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# The Right to Marry the Person of One's Own Choice, and the Aspect of Freedom of Conscience

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## ABSTRACT

*Marriage is an important social institution, which has existed since the early days of civilization. In this institution, the paramount is the autonomy available to individuals with regards to the selection of the person to whom one wishes to marry. With the process of evolution aided by social and legal reforms, this autonomy has grown in multiple dimensions, thereby breaking the presupposed restrictions. In the recent times, one such restriction, I.E. the restriction to choose only the person of opposite sex as spouse is going through the same process of revisitation. The right to choose the person of same sex as spouse is being claimed as a matter of right and also considered as essential for the realisation of constitutional ideals like the liberty, equality and dignity. The author, who is a law student, attempts through this paper, to locate the same autonomy in the exercise of the freedom of conscience available under the Indian constitution. By analysing the various facets of the freedom of conscience, the paper seeks to establish that the liberty to perform same sex marriage is also a matter of conscience just like the liberty to perform the heterosexual marriages is considered. An attempt is made also to claim that the location of this right under the heading of freedom of conscience may strengthen the case of people seeking for the recognition of the same sex marriages by the state.*

**Keywords:** Conscience, Same-sex, Choice, constitution.

## I. INTRODUCTION

With the society expediting its evolution process in the current times, the debate around the topic of legal recognition of the non-heterosexual marriages is on its peak. The institutions like the courts, media, and other pillars of democracy, have been involved directly or indirectly in the deliberations on the subject. Frequently, the prominent newspapers are publishing articles in their opinion or editorial sections expressing a variety of views on acceptance of marriages

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other than the conventional marriages involving only heterosexual parties.<sup>23</sup> On the other hand, approximately 20 individuals representing a variety of classes amongst LGBTQIA++ community have approached the judiciary, whose petitions, most of which are asking for various reliefs concerning legal recognition to their right to marry, and for enforcement of other associated rights such as the right to adopt children, have been clubbed and transferred to itself by the supreme court.<sup>4</sup> After hearing them for around 10 days, a 5 judge constitution bench comprising the chief justice of India Dr. DY Chandrachud, justices S.R. Bhat, S.K. Kaul, P.S. Narasimha and Hima Kohli, has reserved its judgement on the petitions.<sup>5</sup> During the course of their arguments, the petitioners while convincing the court about the existence of a fundamental right to marry for all persons, and a coexisting duty on the state to recognize the same, arduously attempted to locate the right in various articles of the part 3 of the constitution. The status of being married was linked with dignity and privacy under article 21,<sup>6</sup> and article 14 was invoked to term the petition as the “marriage equality petition”.<sup>7</sup> Some even argued on the aspects of marriage being an association under article 19 (1) c<sup>8</sup> or expression under article 19 (1) (a). However, much lesser emphasis was laid on the aspect, which found its mention in the submissions of not less than 2 counsels for petitioners, that the right to marry is closely linked with the freedom of conscience under article 25 of the constitution.<sup>9</sup> In fact, in my opinion, when the contours of the people opposing the same sex marriages are more often than not hovering around the grounds of marriage being a sacrament and therefore religiously special, the aspect of conscience in marriage becomes worth examining from the constitutional perspective. Thus, it is necessary to analyse various factors, which determine the extent and

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<sup>2</sup> Vivek Katju, My journey has made me a better person, a better Hindu: A father writes on accepting his daughter, finding himself, the Indian Express, (Apr. 11<sup>th</sup>, 2023), <https://indianexpress.com/article/opinion/columns/my-journey-has-made-me-a-better-person-a-better-hindu-a-father-writes-on-accepting-his-daughter-finding-himself-8544734/>.

<sup>3</sup> Satchit Balsari, My same-sex marriage violates no scripture — talk to my mother, the Indian express, (May 5<sup>th</sup>, 2023), <https://indianexpress.com/article/opinion/columns/same-sex-marriage-supreme-court-8591585/>.

<sup>4</sup> Padmakshi Sharma, Supreme Court Transfers To Itself Petitions Pending In High Courts For Recognition Of Same-Sex Marriage, Live law, (Jan. 6<sup>th</sup>, 2023), <https://www.livelaw.in/top-stories/supreme-court-transfers-to-itself-petitions-pending-in-high-courts-for-recognition-of-same-sex-marriage-218248>.

<sup>5</sup> Live law news network, Supreme Court Reserves Judgment On Petitions Seeking Legal Recognition For Same-Sex Marriages, Livelaw, (May 11<sup>th</sup>, 2023), <https://www.livelaw.in/top-stories/supreme-court-same-sex-marriages-reserves-judgment-lgbtq-228501#:~:text=A%20Constitution%20Bench%20of%20the,after%20ten%20days%20of%20hearing>.

