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MARRIAGE EQUALITY: THE TRIUMPH OF SAME-SEX MARRIAGE

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I. ABSTRACT

Ancient scriptures and changing social mores form the foundation of India's complicated history of the fight for marriage equality. Despite progress in LGBTQ+ rights around the world, India has encountered formidable societal and legal obstacles. It would appear that ancient Indian society was more accepting of same-sex relationships, but homosexuality was criminalized in post-colonial regulations, particularly Section 377 of the Indian Penal Code. The Supreme Court of India struck a major victory for LGBTQ+ rights in 2018 by repealing this law. Still, same-sex weddings are not permitted in India, no matter how far the country has come. The continuous fight for marriage equality is reflected in the current Judgment of the SC, which rejected the legalization of same-sex marriages. Although it does not go far enough, the court has proposed establishing a group to examine expanding legal protections for same-sex couples. As a result of the decision's uncertainty and continuation of discrimination, campaigners and LGBTQ+ individuals are disappointed. Attitudes towards homosexuality in India have been impacted by cultural and religious factors. Equal rights and elimination of discrimination grounded on "sexual orientation" can only be achieved through the legal acceptance of same-sex marriage. Justice, equality, and the value of each person's independence and freedom are all tenets of the Constitution, and this measure complies with them. There are several legal, cultural, and historical obstacles in India's way to marital equality. Even though we have come a long way, like when homosexuality was decriminalized, the struggle for equal marriage rights is far from over. In order to achieve genuine equality and ensure that LGBTQ+ individuals can live with respect and dignity, there must be legislative reforms and public acceptance.

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II. KEYWORDS:

LGBTQ+, Same-sex marriage, Gay, Lesbian, Constitution of India, Section 377, Indian Penal Code.

III. INTRODUCTION

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

-Conor Franta

In India, same-sex relationships have a long and illustrious history. There are many who disagree, but looking at the scriptures and literature of ancient India shows a more liberal culture than what emerged after colonial India. Worldwide, LGBTQ population has made great strides towards social acceptance.³ It has been a long fight in India, but the court has now stepped in to help the community.⁴ Sec. 377 of the IPC, which was later repealed, had legally repressed sexual minorities in India. This system of legislation was based on English law.⁵ Legal same-sex marriages have not yet been achieved in India, despite ongoing efforts to recognize and sanction such unions. The essential social rights of “LGBTQ+” people and the acknowledgment and defense of LGBTQ+ associations make this a crucial topic.⁶

In 2018, the SC hit down Sec. 377 of the IPC, which made “homosexuality” a crime. This was a major victory for “LGBTQ+” rights in India.⁷ The group now has a legal basis thanks to the Supreme Court’s ruling, which was a huge step in the direction of regularizing the concept of “sexual minorities” in India.⁸ Because of their oppression, members of sexual minorities have been compelled to remain anonymous.⁹ Among other things, same-sex pair do not have the marriage right, have children, or be adopted or maintained. Legally, a marriage in India must be between a male and a

³ “Same Sex Marriages in India: A complete overview.” Times of India Blog.

⁴ Kachwaha M. “The Judiciary in India: Determinants of its Independence and Impartiality, PIOOM; 1998.”

⁵ Members of the LGBTQ community were subject to the provision that classified unnatural offenses, which led to an atmosphere of persecution, violence, and fear perpetrated by both society and the authorities.

⁶ Nayak S., “Sathpathy SP. Determinants Affecting Social and Legal Status: A Study on Same-Sex Marriage in Indian Context.” YMER 2024; 23–23(02):543–543.

⁷ Navtej Singh Johar v. Union Of India AIR 2018 SC(CRI) 1169.

⁸ Khan SR. “Same-sex relationships and marriage in India: the path forward,” 2021.

⁹ Human Rights Violations against Sexual Minorities in India, 2001.

female; same-sex marriages are not recognised.¹⁰ By a vote of 3 to 2, the five-judge panel handed down its decision on the LGBTQ+ marriage equality petitions, and the ruling implied that same-sex marriage for homosexual couples will continue to be an ideal, if not a myth. Millions of LGBTQ+ persons in India have had their hopes dashed for marriage equality dashed as the country's highest court decided against legalizing same-sex nuptials.¹¹ Instead, the court agreed to the government's request that a panel investigate the possibility of expanding protections for same-sex couples under the law.¹²

The idea of allowing same-sex couples to enjoy the same *"benefits that married people enjoy"* was supported by two judges, including Chief Justice DY Chandrachud, who was in favour of civil unions.¹³ The chief judge also issued a lengthy rebuke to the government, urging them to remove prejudice and safeguard the *"queer community"* against attacks.¹⁴ A child could be adopted by *"queer and unmarried couples"* according to Justice Chandrachud. Activists and same-sex couples expressed disappointment with the ruling but vowed to keep fighting for equality.¹⁵

It has been exceedingly difficult for the community to take this next step toward a normal living due to the government's persistent opposition. The Bench reached a majority decision, ruling that the right to marriage is not a basic one and that the Court cannot acknowledge the right to marry of LGBTQ+ persons under the SMA.¹⁶ Protesters and same-sex couples are *"disappointed"* by the verdict. We had high hopes going into today's judicial hearing, but I was devastated when the judges read out their orders. *"My dreams were shattered,"* said **Sharif Rangnekar**, an advocate for LGBT rights.

The decision to put everything in the hands of a government committee without a schedule for when it will be established or when it will grant us rights puts us in a

¹⁰ Supriyo and "the Fundamental Right to Marry - Centre for Law & Policy Research". Centre for Law & Policy Research.

¹¹ Ibid.

¹² Pandey BG. *"India Supreme Court declines to legalise same-sex marriage."*

¹³ Ibid

¹⁴ *"India Supreme Court declines to legalise same-sex marriage"*

¹⁵ Ibid

¹⁶ *"Plea for Marriage Equality: Judgement Summary"*. Supreme Court Observer.

state of bureaucratic ambiguity. *"It is quite concerning."* **Pia Chanda** said to the BBC that the *"Supreme Court is playing passing the parcel"* after being in a same-sex partnership for 34 years.¹⁷ *"This judgement is a predictable farce and will keep the discrimination in place,"* according to her.¹⁸ Additionally, many have praised the decision. Reporters were informed by Apex Court Bar Association president **Adish Aggarwala** that he was pleased that the bench had agreed with the administration's position that it lacked the authority to decriminalize same-sex union.¹⁹

We believe that this ban goes against the principles of promoting *"equality between sexual orientations"* and reducing prejudice in society, as it limits the types of romantic and intimate relationships that people are likely to have with others based on their sexual orientation.²⁰ Traditional values, morality, shattered family structures, etc. are some of the arguments advanced by those who are against same-sex marriage.²¹ There is no need to abolish traditional cultural practices. Different cultures do, in fact, bring something special to the table that helps keep humanity's core values alive.²²

Cultural traditions are not the issue here; what is damaging is the practice of adhering to rules that make it impossible for people to live a dignified life and to pursue their own health and happiness.²³ Seventeen percent of American respondents to a 2022 study said they thought gay and lesbian relationships were morally acceptable. Proponents of equal marriage argue that it is a fundamental human right, while opponents argue that it is unnatural and morally wrong.²⁴ The practice of same-sex marriage has been around since the early Roman Empire, although this fact remains unknown to many.²⁵ Also, many people don't realize that other cultures, including

¹⁷ Pandey BG. *"India Supreme Court declines to legalise same-sex marriage."*

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ *"Understanding sexual orientation and homosexuality."* <https://www.apa.org> Accessed on July, 15, 2024.

²¹ Ibid.

²² *Infra note 21*

²³ Kühn B. *"Universal Human Rights vs. Traditional Rights"*, 2009, p. Article 57.

²⁴ *Moral stance towards gay or lesbian relations in the United States 2022.* Statista.

