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LEGALISATION OF SAME-SEX MARRIAGES

~Bhavya Jain

On 18 September 2018, the Hon'ble Supreme Court of India in its infamous judgement of *Navtej Singh Johar v. Union of India*¹ where it went ahead to decriminalised homosexuality in India. However, despite this progressive judgement and a step forward, the concerns associated to the homosexual relationships remained unaddressed by both the Apex Court and the Government of India, specially marriage. The Question still prevails to same-sex marriages as India does not recognise same-sex marriage since no marital laws of our country explicitly recognise the same-sex marriages. Right to life comes with right to choose, but same is not the case with homosexual couples.

LEGALISATION OF SAME-SEX MARRIAGE

Marriage, as defined in Hindu scriptures, is “the union of ‘two souls’ and the same scriptures also define that a soul has no gender. It is only the human bodies that possess a gender and not the soul.” Quoting, lawyers Arundhati Katju and Menaka Guruswamy’s speech at Oxford University². “We ought to specialize in creating Indian society a cushty place for all LGBTQ+ individuals so they be at liberty to specific themselves sexually and romantically. Marriage is that the logical next step is loaded with title and it's solely being aforesaid as a result of it's the logical next step for privileged individuals.”

Homosexuality has been prevalent in India since olden times. There are many evidences which proves that it was very much found in the Indian society. Kamasutra in the 4th century AD

¹ WRIT PETITION (CRIMINAL) NO. 76 OF 2016

² <https://youtu.be/-Lp6H4YYN-k>

mentions physical pleasure in male-male unions in vivid detail. Scholars point out that all kinds of sexual practices that are illegal in India today co-existed side by side for centuries without necessarily being named as such and such or looked down upon. In fact till around 1800s, poets like Insha and Rangin wrote openly about male-male and female-female relations in the same tone as heterosexual relations. It all changed after the Britishers came to India, they were aghast to see texts like Kamasutra and considered themselves a backward civilisation by seeing India's openness towards sex and sexuality. But they didn't fail to criticise the Indian authors on their way of writing and being so open, the Indian then adopted a very conservative Victorian culture/attitudes towards our own non-heteronormative traditions. In order to assert the "respectability" of Indian Culture. And now with the progressing time people have become more and more conservative in their approach but the LGBTQ+ activists have fought back against these perceptions.

Article 21 states,

"Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law."³

It has been time and time again held in *Shakti Vahini V. Union of India*⁴, *Shafin Jahan v. Asokan K.M.*⁵ and in *Lata Singh V. State of Uttar Pradesh*⁶ that the right to marry is an integral part of Article 21 of the Indian Constitution. The right to marry is a universal right and it is available to everyone irrespective of their gender. Again, in *Puttaswamy Judgement*⁷ the Court emphasised on the right to privacy being an intrinsic part of the right to life and personal liberty under Article 21. Then, why not extend this right to every citizen as mentioned in Article 21 of the Constitution.

Sexual orientation constitutes a crucial aspect of personal privacy. Treating someone unfairly based on their sexual orientation profoundly undermines their dignity and self-esteem. The right to privacy is also closely linked to human dignity and is inherently protected by the constitution. This includes the right to make decisions about family life, such as choosing to marry. When two consenting adults decide to marry, they are exercising their freedoms under Articles 19 and 21 of the Constitution, allowing them to live with human dignity and express

³ Constitution of India

⁴ WRIT PETITION (CIVIL) NO. 231 OF 2010

⁵ CRIMINAL APPEAL NO. 366 OF 2018 (Arising Out Of S.L.P. (Crl.) No.5777 of (2017)

⁶ Writ Petition (Crl.) 208 of 2004

⁷ WRIT PETITION (CIVIL) NO. 494 OF 2012

themselves freely. The right to privacy is an essential component of personal freedom, encompassing a wide range of behaviours and expressions that individuals are entitled to pursue without interference or intrusion.

CONCLUSION

I've always assumed that when we talk about freedom, we talk about freedom in all aspects. Including the right to choose our significant other. The compulsion of having 2 genders is absolutely bizarre and bogus, if marriage is the union of two souls then how is that societally constructed abbreviations like caste, colour, gender or creed come into play? The misconception attached to same sex couples is that they aren't fit to raise a child together, however, studies have shown time and time again how raising a child has nothing to do with gender, or anything for that matter, only love. It is not about how any "gender" brings up a child, for every child deserves a parent, but not every parent deserves a child, and that implies to all. Telling homosexuals that marriage is not the right step for them is not only judgemental but also- plainly ignorant of us as a society. We as a country as prospering socioeconomically and striving towards the utopia our forefathers dreamed of, I ask people doesn't the definition of love need an update as well? Despite the decriminalization of section 377, people still continue to ostracize members of the community, often forgetting that we are all humans first, and lovers second. LGBTQ+ rights are provided by the Apex Court of our country but the old "customs and values" which are embedded in the Indian society are restraining people to choose love over the societal pressure. Despite these cultural shifts, most heterosexual marriages, still, continue to be phallocentric and revolve around the Male head of the family, so much so for love, no? The idea of marriage is to keep the generation going, ideas and characters being passed from one generation to the other. The concept of sustaining your "bloodline" can still be fulfilled with the growth of technology in our country. The main constituent of marriage is, you guessed it right, love. And it comes in all forms, shapes and sizes, without inquiring what your genitals look like first. What one considers a settled life is this- complacency, peace and a little love. Nobody, and I mean absolutely nobody deserves to be deprived of that, when Charles Darwin talked about evolution helping us all grow as a society, he wasn't talking about this. The concept of same sex relationships and marriages is not new to our country but has been in motion way before India was colonized, what about the evidence you ask? Well, the historians will take over from here.