<sup>6</sup> Aneasha Mathur, Same-sex marriage case in Supreme Court - Issues and debates, India Today, (May 13<sup>th</sup>, 2023), <https://www.indiatoday.in/law/story/same-sex-marriage-case-supreme-court-issues-and-debates-2378525-2023-05-13>.

<sup>7</sup> for example, <https://www.livelaw.in/tags/marriage-equality-petitions>.

<sup>8</sup> Supra note 6.

<sup>9</sup> Ramachandran: “Art 25, freedom of conscience. I have a right to freedom of my own moral compass.”, Livelaw, (Apr. 20<sup>th</sup>, 2023), <https://www.livelaw.in/buzz/same-sex-marriage-supreme-court-constitution-bench-hearing-cjidy-chandrachud-20615>.

scope of the freedom of conscience and also the limitations on its exercise.

## II. WHAT IS MARRIAGE

Marriage, though a universal phenomenon, is a relative concept having varied connotations and denotations across societies. With regards to the nature of marriage, in some societies, it is pursued as a religious ceremony, E.G., according to dharma Shastra, amongst Hindus, it is one of the 16 Sanskaras which are considered essential to attain Moksha,<sup>10</sup> while in other societies such as the Islam, it is considered as the contract for cohabitation and giving rise to mutual rights and duties.<sup>11</sup> With regards to its duration, Some religions regard marriage as indissoluble, although others do not take a hard line on divorce.<sup>12</sup> In spite of this, there are some universal characteristics of marriage, Namely: an enduring bond between at least 2 individuals called spouses, cohabitation and sexual intercourse, creation of a family, certain conjugal rights and duties, certain limited grounds and ways of its dissolution, etc. It can also be stated that even in communities, where marriage is not strictly a religious ceremony, it is governed as per the DeVine prescriptions of that religion, for instance, the grounds of a valid Muslim marriage, and various conjugal rights flowing therefrom can be sourced in the Koranic Law.<sup>13</sup> Relying upon these universal characteristics, various sociologists have attempted to define marriage in an inclusive manner. For example: Westermarck in 'History of Human marriage' defines marriage as “the more or less durable connection between male and female lasting beyond the mere act of propagation till after the birth of offspring.” According to Malinowski, “Marriage is a contract for the production and maintenance of children.” Robert Lowie describes marriage as “A relatively permanent bond between permissible mates.” For Horton and Hunt, “Marriage is the approved social pattern whereby two or more persons establish a family.<sup>14</sup> The elements of inclusivity and diversity in these definitions make it clear that these features are not cumulative in nature, and marriage in absence of any one or more of these features is still a valid marriage. The concept of marriage is not only relative in terms of place and community, but also in terms of time. The other sociological phenomena like globalisation, urbanisation, and modernisation have brought about various changes in aims and functions of marriages over the period of time.<sup>15</sup>

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<sup>10</sup> Wisdomlive.org, Vivaha, Vivaha: 32 definitions, <https://www.wisdomlib.org/definition/vivaha>.

<sup>11</sup> Kecia Ali, Marriage contract in Islamic jurisprudence, Feminist sexual ethics project, brandeis university, (June 19<sup>th</sup>, 2003), <https://www.brandeis.edu/projects/fse/muslim/marriage.html>.

<sup>12</sup> JONATHAN HERING, Family Law 75 (8<sup>th</sup> ed. 2019).

<sup>13</sup> Malika Kahn, Marriage In Islam: 8 Quranic Verses About Marriage, (Feb. 23<sup>rd</sup>, 2021), <https://www.getquranic.com/marriage-in-islam-8-quranic-verses-about-marriage/>.

<sup>14</sup> Arvind Sirohi, PPT on marriage, Chaudhry Charan sing University, <https://ccsuniversity.ac.in/bridge-library/pdf/Sociology-Arvind-Sirohi-2305-Marriage.pdf>.

<sup>15</sup> Gaganpreet Kaur, & Sukhdev Singh, Changing patterns of marriage in Indian society, Indian Journal of Economics and Development 9(3), at 261, <https://www.researchgate.net/profile/Gaganpreet-Kaur->

Today, marriages are subsisting even without cohabitation, where it is not possible for the parties to live together because of other prospects. Due to increasing tolerance and liberalization, the aim of marriage has not been restricted to provide legality to sexual intercourse. People do not enter into marriage for procreation alone, and other considerations such as companionship and sharing the responsibilities have also been taken into account. Thus, what constitutes marriage, is a question, answer to which differ from community to community, place to place, and from time to time; and it depends upon the contemporary morality prevailing in that particular society.