²⁵ Akpan CO. *"The Morality of Same Sex Marriage: How Not to Globalize a Cultural Anomie. Journal of Health Ethics"* 2017; 13(1). Doi: 10.18785/ojhe.1301.02.

those in Sub-Saharan Africa, tolerate and even celebrate same-sex marriage, because they think it's only a Western phenomenon.²⁶

The time has come for our society's views on sexuality to center on what really matters: the "quality of love," rather than the organic purpose of affection or the gender of the "lovers".²⁷ Getting married is something that gay lovers want for the same reasons that anyone else wants it: it's a chance to commit to another human being, build a life together, and take advantage of the security, benefits, and reinforcement that society offers.²⁸ As well as a chance to become more profound and experience immortality via love, transcendence, and sexuality.

One possible explanation for the continued denial of same-sex marriage is the significance it has for LGBT people as a symbol of their inherent value.²⁹ When two people tie the knot, they are making a public declaration about who they are and what they value in society: the desire to "be master of the identity one creates in the world."³⁰ "The freedom to have impact on other- to make the 'statement' implicit in a public identity...central to any adequate conception of the self" is what the right to privacy should safeguard, as Tribe points out.³¹

Refusing same-sex marriage prevents individuals from loving themselves and reinforces negative attitudes and beliefs towards the gay community.³² When it comes to building connections and loving, can gay people, like the rest of society, lose faith? When a community rejects its own members, as is the case with LGBT people, the resulting estrangement frequently takes on a political hue.³³ Homosexuals frequently face stigma and isolation because they lack a safe place to call home, which is probably

²⁶ Ibid.

²⁷ Boswell, supra note 7, p.135. *Zeno, the father of Stoicism, said, "You make distinctions about love objects? Do not make invidious comparisons between gay and nangay, male and female." Not at all on page 130 of the same source.*

²⁸ Evan Wolfson's 1983 "Thesis on the Freedom to Marry Freedom to Marry." FTM.

²⁹ "Why is same-sex marriage important?", n.d.

³⁰ Tribe, p.888.

³¹ Ibid.

³² Supra, pp. 49-50, 53-56. This is not coincidental; it is the result of a conscious societal decision to stigmatize gay love. Reference the previous section and JFL, p.621.

³³ M. Hoffman, "The Gay World" 77 (1968).

more important to them than to comply with societal norms.³⁴ Refusing to recognize homosexual marriage deals a global and, at times, catastrophic blow to individuals trying to make it in society, as it is not just a matter of withholding one last blessing.³⁵ Nothing about it is right or necessary.

The right to make, live, and love one's own happiness is a fundamental human right that the Constitution upholds.³⁶ Although we all come from diverse backgrounds and experiences, the Constitution of the United States guarantees that all individuals are equivalent before the law and under moral considerations. Love, the great leveler, does not enter our lives entirely voluntarily or intentionally, thus this equality is more important when it concerns love. Making sense of who we are is a decision we should and can make. Since sexual orientation is a personal choice, the **Puttaswamy** judgment rightly pointed out that equality requires equal protection for all people.³⁷ In order to accomplish this, awareness and education programs are essential.

The first misconception that needs rebutting is that it has nothing to do with biology and everything to do with free will. To debunk the numerous urban legends that abound, the community needs the right kind of programming.³⁸ Same-sex marriage is a basic human right and an ideal for loving homosexual men and women. It must be acknowledged by the Constitution and by actual morals. We may liberate ourselves and our conceptions of love to a greater extent by granting *LGBT* people the freedom that our constitutional morality demands.³⁹

Additionally, numerous professional organizations have demonstrated that being gay is just a normal expression of human sexual orientation and does not in and of itself prevent a person from having a fulfilling life, including having healthy intimate

³⁴ Supra note 21; "*Slovenko, IIS exual Deviation: Response to an Adaptational crISis*", When a homosexual couple breaks up, Slovenko says, "I offered you love and the best I could; all I got in return, in the end, was a kick in the teeth."

³⁵ See, e.g., A. Holleran "Dancer From the Dance" 11 (1978)

³⁶ "The Court, the Constitution, and the Culture of Freedom. Hoover Institution." Available from: <https://www.hoover.org/research/court-constitution-and-culture-freedom>.

³⁷ *Justice K.S.Puttaswamy(Retd) v. Union Of India*, AIR 2018 SC (SUPP) 1841, 2019 (1) SCC 1

³⁸ Menon, N., & Rege, N. (2012). "*Same-sex marriage in India: A feminist perspective*." *Journal of Indian Law Institute*, 54(4), 501-524.

³⁹ Some members of our culture are now considered gay. In the fight against sexualism tomorrow, maybe we will all finally be able to love without limits. "Eros, turned upside down, blackened, distorted, filthy, still bore the traces of his divinity is a statement that gay people in our society have been able to affirm despite the shame associated with sexual subjugation.

relationships with others of the same sex and raising children who are healthy and well-adjusted.⁴⁰

Section 4(c) and other SMA provisions entrench segregation and prohibition, which we contend are ultra-vires in the Constitution. We further contend that Articles 14, 15, 19, 21, and 25 provide the fundamental freedom to marry whoever one chooses. They are in violation of Articles 14, 15, 19, 21, and 25 if their right to marriage is denied to them.⁴¹ A fulfilling relationship with a person one chooses is part of the right to happiness, which is covered in Article 21. The freedom to marry one's chosen spouse is a fundamental human right.⁴² Queer people have the same right as everyone else to exercise this right.⁴³ Gender should not be considered while interpreting the SMA. "Wife" and "husband" are gender-denoting terms that should be understood as "spouse."⁴⁴ "Family" and "household" have broad legal meanings that extend beyond a "biological" couple and their progeny.⁴⁵ Couples who identify as LGBTQIA+ are denied equal legal protection and the chance to start a family because surrogacy and adoption are only available to married couples.⁴⁶ When LGBTQIA+ marriages are not legally recognized, not only do LGBTQIA+ persons experience prejudice, but they are also denied social welfare benefits and favorable laws.⁴⁷

Legislation detailing citizens' numerous rights and providing particular instructions for how each state should implement this law ought to be passed by the Indian government.⁴⁸ A person's right to be married is guaranteed by the "Indian Special Marriage Act of 1954." In most cases, the first thing that has to happen is for individuals to start having more open and honest conversations about gender and sexuality in their homes and communities. The success of the community depends on everyone's

⁴⁰ Ibid.

⁴¹ Infra.

⁴² Infra.

⁴³ "The Rights of Lesbian, Gay, Bisexual and Transgender People", American Civil Liberties Union, American Civil Liberties Union.

⁴⁴ *Supriyo @ Supriya Chakraborty & Anr. v. Union of India* Writ Petition (Civil) No. 1011 of 2022

⁴⁵ Ibid.

⁴⁶ Supra Note 41.

⁴⁷ Ibid.

⁴⁸ "Ambedkar Br. Fundamental Rights, Directive Principles and Fundamental Duties," 1949.

active participation in daily life. Respect for and protection of one's personal space is essential.⁴⁹

In addition, we disagree with the argument against same-sex marriage; our views center on human rights, equality, and the importance of love and commitment. Recognizing same-sex marriage establishes equality before the law, which in turn prevents discrimination grounded on "sexual orientation" and grants "same-sex couples" the same rights and advantages, including the ability to make decisions about their health care and inherit property, as opposite-sex couples.⁵⁰

Because it is fundamentally unfair to discriminate against people because of their sexual orientation, it is morally compatible with principles of love, commitment, and human dignity. No matter the gender involved, love and devotion are common human experiences that deserve our celebration and support.⁵¹ We can build a more accepting, caring, and peaceful society by recognizing same-sex marriage as a legitimate marriage between consenting adults.

IV. HISTORICAL CONTEXT

Homosexuality and same-sex marriage have a long and complex history that spans many cultures and time periods.⁵² The ideology, beliefs, practices, and traditions of an individual, group, or nation are all influenced by their religious affiliation. Religious and cultural variety abounds on this planet.⁵³ Every major religion in the world condemns homosexuality, which contributes to the widespread perception that homosexuality is not a normal behavior.⁵⁴ Hinduism, the biggest religion in India, does not have any direct references to homosexuality in its sacred scriptures. There are no explicit prohibitions or instructions regarding homosexuality in our *Dharamshastras and Dharamsutras*.⁵⁵

⁴⁹ Same-sex Marriage under the Special Marriage Act, 1954,

⁵⁰ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁵¹ Team E., Team E. Legalising Same-Sex Marriage - UPSC Social Justice Notes. Blog -. Available from: <https://edukemy.com/blog/legalising-same-sex-marriage-upsc-social-justice-notes/>. Accessed on July, 17, 2024.

