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Love has no Gender and Compassion has no Religion

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ABSTRACT

Freedom and the right to live- does it entail all aspects of being free in a democratic country, including the right to express individual sexuality and gender identity? Isn't freedom an illusion if individual expression is subdued or curbed? After decriminalisation of homosexuality in Section 377 of IPC, the next logical step should be legalising marriage between homosexual individuals. However, it is still a challenge posed to the queer community. Landmark judgements like Navtej Singh have set progressive and forward thinking precedents when the judges scrapped the homophobic interpretations of Section 377 on the grounds of it being manifestly arbitrary and violative of Articles 14, 15 and 21. Under the right to privacy and right to choose a life partner, the scope of the Constitution was interpreted to cover outside the norm of cis-het gender identities. The term 'person' includes individuals who are not just cis-gender and heterosexual. These are pretty forward thinking legislations. 29 nations like US, United Kingdom, France, including third world countries like Argentina have facilitated gay marriage rights and the privileges that come with them, such as adoption, IVF for lesbian mothers. Forward thinking legislations propel the State forward, and immensely help in changing public opinion for the better. It is time for India to follow in these footsteps and make positive change. For far too long the LGBT community faced oppression, police atrocity and social stigma. Let this be an apology for decades of mistreatment and disrespect meted out to them.

Keywords: LGBT, Navtej Singh Johar, homosexuality, gender, cis-het.

I. INTRODUCTION

*"A hundred and fifty-eight years is too long a period for the LGBT community to suffer the indignities of denial. That it has taken 68 years even after the advent of the Constitution is a sobering reminder of the unfinished task which lies ahead. It is also a time to invoke the transformative power of the Constitution"*³

Marriage is the state of being unified under a legal and contractual relationship, that gives rise

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³ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶616 (per Chandrachud, J.)

to certain rights and obligations to both parties concerned. But it is so much more than that. Most cultures consider it a sacrament. What should have been a simple act of unification has different interference from culture, religion and ethnicities since centuries. Most cultures used to (some still do) consider it a sacred union between only one man and one woman. It's strange considering homosexuality has always been a prominent part of ancient civilisations and cultures as depicted in the architecture, scriptures and other sources. There arises the stigma and social taboos regarding homosexuality as it didn't find any legal sanction or religious backing initially. What is such a moral transgression when both the individuals in marriage happen to be of the same sex? It is a legal right of an individual to marry the person of their choice but unfortunately it is reduced to a privilege only few can afford. Married couples find certain privileges like getting housing easier, filing income tax together, adoption of children and as long as homosexual couples are not permitted to marry, which is their legal right, the stigma will prevail.

II. INTEGRATION OF THE LEGISLATION

The Supreme Court of India has delivered a plethora of celebrated judgements which have increased our vocabulary on terms like 'Privacy', 'Constitutional Morality' and 'Autonomy'. One such judgment was the decriminalising of section 377 of IPC in **Navtej Singh Johar v. Union of India**⁴ where the contours of intimate relations were dealt in a broader perspective. Yet the battle continues as the rights that are incidental to the decriminalising of section 377 are yet to be redressed that is the recognition of gay marriage rights. And all the jurisprudential ingredients are already present for such recognition. The decision that was passed in the case of **Navtej Singh Johar v. Union of India**⁵ is inviolable as the decision was passed despite the presence of a disastrous judgement of **Suresh Kumar Koushal v. Naz Foundation**³ ('**Koushal**')⁶ which set a completely different precedent.

The Supreme Court of India has the Fundamental Rights enshrined under Chapter III of the Constitution such as the right to privacy⁷, the right to choose a life partner⁸, and have now given the decision to decriminalise gay sex⁹. And through all the judgements made, it can be clearly

⁴ Id., 1

⁵ Id., 1

⁶ Naz Foundation v. Government of NCT of Delhi, (2009) 111 DRJ 1

⁷ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1

⁸ Shakti Vahini v. Union of India, (2018) 7 SCC 192; Shafin Jahan v. Asokan K.M., AIR 2018 SC 1933; Shayara Bano v. Union of India, (2017) 9 SCC 1

⁹ The term is used in the broadest sense to cover all that was decriminalised in Navtej Johar, which is broadly all sexual acts between consenting adults previously considered "carnal intercourse against the order of nature" under §377 of the Indian Penal Code.

deduced that all jurisprudential ingredients are already present for such recognition of marriage equality. Marriage equality is to grant legal status to the couples that fall outside the purview of a cis-het¹⁰ relationship. Prima facie it might appear that after decriminalisation of section 377 of IPC, legitimising it is just a step away but nothing could be further from the truth. Legitimising gay marriage is going to be a mammoth task as centrality of marriage is religion. In India, marriage as a ceremony is conducted or solemnised and is inviolable. Most religions look down upon same-sex relationships, much less, marriage.