### **III. RELATIONSHIP BETWEEN MARRIAGE AND LAW**

In connotative sense, law is generally defined as a set of principles, which govern the code of conduct in a particular society. It is the tool, which lays down procedural and substantive aspects of intra-personal and inter-personal relationships, of which marriage is an example.

In Indian jurisprudence, we find inclusive definitions of law in general clauses act 1897, section 2(29) whereof states that ““Indian law” shall mean any Act, Ordinance, Regulation, rule, order, bye-law or other instrument which before the commencement of the Constitution, had the force of law in any Province of India or part thereof, or thereafter has the force of law in any Part A State or Part C State or Part thereof, but does not include any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act;”<sup>16</sup> or in article 13 of the constitution, which states that “law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas”.<sup>17</sup>

With regards to the custom, it may be noted that not all customs, but only those having force of law are included in the definition. Furthermore, as per a Bombay High Court judgement in *State of Bombay v Narasu Appa Mali*, 1951, personal law is a separate class of law, and it is distinct from custom having force of law.<sup>18</sup>

It would not be an exaggeration to state that since the very beginning, each human conduct is

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[4/publication/269746286\\_Changing\\_patterns\\_of\\_marriage\\_in\\_Indian\\_society/links/5e97384492851c2f52a61cbc/Changing-patterns-of-marriage-in-Indian-society](https://www.ijlms.com/publication/269746286_Changing_patterns_of_marriage_in_Indian_society/links/5e97384492851c2f52a61cbc/Changing-patterns-of-marriage-in-Indian-society).

<sup>16</sup> The General Clauses act, 1897, No. 10, acts of parliament, 1897, S 3(29).

<sup>17</sup> INDIA CONST. art. 13, cl. 3.

<sup>18</sup> A.I.R. 1951 Bom. 84.

governed by law, and only the authority which lays down the law changes. The law of nature or the natural law was followed in the earlier periods, which later got replaced by the law made by the society, and ultimately societies getting culminated into state, thereby giving rise to state made law. Since marriage is considered as a social institution, it would not have been governed by the natural law, and only could have found recognition and sanction by the law made by the society. From customs of the ancient times, to the modern day codified state-made laws, marriage has consistently been a subject dealt by them.

In India, until very recently, the marriages amongst all the communities were governed by their religious scriptures. Even after the establishment of the east India Company rule, marriages were explicitly left untouched by the codification exercise carried on by the then government. The regulations of 1773, 1797, or govt of India act, 1833, and even the first law commission in 1836, did not suggest anything contrary to this.<sup>19</sup> However, very soon after India was conferred with the dominion status in 1858,<sup>20</sup> the 3<sup>rd</sup> law commission, which functioned between 1862-1868, recommended the codification of various personal laws, some of which were related to marriage. These laws were, Indian Divorce act 1869, Indian Marriage act 1872, special marriage act 1872, etc.<sup>21</sup> It was just a beginning, and in subsequent years, many other laws related to marriages were codified and enacted by the British government, and by the government of independent India, for example: Parsi Marriage and divorce act 1936, Child Marriage restraint act 1929, dissolution of Muslim Marriages act 1939, special marriage act 1954, Hindu marriage act 1955, prohibition of child marriage act 2006, etc. By analysing these legislations, following 3 propositions can be laid down to summarize the relationship between marriage and law in India:

1. Matrimonial laws are enacted to remove the ambiguity in prevailing customs and to provide for certainty in law: This was the primary reason behind the 3<sup>rd</sup> law commission recommending the codification of marriage laws. Before the codification, there was diversity in the prevailing customs among different sects of the same community, which was difficult for the British courts having English judges to administer marital disputes. Although, they were assisted by religious experts like Pandits or Kazis, it did not prove to be adequate. Thus, after codification, those personal laws achieved certainty, and ultimately the role of religious experts in the adjudication

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<sup>19</sup> Lekshmi Parameswaran, History of personal laws in India, India policy foundation, [https://www.ipf.org.in/encyc/2020/11/13/2\\_02\\_27\\_53\\_History-of-Personal-Laws-in-India-Papers\\_1.pdf](https://www.ipf.org.in/encyc/2020/11/13/2_02_27_53_History-of-Personal-Laws-in-India-Papers_1.pdf).

<sup>20</sup> Queen's proclamation 1858.