⁵² Section 3: *Religious Belief and Views of Homosexuality*. Pew Research Center.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ "Stances of Faiths on LGBTQ+ Issues: Hinduism. Human Rights Campaign."

However, the Vedas have provided some really strange interpretations of certain topics. Some scholars argue that the Rig-Veda, one of Hinduism's four sacred books, acknowledges the recurring constancy of "homosexual" and "transsexual" components of human life, as well as all procedures of widespread diversity, by saying "*Vikruti Evam Prakriti*".⁵⁶ It is worth noting that a common representation of the Hindu god Shiva is *Ardhanarishvara*, who possesses both masculine and female qualities.⁵⁷ Artifacts unearthed in the *Elephanta Caves*, not far from Mumbai, provide as proof.⁵⁸

In many kingdoms⁵⁹ there is a reflection of the concept of gender fluidity in Hindu art, architecture, and the Vedic era.⁶⁰ Among the most famous examples is the scene in Lanka where *Hanuman* witnesses two *rakshasa* ladies kissing, as described in *Valmiki's Ramayana*.⁶¹ "King *Bhagirathi's* birth, the *Ellora caves* in Maharashtra, the *Sun Temple* in Kornak, and the famous treatise, *Kama Sutra*, written by *Vatsyayana*, which encompasses eroticism, sexuality, and the emotional fulfilment of life."⁶²

Homosexual and transgender Hindus frequently recognize with and adoration the various "Hindu deities" associated with gender variety for example "*Ardhanarishvara* (the hermaphrodite form of Shiva); *Aravan* (a hero whom Krishna married after becoming a woman); *Ayyappa* (a god born from the union of Shiva and Mohini, a female incarnation of Vishnu); *Kartikeya*; *Vallabhavardhana*, *Yellamma-devi* and countless others."⁶³

The ancient tolerance of the Khajuraho people is exemplified by their temples.⁶⁴ "*The Chandela dynasty constructed these sacred buildings between the years 950 and 1050 AD.*"

⁵⁶ Where or Which Vedic Text's says "Vikruti Evam Prakriti"? Hinduism Stack Exchange. Available from: <https://hinduism.stackexchange.com/questions/29088/where-or-which-vedic-texts-says-vikruti-evam-prakriti#:~:text=Rigveda%2C%20one%20of%20the%20four,all%20forms%20of%20universal%20diversities>. Accessed on July, 17, 2024

⁵⁷ Ghose I. "*Ardhanarishvara: Meaning, Symbolism and Interpretations.*" I Share. Available from: <https://isharethese.com/ardhanarishwara-meaning-statues-concept-story-photos/>. Accessed on July, 17, 2024

⁵⁸ Shukla A. *Difficulties and Changes in the Situation Relating To the Same Kind Of Sexual Relationships in India*, vol. 2, 2023.

⁵⁹ Ibid.

⁶⁰ Ray S, "*Indian Culture Does Recognise Homosexuality, Let Us Count the Ways*".

⁶¹ Desk ITW, "Homosexuality in Ancient India: 10 Instances".

⁶² In the context of oral sex, the chapter named "*Auparishtaka*" makes reference to gay men. The homosexual men, called '*mukhebhaga*' or '*asekya*,' took on a submissive role.

⁶³ Ibid.

⁶⁴ Pandey BV, "*Why Legalising Gay Sex in India Is Not a Western Idea*".

The sculptures in the temples depict associations between people of the same sex.⁶⁵ You can see comparable artwork at “Kornak’s Sun temple.”⁶⁶ Similarly, paintings of same-sex intercourse may be discovered in the “Ellora caves,” which portray the life of **Gautam Budha**, the originator of Buddhism.⁶⁷ They boldly displayed themselves in such a revered and public site as a temple, which is indicative of a liberal culture that did not judge them.⁶⁸

For example, according to the ‘*Arthashastra*,’ the penalty for sexual actions between men is the same as the penalty for low-value robberies; a woman is fined more if she forces sex on a woman who is unwilling.⁶⁹ Like men who have intercourse with non-human females, menstrual women, etc., the manusmriti mandates a small penance for men who have sex with men.⁷⁰ Intercourse between two non-virgin women is subject to a small fee, while “*deflowering*” a virgin girl is severely punished.⁷¹ There seems to have been no distinct codification of juridical consequences for non-heterosexual activities or persons; instead, penances were likely caste based.⁷²

As far as Islamic texts concerning same-sex attraction go, “*Baburnama stands head and shoulders above the others.*”⁷³ Notable writers who have displayed such references include Sufi poets like *Bulleh Shah, Sarmand Kashani, and others.*”⁷⁴ According to Muslims, God’s will is revealed in the holy book Qur’an in an unmodified and definitive form.⁷⁵ Many factors, including the cultural and legal history of Muslim-majority nations and the general public’s interpretation of particular verses in “*the Qur’an*” and claims made by the “*prophet Mohammed*,” shape public discourse on LGBT issues and Islam.⁷⁶ The inhabitants of Lut were damned by Allah for their exceptionally obscene conduct-

⁶⁵ Ibid.

⁶⁶ Nair SS, “*Life 360*” (November 28, 2019).

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Reejonia M. Homosexuality A Reality, vol. 7-5, 2019, p. 161-3.

⁷⁰ Manusmriti Verse 11.176.

⁷¹ “*Virginity testing: a human rights violation, with no scientific basis*”- UN. UN News.

⁷² Unit 10 Indian - Penal Code “*Liability Creating Laws*”, n.d., p. 1-7.

⁷³ Ibid note 6.

⁷⁴ Ibid.

⁷⁵ The Qur'an and the Hadith.

⁷⁶ Wulandari RS, Anjani EW., Rieftiani RA. “*The Role and Perspective of Islamic Organizations on The LGBT Movement in Indonesia.*” *Dauliyah Journal of Islamic and International Affairs* 2023; 8(2):173-85. Doi: 10.21111/dauliyah.v8i2.10525.

preferring males over females—as told in the Qur’an. Even though his people threaten to eject him due to his innocence, Lut chastises them for their sins. Their persistence, in spite of Lut’s warnings, leads to their doom at the hands of a brimstone shower. Spared are Lut and his relatives, with the exception of his wife. As a warning, the story gives rise to the terms “Liwat” (homosexual activity) and “luti” (those who engage in it). In 4:15–16, the author discusses the legal position of homosexuality in the Qur’an.⁷⁷

As the British Empire expanded into India, Western values, especially those influenced by the Church, began to permeate Indian society and the law.⁷⁸ Lord Macaulay’s criminalization of homosexuality in the Indian Penal Code cemented Western moral standards in Indian culture.⁷⁹ Section 377’s criminality continued in habitation even after India gained its independence, despite the 1967 removal of comparable legislation in Britain.⁸⁰ The Indian legal system still functions under the assumption that marriage is between people of the opposite sex.⁸¹

There is blatant heterosexism in India’s personal laws, even if none of them define marriage specifically. “Any two Hindus, provided certain conditions are met,” reads the Hindu Marriage Act of 1955.⁸² Bigamy, insanity, marriage between individuals under the age of 21 and 18 respectively, and specific types of biological relationships between the couple are all prohibited unless accepted by local traditions.⁸³ It is unclear which of the two “Hindus” is the male.⁸⁴ The third prerequisite, however, is age, and it includes the assumption of gender. Biologically speaking, most people think a bride is a girl and a groom is a boy.⁸⁵ Rather of seeing homosexuality as a normal expression of desire, Indian attitudes on sexuality have become more pathological as a result of

⁷⁷ Ibid

⁷⁸ The Cultural, Economical, and Social Effects of British Dominion on India (1757-2018). Ancient India and the Rest of the Globe, n.d., p. 104–8.