The definition of marriage between one man and one woman can be challenged under Article 21 of the Constitution where it has been clearly enumerated that right to choose a life partner./right to life with dignity./right to autonomy or Article 14 of the Constitution are defences against discrimination on the basis of sexual orientation. This piece deals with the nook and corners of the legal aspect that is related to the legitimisation of gay marriages.

III. THE KERNEL OF THE ARGUMENTS: CONSTITUTION OF INDIA

The arguments that are going to be used in this particular piece for justification of gay marriage are majorly going to be invoked from the case of **Navtej Singh Johar v. Union of India**. The judgement was passed by 5 judge division bench of the Supreme Court and the decision to scrape section 377 was passed unanimously. The ratio of the judgement must be pieced together from the points of agreement between the four separate judgements

(A) Discrimination On The Basis Of Sexual Orientation And Sexual Identity

In the **National Legal Services Authority of India v. Union of India** ('NALSA')¹¹:

The Supreme Court had considered 'transgender' as a third gender and while passing its decision it dealt with the contours of Articles 14, 15, 21 of the Indian Constitution which are imperative in order to prove the legality of gay marriage. Firstly, Article 14 and 15 of the Constitution do not restrict the word 'person' only to male or female¹². Transgender persons, or to be precise, people with different 'gender identity'¹³ who are neither male or female fall within the purview of the expression 'person' and, hence, are entitled to legal protection of laws in all spheres of State¹⁴.

The judges have created a distinction between 'sexual orientation' and 'gender identity'.

¹⁰ Cisgender-heterosexual

¹¹ National Legal Services Authority of India v Union of India, (2014) 5 SCC 438

¹² Id.,54

¹³ 'gender identity' is defined as person's sex is usually assigned at birth, but a relatively small group of persons may born with bodies which incorporate both or certain aspects of both male and female physiology

¹⁴ Id.,55

‘Sexual orientation’ is an individual's enduring physical, romantic and/or emotional attraction to another person¹⁵ whereas ‘gender identity’ is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person¹⁶. A person's sex is not always assigned at birth, individuals can be born with bodies which incorporate both or certain aspects of both male and female physiology¹⁷.

Secondly, the incorporation of the Yogyakarta Principles into the Fundamental rights matrix of the Indian Constitution¹⁸ gives a catalytic effect to the rights of non-heterosexual individuals.

Thirdly, if the purpose of marriage was to prevent unions that could not result in procreation, then marriages involving impotent/infertile individuals would be void and not merely voidable in certain circumstances. Therefore, not granting gay marriage rights amounts to sex discrimination under Article 15, arbitrary under Article 14, and falls foul of the Yogyakarta Principles incorporated into the Constitution.

(B) Choice Of Marriage Partner Of Any Gender As A Corollary To Right To Privacy

The Supreme Court in **K.S. Puttaswamy v. Union of India**¹⁹ unanimously upheld the Fundamental Right of privacy which includes one's right to make their intimate choices. Personal autonomy includes positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in²⁰. It was also held that sexual orientation and gender identity are key components of the right to privacy, and indeed 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 sexuality²¹.

Y.S. Chandrachud²² added:

“The right to intimacy emanates from an individual's prerogative to engage in sexual relations on their own terms. It is an exercise of the individual's sexual agency, and includes the individual's right to the choice of partner as well as the freedom to decide on the nature of the

¹⁵ Id.,20

¹⁶ Id.,19

¹⁷ Id.,19

¹⁸ Id., 60; Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶320 (per Nariman, J.) and 528-529 (per Chandrachud, J.).

¹⁹ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

²⁰ Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1,34-35

²¹ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, 478 (per Chandrachud, J.).

²² id

relationship that the individual wishes to pursue.”

Truer words have never been spoken.

Therefore, a person has the right to choose their intimate as well as life partners without restrictions from religion or tradition. Therefore, the Supreme Court should validate the next logical step that is to legalise gay marriages.