<sup>21</sup> Supra note 19 at p 6.

stage was diluted.<sup>22</sup> Examples of such matrimonial laws include: the Indian Marriage act 1872, Parsi Marriage and divorce act 1936, Hindu Marriage act 1955, etc.

**2. Matrimonial laws are enacted to provide for social reform:** As the substantive aspects of marriage are very closely linked with the contemporary morality in the society, whenever, the morality shifts faster than the custom could, the conflict between the two arises. In modern time, the speed of the change in social moralities can be said to be the fastest, with which the customs related to marriage could not cope up, and ultimately became outdated. Many of these prevalent customs started being considered as social evils, and the state conferred itself with the duty to reform the society by eradicating them. Examples of these social evils include the practice of child marriage, polygamy, dowry, prohibition on inter-cast or inter-religious marriages, prohibition of widow remarriage amongst Hindus, etc. To retaliate this, the state enacted laws like, the Widow remarriage act 1856,<sup>23</sup> special marriage acts of 1872<sup>24</sup> and 1954<sup>25</sup>, child marriage restraint acts of 1929<sup>26</sup> and 1978, prohibition of child marriage act 2006<sup>27</sup>, etc. Even the Hindu marriage act 1955, apart from codifying Hindu personal law of marriage, provides for reform within it by introducing compulsory monogamy amongst Hindus<sup>28</sup>, who before 1955 were allowed to marry unrestricted times.

**3. Laws are enacted to protect the sanctity of marriage as social institution:** examples of this would include the chapter 20 of the Indian penal code 1860 which deals with various offenses against marriage, for example, bigamy, adultery, enticing away another's wife, etc.<sup>29</sup>

Apart from these, various other legislations have been enacted in India to deal with various incidental matters, which arise out of a lawful marriage due to increasing complexities in human relationships, e.g., the married women's property act, or provisions of laws like maintenance, custody of children, etc. despite this, many of the lacunas in the matrimonial laws still remain, which leads to various petitions to the supreme court claiming the recognition and enforcement of the unprotected matrimonial rights. There is a constitutional direction to the state to formulate a uniform civil code,<sup>30</sup> however, despite frequent reminders from the judiciary, it has remained a dead letter<sup>31</sup>.

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<sup>22</sup> Ibid.

<sup>23</sup> The Hindu Widows Remarriage Act, 1856, No. 15 of 1856.

<sup>24</sup> No. 3 of 1872.

<sup>25</sup> No. 43 of 1954.

<sup>26</sup> No. 19 of 1929.

<sup>27</sup> No. 6 of 2007.

<sup>28</sup> No. 27 of 1955, Ss 5, 17.

<sup>29</sup> The Indian Penal Code, 1860, No. 45 of 1860, Ss 493-498.

<sup>30</sup> INDIA CONST. art. 44.

<sup>31</sup> Smt. Sarla Mudgal v Union Of India & Ors 1995, A.I.R. 1995 S.C. 1531.

#### **IV. THE RIGHT TO MARRY, LEGAL, CONVENTIONAL AND CONSTITUTIONAL**

Apart from being universal, marriage is also considered as an integral part of one's life. Thus, the practice of marrying has achieved the status of a right and duty of an individual. This right has been protected under the jurisprudence either as a civil right or a religious right. Though, during the regime of the laws governed by the society, there were few adequate means to enforce this right, with the passage of time, the right to marry has become a part of the state-made laws and also the international law, thus has become capable of recognition, regulation and enforcement.

In the international regime, the right to marry has been recognised in the universal declaration of human rights, article 16 whereof states as “(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”<sup>32</sup> Similar right has been incorporated in the article 12 of the ECHR.<sup>33</sup> The international covenant on civil and political rights, through article 12 provides for an obligations on the state to recognise the right to marry of men and women.<sup>34</sup>

India is a party to both these significant international instruments I.E., the UDHR and the ICCPR, thus these rights can be enforced in India. However, unsurprisingly, the Indian legislature has not taken any steps to statutorily recognize this right, and only through the judicial interpretations, it has been read into the article 21 of the constitution. In a series of judgements, starting from the case of Lata Singh in 2006,<sup>35</sup> and followed by the judgments in the cases of Shakti Vahini<sup>36</sup> and Shafin Jahan<sup>37</sup> in 2018, the supreme court has recognised that the right to marry the person of one's own choice is an essential part of the right to life and personal liberty protected under article 21 of the constitution.<sup>38</sup> Apart from being an issue of personal liberty, the right to marry is also associated with the right to equality under article 14,<sup>39</sup> as everyone shall be equally entitled to this freedom of choice namely the choice of whom to marry or whether or not to marry. Similarly, this choice in marriage can also be equated with

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<sup>32</sup> Universal declaration of human rights, art 16 (1), Dec. 8, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

<sup>33</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, art 12, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221.