⁷⁹ *Naz Foundation v. Government of NCT of Delhi And Others* 2010 CRI. L. J. 94, 2009 (6) SCC 712

⁸⁰ Ibid.

⁸¹ Khanna G., Law L. Live Law. Live Law 2023.

⁸²

[https://wbregistration.gov.in/\(S\(bpaneoslgf2xofzc4tpv0pdr\)\)/writereaddata/THE_MARRIAGE_ACTS_AND_RULES.pdf](https://wbregistration.gov.in/(S(bpaneoslgf2xofzc4tpv0pdr))/writereaddata/THE_MARRIAGE_ACTS_AND_RULES.pdf) Accessed on July, 20, 2024

⁸³ Vanita R. “Happily non-married. Hindustan Times 2011.” <https://www.hindustantimes.com/india/happily-non-married/story-q70D8I8Ysva8wUedk836N.html> Accessed on July, 20, 2024

⁸⁴ Ibid.

⁸⁵ Ibid.

Western views on the subject.⁸⁶ South Africa, Australia, and Germany were among the numerous countries that came to recognize LGBTQ+ rights as global opinions shifted.⁸⁷ There are several international issues that we did not account for in our analysis of the current worldwide politics of decriminalization of gay conduct.⁸⁸

The decriminalization of homosexuality has been greatly advanced by numerous UN-related initiatives, as well as by numerous worldwide NGOs and advocacy networks.⁸⁹ An organization that has been working to combat the worldwide criminalization of homosexuality since its 2011 inception is the Human Dignity Trust, based in the United Kingdom.⁹⁰

At long last, the highest court in India decriminalized homosexuality in 2018. *Navtej Singh v. Union of India*⁹¹, culminating a protracted fight for parity.⁹² But, in case of *Supriya Chakraborty & Anr. v. Union of India*⁹³, No unequivocal basic right to marry existed under the Constitution, according to the majority ruling of the SC of India (“Court”). Sec. 4 of both the SMA and the FMA, which restricts marriage recognition to heterosexual couples, was similarly upheld by the Court as being constitutional. But there has never been a greater need to decriminalize same-sex marriage.⁹⁴

V. A GLIMPSE AT MARRIAGE EQUALITY’S CONSTITUTIONAL ROOTS

As an integral part of India’s rich cultural heritage, marriage is a social institution with great symbolic and practical importance.⁹⁵ A person’s “right to marry” is an essential part of their independence and freedom, not just a legal privilege.⁹⁶ Understanding

⁸⁶ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3146184/> Accessed on July, 20, 2024

⁸⁷ Greenwood S., Greenwood S. “The Global Divide on Homosexuality Persists.” Pew Research Center.

⁸⁸ Han E., O’Mahoney J. “British colonialism and the criminalization of homosexuality.” Cambridge Review of International. Doi: 10.1080/09557571.2013.867298.

⁸⁹ Ibid.

⁹⁰ Human Dignity Trust. Fat Beehive. Available from: <https://www.fatbeehive.com/case-study/human-dignity-trust/>. Accessed on July, 20, 2024

⁹¹ AIR 2018 SC 4321, AIR 2018 SC(CRI) 1169

⁹² Ibid.

⁹³ 2023 INSC 920.

⁹⁴ Ibid

⁹⁵ Jain, Dr. Gunjan. (2017). How Marriage Is Depicted in Indian English Literature.

⁹⁶ Kumar A., “An Argument in Favor of Making Marriage a Basic Human Right.” TSCLD. Available from: <https://www.tsclid.com/recognising-right-to-marry-fundamental-right->

the freedom to marry in India necessitates a detailed investigation of its cultural, social, and legal aspects, all set against the background of the country's diverse history and traditions.⁹⁷ The complexity of the right to marry can be better understood by first gaining an appreciation for its historical and cultural background.⁹⁸ In the sphere of personal freedoms and rights, the "right to marry" is legally safeguarded by constitutional principles, highlighting its significance.⁹⁹ A crucial part of the discussion around marriage equality in India is around Art. 21, which ensures the right to life and personal liberty.¹⁰⁰

Furthermore, in recent judgment of *Supriya Chakravorthy v. Union of India*,¹⁰¹ on this matter, the five-judge bench of the highest court in the land reached a divided decision. The right of gay couples to be married was rejected in the 3:2 judgment. Both **Justice S.K. Kaul** and **Justice DY Chandrachun** sided with the LGBT couples.¹⁰² The opinion that was given by the majority was that of **Justices Bhat, Narasimha, and Hima Kohli**.¹⁰³ As an essential component of choice, **Justice Bhat**, who was leading the majority judgment, said that all LGBTQ people have the living freedom together, cohabitate, and have relationships with whoever they choose.¹⁰⁴ Article 21 has previously acknowledged this.

A "new universe of rights and obligations" and a whole new legal system would be necessary for "ordering a social institution."¹⁰⁵ Justice Bhat pointed out that this would require an independent system for civil union registration, which would detail the requirements for "a lawful union, eligibility, age, limitations, divorce, alimony, and a host"

[india#:~:text=The%20right%20to%20marry%20is,personal%20choices%20and%20societal%20expectations.](#) Accessed on July, 20, 2024

⁹⁷ Right to Marry, vol. 4, 2023, p. 1821-8.

⁹⁸ Ibid.

⁹⁹ Kumar A. "Right To Marry: A Fundamental Right. TSCLD." Available from: <https://www.tscl.com/right-to-marry-fundamental-right-india#:~:text=Article%2021%20of%20the%20constitution%20guarantees%20its%20citizens%20the%20right,of%20choice%20in%20marriage%2C%22>. Accessed on July, 20, 2024

¹⁰⁰ Ibid.

¹⁰¹ 2023 INSC 920.

¹⁰² <https://www.dhyeyalaw.in/supriya-chakravorthy-anr-v-union-of-india> Accessed on July, 20, 2024

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

of other rights that are supplementary to marriage. This “*bouquet of entitlements*” is not something the state has to acknowledge.¹⁰⁶

The legislative framework that regulates marital rights is supplemented by *Article 14*, which guarantees equality before the law.¹⁰⁷ Over the past few years, the Supreme Court has developed a lexicon around concepts like individual liberty, privacy, and constitutional ethics.¹⁰⁸ The culmination of this is the acknowledgment of several rights, including “*right to privacy*” and “*right to choose*” one’s life partner.¹⁰⁹ However, in *Navtej Singh Johar v. Union of India*¹¹⁰, with a decision that upheld the decriminalization of same-sex encounters, the Apex Court provided a wide framework of the right to intimate interactions.¹¹¹ The essay contends that all the necessary legal conditions have been met to acknowledge same-sex marriage on par with traditional opposite-sex marriage, and that this recognition should be the next logical step toward marital equality.¹¹² *Articles 14 and 15* prohibit discrimination based on gender, and the article contends that the constraint of wedding to “*one man, one woman*” is both arbitrary and sexist.¹¹³

Additionally, the article acknowledges that in order to refute claims that same-sex marriage violates the purported sanctity of traditional opposite-sex marriage, one could point to the ever-changing notion of constitutional decency, which supersedes communal or prevalent ethics in order to understand community ethics as a limitation on basic rights.¹¹⁴ It goes on to say that “*one man, one woman*” is a violation of several rights, including the freedom of speech (*which includes the right to express one’s sexual*

¹⁰⁶ Ibid.

¹⁰⁷ <https://indiankanoon.org/doc/367586/#:~:text=14,-Equality%20before%20law,place%20of%20birth%20or%20sex>. Accessed on July, 20, 2024

¹⁰⁸ Bhogle S. “*The Momentum of History – Realising Marriage Equality in India*” – NUJS Law Review. NUJS Law Review.

¹⁰⁹ Sam Vidhiforum. “*The Fundamental Right to Choose a Partner: Hindrances And The Special Marriage Act*”. SamVidhi. Available from: <https://www.samvidhi.org/post/the-fundamental-right-to-choose-a-partner-hindrances-and-the-special-marriage-act>.

¹¹⁰ AIR 2018 SC 4321.

¹¹¹ Ibid note at p. 106.

