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# Role of Judiciary in Expanding Horizon of the Free Will in Marriages

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## ABSTRACT

*For the expression of the right to free choice in family and marital relations, the right to choose one's partner has been explored in all the aspects possible in this research article. The history of marriages in India has been a matter of traditions and religion from a historical perspective and has been evolving ever since Vedic times. From the practice of arranged marriages set by the families and society of the persons marrying each other, to choosing one's partner freely has been a chronology of suffering, awareness, fighting and freeing oneself from the shackles of societal setup and conservative status quoists. When the attempts of the Indian legislature failed to provide protection to the couples marrying in inter-caste or inter-religion, the judiciary came to the rescue. With a plethora of judicial precedents, the right to choose one's partner has been widely interpreted in the Courts across the country.*

**Keywords:** marriage, acts, judiciary, honour killing.

## I. INTRODUCTION

The distinction between all the other forms of rights and fundamental right has been a crucial subject ever since the dawn of the Rule of Law in India. Since turning republic as a nation, much has been in debates, a lot in discussions and remaining in whims to make the status of the rights in favour of the people, for the people and by taking into account what they assert in the form of their rights. Some rights are given, others demanded. Rights which are easily given are mostly recognised human rights and rights which are demanded are the rights that are an individual's best interest. In India, fundamental rights form the Magna Carta and they are the parameters for deciding the validity of other laws. Although marriage is a basic human practice since the dawn of human civilisation, the right to marry is not a fundamental right. This right can be interpreted in terms of the right to choose one's partner without any coercion or force and restriction. But where there is right, there is a remedy and remedies always stem from the violation of the right. The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, the same is bound by the

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principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation<sup>3</sup>. But in practice, in countries like India such a choice sometimes results in unbearable life-threatening circumstances because the societal setup here works in a pressurising way. This is also a result of the majority domination by the conservative status quoists.

### **1. Right to Marriage in India**

The Constitution of India guarantees the right to marry the person of one's choice under Article 21 which provides for the protection of life and liberty. The legislations governing marriages in India are Special Marriage Act of 1954, Indian Christian Marriage Act of 1872, Parsi Marriage and Divorce Act of 1936, Hindu Marriage Act of 1955 and the prohibition of Child Marriage Act, 2006. The right to marry is an incident of human liberty. The right to marriage has been globally placed under the Human Rights Charter in the form of the right to start a family. In its Article 12, the Universal Declaration of Human Rights provides for the freedom from arbitrary interference with a person's privacy, family, home, honour and reputation.

### **2. Right to Choose Life Partner in India**

As a matter of liberty and general privacy, if two persons consent to have a relationship or live together after the marriage, it should be interfered with. It is the people who are consenting to the marriage who have the right to decide who they want to be with. The right to choose life partner is an essence of the right to marriage. Right to marriage is a right in theory but it practically interprets and displays its application in the form of the right to choose life partner.

## **II. HISTORICAL CONTEXT OF RIGHT TO CHOOSE A LIFE PARTNER**

Endogamy was common during the Vedic times around 1500-500 BCE. The concept of arrange marriage was prevalent with the object of social and economic alliances. Later on, the practice of Swayamvara was followed in which the woman who was to marry was given a choice to choose a husband from a gathering of suitors. This led to some expression of free will of the women at that time. In the epic eras of Ramayana and Mahabharata, both arranged and self-

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<sup>3</sup> (2018) 7 SCC 192

chosen marriages were prevalent. The self-chosen marriages at that time were called Gandharva marriages but they were rather the part of exceptions than being a normal practice. However, marriages during this time was based on caste of a persons intending to marry.as the medieval period came by, the patriarchal rigidity in the society strengthened which was also a result a Hindu Dharmashatra texts and laws of Islam. It was during this time that child marriages became a norm leading to the reduction in the possibility of persons choosing their partners.

With the British rule in India came numerous changes in Indian society especially in the laws. The British started codification of laws and it affected the domain of marriage as well. However, the freedom to choose the partner was majorly governed by family and society. Later on, the Brahmo Samaj and Arya Samaj advocated personal choice and mutual consent in marriages thereby countering the traditional norms.

### **III. CHALLENGES TO THE RIGHT TO CHOOSE ONE'S PARTNER**

There exist numerous issues that challenge the right to choose one's partner in India and all such challenges are ingrained in economic, social, cultural and legal setup. The deeply rooted caste system bars inter-caste marriages making them socially unacceptable. And marrying a person of another caste is discerned as a blow to the family honour resulting in honour killing cases. As per the latest available published information with National Crime Records Bureau (NCRB), a total of 28 cases in 2014, 251 cases in 2015 and 77 cases in 2016 were reported with motive as Honour Killing (which includes cases registered under murder (section 302 IPC) & culpable homicide not amounting to murder (section 304 IPC) in the country. The so-called 'honour killings' or 'honour crimes' are not peculiar to our country. The 2009 European Parliamentary Assembly noted the rising incidents of honour crimes with concern. In 2010, Britain saw a 47% rise of honour-related crimes. Data from police agencies in the UK report 2283 cases in 2010 and most of the attacks were conducted in cities that had high immigrant populations. It is an evil which haunts many other societies also.

Inter-caste marriage couples are socially boycotted, hence, promoting ostracism.

Pressure for converting to partner's religion often worsens interreligious marriages. This leads to communal tensions and violent expression.

Due to already existing inequalities in the society on the basis of gender, women suffer more than men when it comes to choosing their life partner. As a result, women who defy their family or community directions and traditions are often seen facing violence, physical abuse and forced marriages.