<sup>34</sup> International Covenant on Civil and Political Rights, art 23, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967).

<sup>35</sup> Lata Sing v State of U.P. & Anr, WP Criminal no. 208 of 2004.

<sup>36</sup> Shakti Vahini v Union of India, WP civil no. 231 of 2010.

<sup>37</sup> Shafin Jahan v Asokan K.M. & Ors, Criminal appeal no. 366 of 2018.

<sup>38</sup> INDIA CONST. Art. 21.

<sup>39</sup> INDIA CONST. Art. 14.

the freedom of association under article 19 (1) c.<sup>40</sup> However, the entire scheme of part 3 of the constitution suggests that no fundamental right is absolute and the state can curtail or even deprive an individual of these rights by constitutionally permissible means. If one goes by the precedent established by the supreme court in the case of *Maneka Gandhi v Union of India* 1978,<sup>41</sup> the rights under articles 14, 19, and 21 shall be read mutually inclusive of each other, and thus, the restrictions of article 19 and the test of reasonableness under the article 14 and 19 shall apply to the right to marry. As a result, the laws which prohibit the children from exercising this freedom would still be constitutional for it makes the reasonable classification as permitted under article 14,<sup>42</sup> and the laws prohibiting the Hindus from exercising this freedom of choice during the subsistence of their previous marriage would be upheld as constitutional on the ground of morality under article 19(4)<sup>43</sup>

## **V. THE RIGHT TO MARRY AND THE FREEDOM OF CONSCIENCE**

Apart from the aforementioned rights, the right to marry to the person of one's own choice can also be interpreted into the freedom of conscience provided under article 25 of the constitution. Article 25 (1) provides that "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion".<sup>44</sup> The construction of this sub-article suggests that it can be divided into 3 parts, namely, the first part laying down the restrictions on the right, the second part providing all persons equal entitlement to freedom of conscience, and the third part granting the freedom to practice, profess and propagate religion. In various interpretations, with a view to equate the freedoms granted by the second and third part, the word "conscience" has been interpreted to be a facet of the larger concept called religion. However, in my opinion, the repetition of the word freedom in the same sub-article, I.E., "freedom of conscience" and "freely to profess", and clubbing them with the word "and", is sufficient to interpret that the constitution makers intended both these freedoms to be distinct from each other, and to grant both to all persons. In support of this contention of mine, attention may be paid to the proceedings of the constituent assembly on the 3<sup>rd</sup> December 1948, when inter alia it was deliberating upon various amendments to the article 19 of the draft constitution, which would later become the article 25 of the final constitution. One such amendment was moved by honourable Mr. Naziruddin Ahmad, who proposed "That in clause (1) of article 19,

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<sup>40</sup> INDIA CONST. art. 19, cl. 1©.

<sup>41</sup> *Maneka Gandhi v Union of India*, A.I.R. 1978 S.C. 597.

<sup>42</sup> *R.K. Dalmia v Justice S.R. Tendulkar*, A.I.R. 1958 S.C. 538.

<sup>43</sup> INDIA CONST. art. 19, cl. 4

<sup>44</sup> INDIA CONST. art. 25, cl. 1.

for the words 'are equally entitled to freedom of conscience and the right', the words 'shall have the right' be substituted."<sup>45</sup> Considering the present form of the article 25, it is obvious that the amendment was not accepted by the constituent assembly. However, for the sake of examination of the intent of the assembly, let us presume the contrary. After the amendment of the honourable member is applied to the original article, the present article 25 sub-article 1 would read as: "Subject to public order, health and morality and to other provisions of this part, all persons 'shall have the right' to freely practice, profess and propagate religion." Thus, by accepting this amendment, the assembly would have deleted the entire group of words and phrases, upon which I have relied to put forth my contention, and needless to mention, there would not have been any freedom of conscience available to persons in India as distinct from the freedom of religion. To understand the anomaly, which would have been created by the assembly by accepting this amendment, we can rely on a speech delivered on the same day in the constituent assembly, by honourable member Mr. Ghanshyam S. Gupta, relevant portion of which reads as :

"Article 19. Sir, is very comprehensive. It says: 'All persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.' Now, as to freedom of conscience: It means that a man is free either to have a religion or no religion...."<sup>46</sup> Thus, had freedom of conscience not been there, no person would have been able to renounce his religion, either to acquire a new one or to become an atheist. Because the freedom to practice, profess or propagate religion does not specify "which religion", I.E., "religion of one's own choice", or "the religion ascribed to one by birth".