(C) Same-Sex Marriage As A Part Of Article 19(1)(A)

In NALSA freedom of expression under Article 19(1)(a) clearly indicates that the freedom of expression guaranteed Under Article 19(1)(a) includes the freedom to express one's chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing etc²³. Similarly, in Navtej Johar, Misra, C.J. concluded:

“Any discrimination on the basis of one’s sexual orientation would entail a violation of the fundamental right of freedom of expression²⁴.”

Further, he held that, in the context of dignity as an essential component of Article 21,

“When biological expression, be it an orientation or optional expression of choice, is faced with an impediment, albeit through any imposition of law, the individual’s natural and constitutional right is dented²⁵.”

Therefore, individuals ought to be permitted to marry others of the same-sex as an expression of their sexual orientation, including, in the case of heterosexual transgenders, an expression of their self-identified gender.

IV. COMPARATIVE ANALYSIS WITH OTHER COUNTRIES

“Respect existence or expect resistance”²⁶ To make their existence acknowledged and accepted has been a long drawn out struggle for homosexual or other queer identities across the world. Dating back to the first century, in the modern era, the first legislation legalizing same-sex marriage took place in the Netherlands on 1 April 2001.

Today, same-sex marriage is legally performed and recognized in 29 countries (nationwide or in some jurisdictions), some of them being, Argentina, Australia, France, Germany, South Africa, United Kingdom and United States.

(A) United States Of America

²³ National Legal Services Authority of India v Union of India, (2014) 5 SCC 438, ¶62.

²⁴ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶268.7 (per Misra, C.J.).

²⁵ Navtej Johar, ¶144 (per Misra, C.J.).

²⁶ Thrash metal band ‘Violator’

In the landmark 2015 case **Obergefell v. Hodges**²⁷, the U.S. Supreme Court ruled that all state bans on same-sex marriage were unconstitutional, making gay marriage legal throughout America. It was a glorious victory after decades of struggle, protests and clashes with not only police and government bodies but also societal taboo and domineering negative public opinion. The Stonewall Riots, also called the Stonewall Uprising, began on 28 June 1969 when New York City police raided the Stonewall Inn, a gay club located in Greenwich Village in New York City. New York State Liquor Authority penalized and shut down establishments that served alcohol to either known or suspected LGBT²⁸ individuals, arguing that the mere gathering of homosexuals was “disorderly.”, it was illegal per se, not including the non-inclusive and close-minded archaic nature of the legislation.

The then mafia and criminal gangs saw profit in providing social and convenient service in bars and inns for homosexual people where they could express themselves freely as they were shunned otherwise from regular bars. Usually, the mafia were tipped off before such police raids happened so they could ensure their profit but what is unique about this incident was that the patrons and bar owners weren’t notified and they were hauled off by police officers leading to widespread riots for six days in and around Christopher Street. The Stonewall Riots served as a catalyst for the gay rights movement in the United States and around the world. They set the stage which propelled this uplifting liberation movement forward. Though the Stonewall uprising didn’t start the gay rights movement, it was a galvanizing force for LGBT political activism, leading to numerous gay rights organizations, including the Gay Liberation Front, Human Rights Campaign, GLAAD (formerly Gay and Lesbian Alliance Against Defamation).

On the one-year anniversary of the riots on 28 June 1970, thousands of people marched in the streets of Manhattan from the Stonewall Inn to Central Park in what was then called “Christopher Street Liberation Day,” the first pride parade America witnessed. In 2016, then-President Barack Obama designated the site of the riot, Stonewall Inn, Christopher Park, and the surrounding streets and sidewalks—a national monument in recognition of the area’s contribution to the gay rights movement. Years after Stonewall, homosexual couples all over US applied and were denied marriage license, giving rise to landmark cases like **Baker v.**

²⁷ 576 US 644 (2015)

²⁸ Lesbian, Gay, Bisexual, Transgender Community, though it is LGBT+, as there are other identified sexualities

Nelson²⁹. Finally after decades of struggle and resistance from orthodox religious groups and narrow minded social opinion, gay marriage was legalised across the country in 2015.