¹¹² Ibid.

¹¹³ *Obergefell v. Hodge*, 772 F. 3d 388

¹¹⁴ Manupatra. Articles – Manupatra.

orientation and self-identified gender), privacy, self-sufficiency, and lifetime with self-respect (Art. 21).¹¹⁵

Furthermore, the paper contends that personal laws are neither religious in nature nor origin, even though they are religion-dependent.¹¹⁶ Applying the much-deprecated “essential religious practices” standard to the question of marriage equality would constitute a violation of religious freedom.¹¹⁷ Finally, the paper contends that same-sex marriage can be legalized by interpreting the “Hindu Marriage Act” and the “Special Marriage Act” as written.¹¹⁸ Although marriage is governed by multiple statutes, it is only through rulings of India’s highest court¹¹⁹ that it has been acknowledged as a basic right.¹²⁰ All courts in India are obligated to follow such a proclamation of law as specified in Art. 141 of the Constitution.¹²¹

A case that addressed this topic in its early stages was *Lata Singh v. State of UP*¹²², the marriage between members of different castes that took place in 2006.¹²³ The petitioner was a major, thus the Supreme Court ruled that she could marry anybody she pleased, regardless of caste, because no law forbade such a union.¹²⁴ Although the Court did not make a general “declaration of law,” its ruling was case-specific.¹²⁵

¹¹⁵ “Supreme Court Cases on the rights of LGBTQIA+ Persons - Supreme Court Observer.” Supreme Court Observer.

¹¹⁶ *Saumya Ann Thomas v. The Union of India, Represented by the Secretary, Department of Law & Justice & Another*, 2010 2 DMC 526.

¹¹⁷ *Amna Bint Basheer & Ors. v. Central Board Of Secondary Education (Cbse), Shiksha Sadan & Ors.*, 2016 0 AIR (Ker) 115; *Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors*, 2018 4 ILR (Ker) 285; 2018 10 JT 19; 2018 4 KHC (SN) 17; *Jamshed Noshir Sukhadwalla & Ors. v. Union of India & Ors.* 2018 0 Supreme(Bom) 1922

¹¹⁸ *Ibid.*

¹¹⁹ Dormaan J Dalal. “The fundamental right to marry in India and its application to same-sex marriage.” Bar and Bench - Indian Legal News.

¹²⁰ *Ibid.*

¹²¹ Rajagopal K. “Under Constitution, law declared by the Supreme Court is binding on all.” The Hindu.

¹²² 2006 AIR SCW 3499, 2006 (5) SCC 475, 2006 CRI. L. J. 3309, 2006 (5) ALL LJ 357, 2006 (5) AIR BOM R 237, 2006 (3) AIR JHAR R 613, 2006 (5) AIR KANT HCR 228

¹²³ *Ibid.*

¹²⁴ Law Foyer. The Chances of Indian Courts Recognising Same-sex Marriages. LawFoyer, a Daily Doze for Inquisitors. Available from: <https://lawfoyer.in/the-chances-of-indian-courts-recognising-same-sex-marriages/>. Accessed on July, 22, 2024

¹²⁵ Dormaan J Dalal., Dormaan J Dalal. The fundamental right to marry in India and its application to same-sex marriage. Bar And Bench - Indian Legal News.

However, the petitioner's right to choose her partner was explicitly acknowledged by the Court.¹²⁶

Contrary to popular belief, *Article 15* does not specifically prohibit discrimination based on sexual orientation.¹²⁷ The provision of both a constitutional concept and ideas for its application in particular cases is, nevertheless, a characteristic shared by most constitutions.¹²⁸ So, *Article 14* lays forth the general "*right to equality and freedom from discrimination*," *Art. 15* stresses the need of non-discrimination based on 5 distinct grounds, and *Art. 17* outlaws untouchability as a specific type of discrimination.¹²⁹ Accordingly, the prohibition of discrimination outlined in *Article 14* extends outside the grounds specified in *Art. 15*.

At last in, *National Legal Services Authority of India v. Union of India* ('NALSA')¹³⁰ involved treating a person's sexual orientation in the same way as their gender when applying the law (*Article 14*).¹³¹ According to the Supreme Court's interpretation of *Article 14*, the term "*person*" encompasses individuals of any gender.¹³² The court also ruled that "*gender identity*" is considered part of "*sex*" for the purposes of *Article 15* discrimination protections, and that neither gender is static but rather exists on a continuum.¹³³ *Articles 14 and 15* of the Constitution, among other measures, define sex discrimination as comprise bias founded on a person's sexual orientation or gender identity.¹³⁴

But the rationale of the Supreme Court is flawed. Prior to *Navtej Johar*, NALSA was agreed upon after *Koushal*. Thus, the Court chose not to address sec. 377 of the IPC.¹³⁵

¹²⁶ Ibid

¹²⁷ Asthana S. *Article 15 of the Indian Constitution*. iPleaders. Available from: <https://blog.ipleaders.in/article-15/>. Accessed on July, 22, 2024

¹²⁸ Gautam Bhatia, *supra* note 42, 65.

¹²⁹ Ibid.

¹³⁰ *National Legal Services Authority of India v. Union of India*, (2014) 5 SCC 438.

¹³¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, paragraph11 (per Misra, C.J.).

¹³² *John Vallamattom v. Union of India*, (2003) 6 SCC 611, paragraphparagraph33, 36.

¹³³ *Id.*, paragraphparagraph21-21, 81 "(per Radhakrishnan, J.)". But see *id.*, paragraph113 (per Sikri, J.) (agreeing with Radhakrishnan J., but limiting his own findings to individuals who identify as a non-binary gender, rather than stating that everyone does not identify with their biological gender). *Navtej Johar* replaced *Koushal* and did not restore the *Naz Foundation* judgment, which explicitly recognized sexual orientation as sex discrimination.

¹³⁴ *National Legal Services Authority of India v. Union of India*, (2014) 5 SCC 438,

¹³⁵ Ibid

It took into account bias based on “sexual orientation,” which is a person’s “persistent physical, romantic, and/or emotional attraction to another...”¹³⁶ as a distinct matter.¹³⁷ All humans would be considered “persons” for the purposes of *Article 14*, according to the Supreme Court.¹³⁸ Unfortunately, this occurred within the framework of violence and discrimination against transgender people in public areas, as stated in *Article 15(2)*, mainly because transgender people openly do not comply with traditional gender roles and display their gender identification in a way that is stereotypical.¹³⁹ It should be emphasized that sexual orientation and gender identity are distinct ideas.¹⁴⁰

Without citing any authority, the Court sought to conflate the both, characterizing sexual orientation as “self-defined” and saying that it “may or may not change” once a person transitions between genders. The Court’s citation of affidavits that supported the petition shed light on the facts that were known to it as this was a straight Supreme Court case without a particular cause of action. The three accounts that were cited did not¹⁴¹ address the issue of sexual orientation and any prejudice based on it. The Court’s concern with the transgender community was also described in this way,¹⁴² has nothing to do with non-heterosexual inclinations.

Simultaneously, the Court was aware of instances of discrimination based on sexual orientation, for instance, under *sec. 377*.¹⁴³ So, even though NALSA says that *Article 14* does cover all sexual orientations, it doesn’t explain why transgender people should be able to have their cases heard in court involving gender identity discrimination rather than sexual orientation discrimination. The Yogyakarta Principles have been comprehensively included into the Indian Constitution’s fundamental rights matrix by NALSA.¹⁴⁴

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ *Sreeja S. v. Commissioner of Police*, 2018 SCCOnline Ker 3578

¹⁴² Id. (per Radhakrishnan, J.); Id., paragraph 113-115 (per Sikri, J.).

¹⁴³ Id.

¹⁴⁴ Id.