Furthermore, the conscience of a person may be the result of his religious believes, or sometimes out of his reading on the subjects of sociology, or history.<sup>47</sup> Thus the freedom of conscience is much wider than the freedom of religion.

With regards to the restrictions set out in the first part, that is "public order, health, morality and other provisions of this part" I.E., part 3, they shall apply to both these freedoms.

The freedoms provided under Indian constitution closely resemble with the freedom granted by other democratic and secular constitution, such as the amendment 1 of the US constitution,<sup>48</sup> section 15 of the South African constitution,<sup>49</sup> section 2 of the Canadian charter of rights and

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<sup>45</sup> Constituent assembly debates, December 3 1948, <https://www.constitutionofindia.net/debates/03-dec-1948/>.

<sup>46</sup> Ibid.

<sup>47</sup> *Welsh v. United States*, 398 U.S. 333, 341 (1970).

<sup>48</sup> U.S. CONST. amend. I.

<sup>49</sup> SOUTH AFRICA CONST. 1996, s. 15.

freedom,<sup>50</sup> and by various multinational treaties and agreements, such as the European convention<sup>51</sup>, the American convention of human rights,<sup>52</sup> the African charter on human and people's rights,<sup>53</sup> or even the International covenant on civil and political rights.<sup>54</sup> These instruments too have subjected it to restrictions like public order, morality, health, or other grounds under national laws.<sup>55</sup>

As far as the marriage, and in particular, the right to choose a partner in marriage is concerned, the fundamental right under article 25 applies in following 2 ways.

**1. Right to choose the partner in marriage itself can be claimed as the essential to the religion practiced by the person exercising it:** In religions, where marrying is considered as one of the essential religious practice, and is considered as one of the paramount ways to attain the ultimate salvation, the person practicing and professing such faith can claim right to marry as the exercise of freedom of religion under article 25. Now as per established jurisprudence regarding when a practice can be held to be essential to any religion, among various factors, is the availability of an authoritative text of that religion prescribing such practice.<sup>56</sup> Thus, by furnishing the authoritative text of one's own religion, which prescribes the autonomy of an individual with regards to spouse selection, one can claim such autonomy as an exercise of one's freedom of religion under article 25. This exercise can only be curtailed on the constitutionally permissible grounds such as public order, health, morality, and inconsistency with other fundamental rights. Suppose, if a particular sect of Hindu religion proves that the practice of Swayam-Var, which is equivalent to the freedom to choose one's own Var or bridegroom, is an essential practice in the marriages performed therein, and furnishes any authoritative text in that regard, such practice can be claimed as the exercise of the fundamental right available under article 25,

**2. Right to choose partner in marriage even if in defiance of one's own religion, amounts to freedom of conscience:** If a religion considers marriage to be one of its essential practice, and lays down certain rules for a valid marriage under that religion, some of those rules may be related to matters like, whether one has a right to choose ones future spouse, or who cannot be

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<sup>50</sup> Canadian Charter of Rights and Freedoms, s 2, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

<sup>51</sup> Supra note 33, art. 9.

<sup>52</sup> American Convention on Human Rights "Pact of San Jose, Costa Rica", Nov. 22, 1969 S. 12, Treaty Doc. No. 95-21; 1144 U.N.T.S.123; O.A.S.T.S. No. 36; 9 I.L.M. 99 (1970).

<sup>53</sup> African Charter on Human and Peoples' Rights, article 8, June 27, 1981, 1520 U.N.T.S. 217; 21 I.L.M. 58 (1982).

<sup>54</sup> Supra note 343, art. 18.

<sup>55</sup> Kirsten Lavery & Elizabeth Cassidy, Limitations on the Freedom of Religion or Belief, June 2020, [https://www.uscirf.gov/sites/default/files/2020%20Legislation%20Factsheet%20-%20Limitations%20on%20FoRB\\_0.pdf](https://www.uscirf.gov/sites/default/files/2020%20Legislation%20Factsheet%20-%20Limitations%20on%20FoRB_0.pdf).