(B) France

France has been quite open minded on this front, but even this country witnessed its fair share of injustices towards homosexual couples due to narrow-minded yet influential government officials and people in power. Finally, in June 2013, the French Government issued a bulletin "relating to the consequences of illegally refusing to celebrate a marriage on the part of a civil registrar"³⁰ wherein it declared the illegality of any refusal by a state officer to grant marriage certificates to same-sex couples.

It is a welcome change quite contrary to the treatment ushered on a presidential candidate getting penalised for conducting a same sex marriage ceremony. The bulletin stipulates a punishment of 5 years imprisonment and a fine of 75,000 euros for any mayor or local official who refuses to issue a marriage license to a same-sex couple for the only cause that they are gay. The official may also face discrimination charges under Article 432-7 of the French Penal Code. Several mayors challenged the bulletin in French courts; their case eventually made its way to the European Court of Human Rights, which dismissed it in October 2018 proving once again, however prejudiced people may be, love and revolution will find a way. And no one can dispute France's claim on revolutions against unjust hierarchy, transcending decades.

(C) Argentina

LGBT rights in Argentina, one of the third world countries, are among the most advanced in the world. Upon legalising same-sex marriage on 15 July 2010, Argentina became the first country in Latin America, the second in the Americas, and the tenth in the world to do so. Argentina became a democratic nation in 1983, and since then its laws have become more inclusive and accepting of LGBT people, as has public opinion. In 2015, WHO³¹ cited Argentina as an exemplary country for providing transgender rights. In a 2013 Research Centre poll³², Argentina was ranked the Latin American country with the most positive societal attitudes towards homosexuality, with about three-quarters of those surveyed opining that it should be accepted. Same-sex couples have been able to legally adopt since July 2010, when the same-sex marriage legislation came into effect.

²⁹ 291 Minn. 310, 191 N.W.2d 185 (1971)

³⁰ (circulaire du 13 juin 2013 relative aux conséquences du refus illégal de célébrer un mariage de la part d'un officier d'état civil)

³¹ World Health Organisation

³² pewresearch.org

Since 2013, lesbian couples have had equal access to IVF³³. A law allowing such procedures was approved by the House of Deputies.

(D) South Africa

Following colonisation, lingering effects of Apartheid³⁴, influence from traditional and orthodox customs has made the rights recognition and public opinion of LGBT community a complex affair in South Africa. South Africa's post-apartheid Constitution was the first in the world to outlaw discrimination based on sexual orientation, and South Africa was the fifth country in the world to legalise same-sex marriage. Suffering from discrimination for decades, at times, lead to progressive change. It is till date the only country in Africa to have legalised same-sex marriage. Same-sex couples can adopt children jointly, arrange IVF and surrogacy treatments, enjoy constitutional and statutory protections from discrimination in employment, the provision of goods and services and many other areas.

V. CONCLUSION

The judgement passed in the case of Navtej Johar³⁵ is just one step away from validating marriage between same-sex. C.J Mishra in his part of the judgement didn't validate same sex marriage obliquely but definitely insinuated it:

“The LGBT community possess the same human, fundamental and constitutional rights as other citizens do since these rights in here in individuals as natural and human rights. We must remember that equality is the edifice on which the entire non-discrimination jurisprudence rests. Respect for individual choice is the very essence of liberty under law and, thus, criminalizing carnal intercourse under Section 377 IPC is irrational, indefensible and manifestly arbitrary. It is a vital personal right falling within the private protective sphere and realm of individual choice and autonomy. Such progressive proclivity is rooted in the constitutional structure and is an inextricable part of human nature³⁶.”

A PIL was filed in the Supreme Court of India recently to incorporate same sex marriage under the Hindu Marriage Act, 1955. The petitioners argue that there is no language in the Act that restricts marriage between one man and one woman. It is, as of now, a matter under consideration by the Court.

History owes an apology to the members of this community and their families, for the delay in

³³ In vitro fertilization

³⁴ Literally Apartheid means ‘apartness’. It was a legislative, pro-segregation system, violently discriminatory against non-white citizens of South Africa.

³⁵ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

³⁶ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶255 (per Misra, C.J.).

providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality. The misapplication of this provision denied them the Fundamental Right to equality guaranteed by Article 14. It infringed the Fundamental Right to non-discrimination Under Article 15, and the Fundamental Right to live a life of dignity and privacy guaranteed by Article 21. The LGBT persons deserve to live a life unshackled from the shadow of being 'un-apprehended felons'³⁷

³⁷ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1