Adults of marriageable age are often dependent on their families for financial support and inheritance. If they marry against the will of their families, it can result in disinheritance and loss of financial support.

#### IV. VIOLENCE AGAINST INTER-CASTE MARRIAGES AND PROTECTION OF COUPLES

It has been seen that threats, coercion, undue influence and force are often resorted to by the society against inter-caste marriages. However, all such resorts are illegal but are still used anyway. The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence addresses this issue. Article 42<sup>4</sup> reads thus:-

*“Article 42 – Unacceptable justifications for crimes, including crimes committed in the name of so-called “honour”*

The Supreme Court of India has expressly castigated such incidents of threats and violence against inter-caste marriage in a catena of cases. One of the leading cases in this regard is *Lata Singh v. State of UP*<sup>5</sup> in which the Court stated:

*“However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes.*

*If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage.”*

The Court further directed the authorities for instituting criminal proceedings against anyone who tries to threaten or injure the persons who have undergone the marriage. The Court stated as follows:

*“We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings*

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<sup>4</sup> Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence

<sup>5</sup> *Lata Singh v. State of U.P.*, (2006) 5 SCC 475

*by the police against such persons and further stern action is taken against such persons as provided by law.”*

*Reiterating the directions in the Shakti Vahini case<sup>6</sup>, the protection of couple has been given authority protection by the Apex Court as follows:*

*“The District Magistrate/Superintendent of Police must deal with the complaint regarding threat administered to such couple/family with the utmost sensitivity. It should be first ascertained whether the bachelor-bachelorette are capable adults. Thereafter, if necessary, they may be provided logistical support for solemnising their marriage and/or for being duly registered under police protection, if they so desire.*

*After the marriage, if the couple so desire, they can be provided accommodation on payment of nominal charges in the safe house initially for a period of one month to be extended on monthly basis but not exceeding one year in aggregate, depending on their threat assessment on a case-to-case basis.”*

*In 2018, the Ministry of Home Affairs, in pursuance of the judgment of the Supreme Court Shakti Vahini v. Union of India gave the following directions<sup>7</sup> to the States and UTs:*

(a) The State Governments shall create Special Cells in every District comprising of the Superintendent of Police, the District Social Welfare Officer and District Adi-Dravidar Welfare Officer to receive petitions/complaints of harassment of and threat to couples of inter-caste marriage.

(b) These Special Cells shall create a 24-hour helpline to receive and register such complaints and to provide necessary assistance/advice and protection to the couple.

## **V. JUDICIARY AND INTERPRETATION OF THE RIGHT TO CHOOSE LIFE PARTNER**

In *Lata Singh v. State of Uttar Pradesh*<sup>8</sup>, the Supreme Court while deciding the case pertaining to the right to marry and inter-caste marriage of a petitioner who was a major, has held that every major person has the right to marry the person of choice and also reiterated that there is no statute which prohibits an inter-caste marriage.

In *State of U.P. v. Krishna Master and others*<sup>9</sup>, the Court, while setting aside the judgment of acquittal of the High Court, convicted the accused persons with rigorous imprisonment for life and fine of Rs. 25,000/-. It observed that killing of six persons and wiping out of almost the

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<sup>6</sup> (2018) 7 SCC 192

<sup>7</sup> Ministry of Home Affairs, Honour Killings, <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1540824>

<sup>8</sup> *Lata Singh v. State of U.P.*, (2006) 5 SCC 475

<sup>9</sup> AIR 2010 SUPREME COURT 3071

whole family on the flimsy ground of saving of honour of the family would fall within the 'rarest of rare' case evolved by this Court and, therefore, the trial court was perfectly justified in imposing capital punishment on the respondents. However, taking into consideration the fact that the incident had taken place before twenty years, it did not pass the death sentence but imposed the sentence of rigorous imprisonment for life. The said decision reflects the gravity of the crime that occurs due to "honour killing".

One of the landmark cases in the context of the right to marriage is *Shafin Jahan v. Asokan K.M. and Ors.*<sup>10</sup> Or the Love-Jihad case, also known as Hadiya Case. In this case, the petitioner who was a father, filed a writ for habeas corpus in the Kerala High Court for her daughter, thereby invoking the writ jurisdiction of the High Court under Article 226 of the Constitution. Akhila, the daughter, had converted to Islam from being a Hindu to marry a Muslim boy when she was 25 years of age. The father contended that her daughter fell victim to sheer influence and manipulation by the religious extremists(the boy). the Kerala High- Court ordered for the annulment of the marriage and held the marriage invalid. Consequentially, the husband filed a Special Leave Petition in the Supreme Court against the judgment of the Kerala High Court. While setting aside the order of the High Court, the Apex Court held her marriage to be valid on the ground that "the exercise of the jurisdiction to declare the marriage null and void while entertaining a petition for habeas corpus, is plainly in excess of judicial power". The Court went on to state that "the right to marry a person of one's choice is integral to Article 21 of the Constitution and society has no role in determining our choice of partners".

## VI. CONCLUSION

The right to choose a partner is a complex matter in India because of its basis in the culture, society and economy along with other factors. A multifaceted approach is needed to address these challenges including reforms in the laws, awareness, education, stronger enforcement of existing laws and wider social change. A supportive environment ought to be created in which couples are able to fully exercise their basic right of choosing partners without any fear of mishappening. the consent of the family or the community or the clan is not necessary once the two adult individuals agree to enter into a wedlock. Their consent has to be piously given primacy. If there is offence committed by one because of some penal law, that has to be decided as per law which is called determination of criminality. It does not recognize any space for informal institutions for delivery of justice.

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<sup>10</sup> AIRONLINE 2018 SC 1136