizes that gender identity and sexual orientation exist on a spectrum, rather than being strictly categorized as male or female. Consequently, the Court concluded that discrimination based on gender identity and sexual orientation falls within the purview of sex discrimination under both Articles 14 and 15, along with other provisions of the Constitution.

⁴ S. Khushboo v. Kanniammal, (2010) 5 SCC.

⁵ (2014) 5 SCC 438.

However, a gap in the Supreme Court's reasoning is evident. NALSA was decided subsequent to Koushal but prior to Navtej Johar case. Consequently, the Court refrained from delving into any discussion regarding Section 377 IPC. Instead, it focused on discrimination based on 'sexual orientation,' defining it as an "individual's enduring bodily, loving or emotional attraction to another person" as a distinct matter. The Supreme Court asserted that the application of Article 14 encompasses everyone. Nevertheless, this was within the framework of both violence and discrimination in accessing public spaces as delineated in Article 15 (2) of the Constitution of India, primarily due to transgender individuals outward non-conformity with traditional gender roles and expression of gender identity. While emphasizing the disparity between gender identity and sexual orientation, the Court appeared to conflate the two, characterizing sexual orientation as 'self-defined' and subject to change or remain constant following a transition between genders, without citing any authoritative sources. The Court although recognized the oppression faced by individuals due to their sexual orientation, as characterised by Section 377. Although NALSA affirms that Article 14 extends to people of diverse sexual orientations, its argument does not elucidate why discrimination based on sexual orientation is deemed a form of sex discrimination akin to that encountered by transgender individuals.

The Supreme Court ruling in another case titled *K.S. Puttaswamy v. Union of India*⁶ (hereafter Puttaswamy) solidly confirmed the Fundamental Right to privacy, which includes the autonomy over personal and intimate choices. Personal autonomy consists of the right to be free from interference by others and the right of individuals to make decisions about their own lives, express themselves, and choose their activities. The majority opinion in Puttaswamy explicitly mentioned sexual orientation as a fundamental element of the right to privacy, as well as being essential to Articles 14, 15, and 21 of the Constitution. Therefore, the societal institutions should provide the necessary acknowledgment and validation for these relationships to flourish. Consequently, individuals possess the fundamental right to select a partner for intimate relationships, including marriage, based on their sexual orientation and personal preferences. These choices should not be constrained by societal norms, religious beliefs, social acceptance, or the rigid constructs of sex and gender. As a result, the Supreme Court has essentially acknowledged the right to marry a same-sex partner as an inherent aspect of the right to privacy and self-governance.

Conclusion

The NALSA ruling clarified that sex as mentioned in Article 15 encompasses sexual orientation, and that a person in Article 14 includes individuals of any gender. Additionally, the Navtej Johar case reinforced the requirement for a two-step test involving intelligible differentia and rational nexus to justify any form of sex discrimination as constitutional. Furthermore, it introduced the manifest arbitrariness test. Since there is no rational basis for discriminating between same-sex and opposite-sex relationships, such discrimination should be deemed unconstitutional under both Articles 14 and 15. The majority opinion in Navtej Johar also acknowledged constitutional morality as the guiding principle for interpreting public morality, rather than social or popular morality, when it comes to restricting fundamental rights. Constitutional morality

⁶ (2017) 10 SCC 1.

necessitates tolerance for diverse lifestyles, and a narrow interpretation of marriage contradicts this constitutional principle. Navtej Johar also recognized that sexual orientation and the choice of a partner as integral to the right to life with dignity under Article 21 of the Constitution of India. The expression of sexual orientation, similar to the expression of gender, is also protected under the right to freedom of expression under Article 19 (1)(a) of the Constitution of India. In fact, Navtej Johar came very close to acknowledging the right of same-sex partners to marry. Lastly, while marriage holds significant importance in personal laws, the principle of marriage equality should not be seen as a violation of religious freedom, as determined by the essential religious practices test in the Sabarimala and Shayara Bano cases.