Similar to how the Agreement on the Abolition of All Approaches of prejudice against female was included in *Vishaka v. State of Rajasthan* ('*Vishaka*')¹⁴⁵ delivers strong backing for the "constitutional protection" of individuals who do not identify as heterosexual. However, the Court has repeatedly used its provisions against discrimination based on sexual orientation to justify its position.¹⁴⁶

The Court's assertion that sexual orientation and sex are intertwined is, however, not without merit. For example, a gay man's attraction to males is what makes him gay, and the fact that he is a man is what makes him unmarried.¹⁴⁷ The assumption that men will marry women and women will marry men is fundamental to the heteronormative institution of marriage.¹⁴⁸ As a result, it divides males into 2 groups, those "who desire to marry women" and "those who desire to marry men", and it decrees that the former group is allowed to marry while the latter group is forbidden.¹⁴⁹

Similarly, it specifies that wives of men can wed, but men of women cannot.¹⁵⁰ Marriage in India has traditionally followed heteronormative norms, regardless of the legislation in place (more on this below). This categorization can be challenged on three fronts: first, that it violates *Article 15's* prohibition on sex discrimination; second, that it is arbitrary and/or class legislation that violates *Article 14*; and third, that it violates the *Yogyakarta Principles* that are a part of the Constitution.¹⁵¹

We must thoroughly examine any legislation that discriminates against women.¹⁵² So, according to NALSA, discrimination based on sexual orientation must also be

¹⁴⁵ (1997) 6 SCC 241.

¹⁴⁶ "Constitutional Equal Rights Across Sexual Orientation and Gender Identity", UCLA World. UCLA World. Available from: <https://www.worldpolicycenter.org/constitutional-equal-rights-across-sexual-orientation-and-gender-identity>. Accessed on July, 22, 2024

¹⁴⁷ Andrew Koppelman, "Why Discrimination Against Gay Men and Lesbians is Sex Discrimination," 69(2) NYU L. REV. 197 (1994).

¹⁴⁸ *Ibid.*

¹⁴⁹ For the purpose of clarity, we will use the terms "men" and "women" interchangeably. As with gender identity, which may be defined in a variety of ways beyond just "identifies as a man" or "identifies as a woman," sexual orientation can also be defined on a continuum and does not neatly fit into either of these binary categories.

¹⁵⁰ *Ibid.*

¹⁵¹ O'Flaherty M. *The Yogyakarta Principles*, 2007.

¹⁵² *Joseph Shine v. Union of India* 2018 3 ACR 2955 ; 2018 4 AICLR 894 ; 2019 1 AIR(Bom)(R)(Cri) 99 ; 2018 0 AIR(SC) 4898

thoroughly investigated. In order for discrimination to be legal, the government would need to prove that it is necessary to promote a compelling administrative interest and that the law has been carefully crafted to be the least restrictive way to achieve this goal.¹⁵³

Limiting marriage to “*one man, one woman*” is truly not controversial. The idea that the state may legitimate sexuality for reasons other than procreation inside marriage borders is considered illogical and out of date.¹⁵⁴ Marriages between people who are unable to procreate due to old age, illness, injury, or impotence would be null and invalid (*rather than just voidable under certain conditions*) if the goal of marriage law was to prohibit unions that could not produce offspring. Also, after *Navtej Johar*, it would be unfair to call one natural and the other unnatural.¹⁵⁵ Public morality is overshadowed by constitutional morality and positive rights like privacy, autonomy, and free speech; so, it cannot be argued that “*discrimination*” is based on ethics or the “*preservation of traditional ideas*” of marriage.¹⁵⁶

In *Navtej Johar*, **Chandrachud, J.** ruled that discrimination that conceals or erases, and erects intentional and systemic obstacles to, the visibility of relationships that challenge the heteronormative gender binary undermines real gender equality.¹⁵⁷ Even in the most sacred of marriages, this would be applicable— as it is with **Navtej Johar** and other unmarried couples.¹⁵⁸

Similarly, for classification to be valid under *Article 14*, two things must be satisfied. Firstly, the organization must be grounded on an “*intelligible differentia*” that separates the grouped things or persons from the ungrouped ones. Secondly, the differentia must have a rational connection to the goal of the statute in question.¹⁵⁹ Restricting marriage to ‘*one man, one woman*’ does not seek to attain any constitutionally justifiable

¹⁵³ *Subhash Chandra v. Delhi Subordinate Services Selection Board*. (2009) 15 SCC 458, paragraph 88.

¹⁵⁴ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, paragraph 478 (per Chandrachud, J.).

¹⁵⁵ *Ibid.*

¹⁵⁶ See *Infra*.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid* note 106.

¹⁵⁹ *Dipak Sibal v. Punjab University*, (1989) 2 SCC 145, paragraph 9; *supra* note 152 paragraph 408 (per Chandrachud, J.), paragraph 637.2 (per Malhotra, J.).

aim, as previously mentioned.¹⁶⁰ A couple's sexual orientation determines whether they are same-sex or opposite-sex. But what could this differentiation possibly be rationally related to, even if there was an aim to achieve?

The traditional view of "*marriage as a union between a man and a woman*" does not hold water in light of the non-discrimination principle as outlined in Art. 14 and 15.¹⁶¹ We have no idea if the legislative design was motivated by heteronormativity or by hatred of same-sex relationships.¹⁶² For these tests, it is irrelevant. There is indication to suggest the context of the Victorian ethics of natural and unnatural relations, which was based on Abrahamic religion and supported sec. 377.¹⁶³ According to the new criteria of manifest arbitrariness, "*one man, one woman*" would be null and void if the legislative purpose was arbitrary in and of itself.¹⁶⁴

The "*Yogyakarta Principles*" recognize same-sex unions as marriage or any other legal form of matrimony, but they do guarantee everyone the chance to live their lives to the fullest, regardless of their gender or sexual orientation.¹⁶⁵ An individual's right to privacy, especially that which pertains to his or her family and residence, the right to be free from legal and institutionalized discrimination based on one's gender identity,¹⁶⁶ and the freedom to start a family in all its varieties.¹⁶⁷ That is why partners of the same sex have the same legal entitlements to a marriage certificate and all that comes with it as partners of the opposite sex.¹⁶⁸

Newspaper accounts of the gang rape of a 20-year-old woman were taken *suo motu* by the Supreme Court in 2014, following the rulings of a village court, which was just

¹⁶⁰ Ibid note 156

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Thomas Macaulay, "Introductory Report to the proposed Draft Bill, 1837":

a repulsive category of crimes about which it is preferable to say as little as possible [...] we are hesitant to include anything in "the text or the notes that could spark public debate" on this repugnant topic; we firmly believe that the harm that would be done to community morals by such discussion would greatly outweigh any potential benefits from carefully crafted legislative measures.

¹⁶⁴ *Shayara Bano v. Union of India*, (2017) 9 SCC 1, paragraph101 (per Nariman, J.); *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, paragraph353 (per Nariman, J.)

¹⁶⁵ "*The Yogyakarta Principles*", Principle 1.

¹⁶⁶ Ibid, Principle 6.

¹⁶⁷ Ibid," Principle 24.

¹⁶⁸ Ibid note 156.

under ten years later. Because the woman was seeing a man from a different community, the village court or public panchayat ordered this so-called punishment.¹⁶⁹ The Supreme Court made it clear that the “right to choose” one’s own spouse is an essential part of Article 21. These violations occur when the state is unable or unwilling to shield its citizens’ rights.¹⁷⁰ The inherent “right to marry” someone of one’s own choice is encompassed within Art. 21.¹⁷¹

Nariman, J. in his discrete judgement in “**Puttaswamy**” raised Subba Rao, J.’s dissent in *Kharak Singh v. State of U.P. (‘Kharak Singh’)*¹⁷² in regard to Article 21, to one of the three major dissents. As *Subba Rao, J.* put it, “How could a movement under the scrutinizing gaze of the policeman be described as a free movement” while discussing the circumstances of a “history-sheeter” who is subject to continuous police observation. Everyone in the nation is incarcerated [...] Because of the constant vigilance that is focused on him, he is unable to express himself freely as he would like.¹⁷³

The government’s efforts to bury relationships are analogous to this. *J. Misra’s* decision in *Navtej Johar*, Although a person exercising his or her right to choose may feel the need for isolation, nobody – and we emphasize nobody – has the right to force that on that person.¹⁷⁴ In India, where wedding is characteristically the only socially tolerable form of intimate contact, a rule that forbids marrying one’s choice of partner leads people to live in secrecy, always worried about being discovered, or in loneliness.¹⁷⁵ Living like that is limiting. Such a life lacks respect. That is why the “one man, one woman” definition of marriage is a violation of Article 21’s right to a dignified existence.¹⁷⁶

¹⁶⁹ Ibid

¹⁷⁰ “*In Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News*” 2014 2 RCR(Cri) 379 ; 2014 4 RLW(Raj) 3056; 2014 4 Scale 237; 2014 4 SCC 786; 2014 2 SCC(Cri) 437; 2014 4 SCR 264.