<sup>56</sup> Sardar Sarup Singh & Ors v The State Of Punjab & Ors, A.I.R. 1959 S.C. 860.

chosen as a spouse, etc., the person claiming any right contrary to those rules is said to act in defiance of that religion, but he can still claim this action as an exercise of his freedom of conscience. For example: almost all the major religions in India, do not confer upon its followers, the right to choose the person of same sex as their spouse, in fact the states opposing the legalization of same sex marriages have relied on this fact.<sup>57</sup> Now if any person, exercising any of these religions claims this right, he is certainly defying his religious teachings and prescriptions, but if it is something in accordance with his conscience, he is well within his rights to claim it as a fundamental right available under article 25, as already discussed, freedom of conscience would include the freedom to believe or not to believe in any religion.<sup>58</sup> Needless to mention, the exercise of this right would also be subjected to only the constitutionally permissible restrictions given in article 25.

When it comes to the exercise of this right i.e., the right to choose one's own spouse, in the first way, no person or group, as a matter of their own right to religious freedom, can deny the same to any person. However, in case of the exercise in the second way, if the exercise of the freedom of one's conscience is in defiance of the religion professed by that person, other members of that religion, as a matter of their right, can deny this exercise, as article 26 of the constitution entitles every religious denomination and every section thereof, the right to manage their own religious affairs.<sup>59</sup> For example: If a same sex couple, who professes Hindu religion, wants to get their marriage solemnized as per Hindu customs, they are well within their rights to claim it as their conscience, however, at the same time, the priest, who denies that couple this right by refusing to solemnize the marriage on the grounds of his Hindu beliefs is also protected under the constitution, thus, it creates a situation of conflicts of rights of 2 classes of people. In my opinion, there can be 2 alternative solutions to this constitutional problem.

1. that the person, whose exercise of his freedom of conscience is in defiance of his religion, can be asked to renounce his religion completely. In near past, in India a similar scheme was adopted by the legislature by enacting the special marriage act 1872. As per this act, the state provided recognition to various marriages, which in the context of spouse selection, were in defiance of religious prescriptions, E.G., the cast exogamy, or gotra endogamy amongst Hindus, or interreligious marriages, etc.<sup>60</sup> However, at the same time, the act

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<sup>57</sup> Prisha, Rajasthan stands against same-sex marriage, 6 states demand time to examine matter, Wionews, (May 10<sup>th</sup>, 2023), <https://www.wionews.com/india-news/india-rajasthan-stands-against-same-sex-marriage-6-states-demand-time-to-examine-591094>.

<sup>58</sup> Supra note 45.

<sup>59</sup> INDIA CONST. art. 26.

<sup>60</sup> Supra note 24 s. 2

required the person exercising his right to marry thereunder to renounce his religion.<sup>61</sup> Though at the time of this enactment, there was no constitution conferring the fundamental right to freedom of religion, in the context of today's constitution, such an act could have stood the test of constitutionality on multiple grounds. The conflict between the conscience of few individuals and the religious freedom of the community as a whole can be considered as the public order issue,<sup>62</sup> or even the exercise of the right under article 25 (1) can be curtailed on the ground of its inconsistency with any other provision of part 3, in this case the rights of the community under article 26. Incidentally, the question never appeared for its judicial review, and by the special marriage act of 1954, the scheme became a part of the past.<sup>63</sup>

2. alternatively, the harmonizing principle can be applied, and if it appears that the preference to the right of one class is resulting into violation of more than one fundamental right of the other class, the view leading to the violation of fewer fundamental rights should be adopted.<sup>64</sup>

Let us take the example of the clash of rights between the Hindu same sex couple desiring to get their marriage solemnized as per Hindu customs and rites, and the Hindu priest refusing to do so. If we give preference to the right of the Priest, it would lead to violation of the following fundamental rights of the couple, along with the freedom of conscience:

- a. Right to equality: Since the priest is not refusing to solemnize marriages of all Hindus, but only a specific class among Hindus, it amounts to unequal treatment of equals, therefore the violation of the right to equality under article 14. <sup>65</sup> It can be argued that article 14 only casts a duty upon the "state" and not an individual to not to deny equality to anyone, and the priest, not being the state, his actions cannot constitute violation thereof. However, it is submitted that by giving recognition and preference to the actions of the priest under its law, the state would be denying the couple the equal protection of the law, thereby leading to the breach of its constitutional mandate; because then, it would be the state-made law making that unreasonable classification and not the priest in his individual capacity.

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<sup>61</sup> Ibid. 1<sup>st</sup> & 2<sup>nd</sup> Proviso.

<sup>62</sup> *Kamlalar Shankar Patil v B. Akashi* 1994 Cr. LJ 1870.

<sup>63</sup> *Supra* note 25.