¹⁷¹ Ibid.

¹⁷² AIR 1963 SC 1295.

¹⁷³ Id., paragraph 29 (per Subba Rao, J.) (dissenting).

¹⁷⁴ “*Law Preventing Marriage Equality in Society*”, ProBono India. Available from: <https://probono-india.in/blog-detail.php?id=189>.

¹⁷⁵ Ibid

¹⁷⁶ Jain R., Article 21 of the Constitution of India: Understanding Right to Life and Personal Liberty from Case Laws -. Academike.

A Bench consisting of 9 justices has deliberated the matter of choice at length in *Justice KS Puttaswamy (retd) and another v. Union of India and others*¹⁷⁷. As an essential component of “the right to life and personal liberty,” the right to privacy is safeguarded under *Article 21*, according to the unanimous Court ruling.¹⁷⁸ **Dr. DY Chandrachud J.** wrote the majority opinion and stated in *paragraph 81* that the privacy right would encompass

- (i) privacy pertaining to one’s physical identity,
- (ii) privacy pertaining to one’s data, and
- (iii) privacy pertaining to one’s ability to make autonomous decisions about one’s most basic life choices.¹⁷⁹

The Court went on to say that privacy is fundamental to who we are as individuals and that we should all have the freedom to decide for ourselves how to handle sensitive and private issues.¹⁸⁰ The court ultimately decided that people should be able to keep their sexual orientation, home, family life, marriage, procreation, personal intimacies, and other sacred aspects of their breathes private.¹⁸¹ The right to one’s own space is another meaning of privacy. Respect for one’s privacy is a defense of one’s independence and a recognition of one’s capacity to direct one’s own life. Integral to privacy are the individual decisions that determine one’s method of life. The SC issued two swift rulings following the “*Puttaswamy case*,” both of which affirmed that the freedom to marry whoever one pleases is fundamental to human dignity and to *Art. 21*.¹⁸²

In *Shakti Vahini v. Union of India*¹⁸³ According to the opinion, it obligation be carefully considered that when 2 adults freely choose one other as life partners, it shows their choice, which is acknowledged by *Art. 19* and *21*. The recognition of such

¹⁷⁷ AIR 2018 SC (SUPP) 1841, 2019 (1) SCC 1.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Supra

¹⁸³ AIR 2018 SC 1601, (2018) 70 OCR 784, (2018) 2 WLC(SC)CVL 588, (2018) 2 CRILR(RAJ) 541, 2018 (3) SCC (CRI) 1.

a right is necessary for its protection, as it has the backing of constitutional law.¹⁸⁴ This was rightfully confirmed by the same bench less than two weeks later, using the most precise language possible, in *Shafin Jahan v. Asokan K.M.*¹⁸⁵ and others on the Puttaswamy case and the Universal Declaration of Human Rights, Article 16. According to the majority, Art. 21 guarantees the freedom to wed whoever the citizen chooses. Constitutional liberty is fundamentally concerned with questions of religion and faith,¹⁸⁶ especially the question of whether to believe. When it comes to choosing a life partner, society should stay out of it.¹⁸⁷

So, is it possible to argue that same-sex pair do not have the same right to wed as heterosexual couples? In their ruling in, the five-judge Constitution Bench addressed this same subject. *Navtej Singh Johar and others v. Union of India*,¹⁸⁸ Court ruled that the *IPC, 1860, Section 377*, which had criminalized gay encounters during the colonial era, was unconstitutional. The Court ruled that this ban violated the rights to equality guaranteed by *Article 14*, as well as the “rights to dignity, privacy, and freedom of expression” guaranteed by *Article 19(1)(a)*.¹⁸⁹

NALSA ruled that the right to express one’s self-identified gender is part of the expression freedom under *Art. 19(1)(a)*.¹⁹⁰ The decision in **Navtej Johar** reached a similar conclusion: the right to free speech would be violated if someone were to be discriminated against because of their sexual orientation.¹⁹¹ Regarding the importance of dignity in *Article 21*, **Misra, C.J.** ruled that when a person’s organic manifestation.

¹⁸⁴ *Ibid.*

¹⁸⁵ AIR ONLINE 2018 SC 1136.

¹⁸⁶ Grover A. “The Supreme Court’s ‘no fundamental right to marry’ is wrong.” *The Hindu*. Available from: <https://www.thehindu.com/opinion/lead/the-courts-no-fundamental-right-to-marry-is-wrong/article67450210.ece#:~:text=There%20is%20no%20fundamental%20right%20to%20marry%2C%20it%20holds,be%20protected%20from%20any%20harassment>. Accessed on July, 25, 2024

¹⁸⁷ *Ibid.*

¹⁸⁸ (2017) 9 SCC 1.

¹⁸⁹ *Ibid*

¹⁹⁰ *National Legal Services Authority of India v Union of India*, (2014) 5 SCC 438, paragraph 62.

¹⁹¹ *Ibid* 186, paragraph 268.7 (per Misra, C.J.).

¹⁹² Whether it's an orientation or a voluntary expression of choice is hindered, even by the imposition of laws, it denies the individual their natural and constitutional right.¹⁹³

The majority opinion “(written by *Dipak Misra CJ and AM Khanwilkar J*)” and the concurring opinion “(written by *Dr. DY Chandrachud J*)” did acknowledge the¹⁹⁴ “sexual autonomy of an individual” and relied on the “**Shafin Jahan and Shakti Vahini**” cases regarding the freedom to choose a life partner.¹⁹⁵

In his concluding portion of his concurring view in *para 156*, **Chandrachud J.** made the most important observations in this case. He specifically held that members of the “LGBT community” are entitled to “equal citizenship” and “equal protection of law”.¹⁹⁶

Since the LGBT population is already “entitled to the full range of constitutional rights,” same-sex couples should immediately be granted the basic freedom to marry whoever they choose.¹⁹⁷ Plus, if that right is dishonored, individuals can always go to the Constitutional Courts to get their fundamental rights upheld.

A. Through The Prism Of Constitutional Morality, Marriage Is Defined As “One Man, One Woman.”

By looking at laws through the lens of the Constitution's conscience and the intrinsic standards it contains, constitutional morality provides an interpretive framework for law making.¹⁹⁸ It upholds a constitutional hierarchy of principles, which takes precedence over popular morality, as demonstrated by the SC's decision in *Navtej Johar*, which prioritized constitutional morality over society conventions.¹⁹⁹ The

¹⁹² Rane AS., Choudhari DS. “Constitutional Morality Vis-À-Vis Cultural Relativism in India.” Journal of Law and Sustainable Development.

¹⁹³ Navtej Johar, paragraph 144 (per Misra, C.J.).

¹⁹⁴ Ibid note 190.

¹⁹⁵ Ibid.

¹⁹⁶ Ias L. “Topic- Analysing The Sc Verdict On Same-Sex Marriage.” Lukmaan IAS. Available from: <https://blog.lukmaanias.com/2024/02/06/topic-analysing-the-sc-verdict-on-same-sex-marriage/#:~:text=NAVTEJ%20SINGH%20JOHAR%20AND%20OTHERS%20V.&text=The%20SC%20held%20that%20members,and%20equal%20protection%20of%20law>. Accessed on July, 25, 2024

¹⁹⁷ Ibid.

¹⁹⁸ Constitutional Morality. Drishti IAS. Available from: [https://www.drishtias.com/daily-updates/daily-news-analysis/constitutional-morality#:~:text=Constitutional%20morality%20\(CM\)%20is%20a,in%20the%2019th%20century](https://www.drishtias.com/daily-updates/daily-news-analysis/constitutional-morality#:~:text=Constitutional%20morality%20(CM)%20is%20a,in%20the%2019th%20century). Accessed on July, 26, 2024

¹⁹⁹ (2018) 10 SCC 1

Court has ruled that societal disapproval of non-traditional partnerships cannot be used to limit people's freedom of choice in matters of law, citing the principle of developing social morality as the rationale for this decision.²⁰⁰

Justice Chandrachud and **Chief Justice Misra** reaffirmed the importance of constitutional morality in safeguarding personal rights, including as autonomy and privacy, from societal obligations.²⁰¹ Marital equality is a constitutionally protected manifestation of sexual orientation and citizenship, they contended, as constitutional morality guarantees LGBT people equal citizenship.²⁰²

Nevertheless, there is no going back on acknowledged rights as they are being gradually realized, thanks to international accords.²⁰³ However, the moral climate of society in the future may be less lenient, impacting rights such as food choices and circumcision, either through legal or democratic means. Consequently, rights, such as the freedom to choose one's spouse, ought to be based on concrete constitutional provisions rather than general principles.²⁰⁴ Constitutional morality can still be used to question long-held views on marriage.

B. 'One Man, One Woman' As A Religion-Fully Binding Matrimony

Marriage is a sacrosanct institution in many faiths, even if it has been demonstrated that "*personal rules are secular in nature and origin.*"²⁰⁵ In a maintenance case, the court ruled that Muslims' personal law does not provide for a woman who is unable to support herself after a divorce.²⁰⁶ In spite of this, the uniformly applicable Criminal Procedure Code ('CrPC') would eventually supersede personal law, which only allowed maintenance payments during the iddat period, and establish a permanent

²⁰⁰ Ibid.

²⁰¹ Pti. CJI Chandrachud underlines "*Constitutional Morality*" as means to preserve India's diversity. The Economic Times 2024.

²⁰² Ibid

²⁰³ Helfer LR. "*Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes.*"

²⁰⁴ Ibid

²⁰⁵ Srivastava, D. K. "*Personal Laws and Religious Freedom.*" Journal of the Indian Law Institute, vol. 18, no. 4, 1976, JSTOR.

²⁰⁶ Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556, paragraph 14; Danial Latifi v. Union of India, (2001) 7 SCC 740, paragraph 34.

framework for maintenance payments thereafter.²⁰⁷ It is undeniable, nonetheless, that the personal law definition of marriage is an essential component.²⁰⁸

Nonetheless, this in no way absolves marriage legislation of constitutional review. Ultimately, diversity in *Shayara Bano v. Union of India*²⁰⁹ ('Shayara Bano') ruled that the execution of three consecutive talaqs violated the constitution.

1) Hindu Marriages Between People Of The Same Sex

Under certain circumstances, "*any two Hindus*" can be married according to Section 5 of the Hindu Marriage Act.²¹⁰ It is clear that the Act intended for heterosexual unions because sub-section (iii) stipulates age restrictions for a "*bridegroom*" and "*bride*," even if the terms 'party' and 'parties' are gender-neutral.²¹¹ Nothing in the "*degrees of prohibited relationship*" definitions mentions same-sex couples either.²¹² Although some priests have officiated same-sex weddings, the traditional solemnization procedures, such as saptapadi and datta homa, are reserved for heterosexual marriages.²¹³

The need of acknowledging same-sex marriage is underscored by the extensive scope of Hindu law. Those who are not expressly protected by other religious statutes are subject to this rule. This includes Jains, Sikhs, and Buddhists.²¹⁴ When it comes to matters of the heart, Muslims go to the Shariah Act, which has traditionally barred same-sex partnerships. Recognizing such unions is forbidden in the Quran, as is engaging in sexual relations outside of marriage.²¹⁵ The All India Muslim Personal Law Board and others have made it clear that they will not support same-sex marriage as it is deemed inappropriate under Islamic law.²¹⁶

Similarly, the "*Indian Christian Marriage Act of 1872*," which governs Christian law, does not allow same-sex marriage, instead using terms like "*the man and the woman*"

²⁰⁷ Id., 205.

²⁰⁸ Srivastava, D. K. "*Personal Laws and Religious Freedom.*"

²⁰⁹ AIR 2017 SC 4609.

²¹⁰ Section 5, The Hindu Marriage Act, 1955.

²¹¹ Ibid note 156.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

or “*husband and wife.*” Marriages may be solemnized in accordance with Church or state-licensed officiant traditions, however these traditions often do not permit same-sex marriages, as stated in the Act. Achieving marriage equality in Christian and Muslim law may, therefore, need using constitutional arguments to overturn current bans.²¹⁷

2) Use Of The Special Marriage Act As A Means Of Protection

A workaround for situations where same-sex marriages are not permitted under personal laws is available under “*the Special Marriage Act of 1954.*” The lack of a religious foundation in this act makes it legal for people to marry whoever they want, regardless of whether it’s an interfaith marriage or not. Additionally, the Act allows for the registration of traditional rites, which do not impact succession rights, therefore it is beneficial to individuals who choose them.²¹⁸

While the Act includes phrases like “*the male*” and “*the female*” and “*living together as husband and wife,*” its use of “*any two persons*” implies inclusivity. All spouses, regardless of gender, are eligible to be registered as a married couple under these circumstances.²¹⁹ The Supreme Court’s decision in *Danial Latifi v. Union of India*²²⁰ backs up this view, since it made it possible for helpful laws to apply even in cases when personal law did not apply. Therefore, same-sex marriages can be legally celebrated under “*the Special Marriage Act.*”

VI. CONCLUSION

Therefore, it is hereby concluded that the fight for marital equality in India has shown both short-term successes and long-term obstacles. Texts and art from ancient India show that the culture was tolerant of same-sex unions. Nevertheless, post-colonial sentiments were shaped by legislation passed during the colonial era, such as Section 377, which criminalized homosexuality and imposed harsh limitations. An important

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ AIR 2001 SC 3958, 2001 AIR SCW 3932, 2007 (3) SCC (CRI) 266.

turning point for LGBTQ+ rights came in 2018 when the Supreme Court decriminalized homosexuality, laying the groundwork for future legal victories.

However, the movement to decriminalize same-sex marriage persists. Many activists and individuals are disappointed since the SC's recent ruling did not decriminalise same-sex unions, but it did suggest civil unions and other rights. This leaves a gap in marriage equality. The petitioners in the most recent same-sex marriage lawsuit sought to have the Special Marriage Act of 1954 and other statutes interpreted to recognize same-sex marriages. Their main point was that the "*Indian Constitution*" guarantees basic rights including equality, freedom, and privacy, and that elimination same-sex marriage is an affront to those rights. In order to protect the rights of same-sex couples, the petitioners emphasized the importance of legal recognition, especially in areas like medical decision-making, inheritance, and adoption.

But the Supreme Court passed a no-marital-rights ruling, saying that such matters are for lawmakers to decide. The court recommended setting up a task force to investigate potential alternatives to marriage that would provide same-sex couples with more legal protections. Though it's an improvement, this proposal doesn't do enough to eradicate discrimination against same-sex couples and resolve the fundamental need for equal marriage rights.

Ancient Hindu texts and temples portray same-sex relations, implying a once-progressive attitude, and this, along with other cultural and religious themes, has impacted how India views homosexuality. These views were turned upside down and a more conservative outlook was ingrained as a result of the colonial era's imposition of Western moral standards. Justice, equality, and respect for human dignity demand the legalization of same-sex marriage. Legal advantages are important, but so are social acceptability and the right to a dignified life.

The rejection of marriage equality contributes to the maintenance of prejudice and impedes the social and personal growth of LGBTQ+ people. It will take a combination of societal acceptance, legislative changes, and the elimination of historical biases to make marriage equality a reality in India. Despite the progress that has been achieved, there is still a long way to go before LGBTQ+ people are recognized and granted the

same rights as their straight counterparts. This can only be achieved through consistent activism, education, and legislative action. True equality and protection for same-sex couples in India must be granted immediately in light of the recent same-sex marriage case.