<sup>64</sup> Ashutosh Singh, All about the doctrine of Harmonious Construction, <https://blog.ipleaders.in/all-about-the-doctrine-of-harmonious-construction/>

<sup>65</sup> Tanushree, 'Equality' A Definite Concept And A Vested Right ; Article 14 Is Violated When 'Equals Are Treated Unequally' : Supreme Court, Asia law offices, <https://www.asialawoffices.com/7708-/equality-a-definite-concept-and-a-vested-right-article-14-is-violated-when-equals-are-treated-unequally-supreme-court/>

- b. Right against discrimination: Article 15 (1) provides that “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them”.<sup>66</sup> If the state, through its laws, authorises the priest to refuse the right of a person to get his marriage with the same sex person solemnized, it would be enabling the discrimination only on the ground of sex to take place. Although, prima facie, the discrimination appears to be on the grounds of sexual orientation, which is not one of the grounds mentioned in article 15, a careful analysis of the situation unfolds the actual reality. In a suit under the title 7 of the civil rights act 1961 in the United States of America, while admitting the petitioner’s claim about discrimination on the ground of sex, the US Supreme court, relying on the verdict of Equal Employment Opportunity commission in the case of *Baldwin v. Foxx*, held that the discrimination on the grounds of sexual orientation amounts to sex discrimination.<sup>67</sup> The EEOC had given an example of a woman, who was punished for having the photograph of her female spouse on her desk, however a man would not have been punished if he had kept the photograph of his female spouse on his desk; thus, the woman was punished on the grounds of her sex. It also considered instances of dating to a same sex partner, that if a man is dating a female partner he would not be punished but if a woman is doing so, she would be punished.<sup>68</sup> This phenomenal observation of the EEOC was quoted with the affirmation in the case of *Navtej Singh Johar v UOI*, wherein the Supreme court of India decriminalised consensual sexual intercourse between same sex partners.<sup>69</sup> If we extend the same example to the solemnization of marriage, if the priest refuses to solemnize the marriage of a female with her female spouse; and does not refuse to solemnize the marriage of a male with his female spouse; we can call it the discrimination on the ground of sex alone. Going one step further, I submit that the argument of sexual orientation being a ground of discrimination is wholly irrelevant in this example. Because, if the priest is refusing to solemnise the marriage of a female with her female spouse, the sexual orientation of either of the spouse is not at all taken into consideration by the priest, as the priest would equally refuse to solemnize the marriage of a lesbian female with her bisexual female spouse, or for that matter even the marriage between two straight (having conventional sexual orientation) females.

Thus, by giving preference to the rights of the priest over the couple’s rights, we would be violating 2 fundamental rights of the couple; on the contrary, if we prefer the couple’s right over

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<sup>66</sup> INDIA CONST. art. 15.

<sup>67</sup> *Kimberly Hively v. Ivy Tech Community College of Indiana*, U.S. 830 F.3d 698 (7th Cir. 2016).

<sup>68</sup> *Baldwin v Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at \*5, \*10 (July 16, 2015).

<sup>69</sup> WP CRL 76/2016.

the priest, only one fundamental right of the priest would be violated, namely the fundamental right to freedom of religion, which itself is subjected to all other fundamental rights, and thus it can be differed in favour of other fundamental rights. However, this particular solution of preferring the right leading to violation of fewer fundamental rights is only applicable when there is a conflict between the freedom of conscience and the freedom of religion as these are equally placed rights under the constitution. As per supreme court in Sahara India Real Estate Corporation Ltd. V SEBI, any balancing exercise between clashing rights is based on the premise of equality of those rights.<sup>70</sup> Thus, in case of the clash between the freedom of conscience under article 25 and fundamental rights provided by any other article of part 3, by virtue of the restrictions set out in article 25, freedom of conscience would have to succumb, as the constitution places the freedom under article 25 inferior to other fundamental rights, making them unequal.<sup>71</sup>

In addition to the aforementioned conflict of rights, the freedom of conscience related to the autonomy in spouse selection can also be restricted on the constitutional grounds like health, public order and morality. The example of such a restriction is the provision of prohibited degrees in all the marital statutes. These statutes prohibit marriages between certain relatives, based upon consanguineal or affinal kinships.<sup>72</sup> The prohibited relationship between parties is also a ground for nullity of marriage in some statutes.<sup>73</sup> Apart from the statutory prescriptions, various customary laws such as Islam also categorically restrict incestuous wedlock.<sup>74</sup> Though, these provisions are a direct curtailment of the right to choose the person of one's own choice as a spouse, as they disallow an individual to marry certain relatives of hers, such a curtailment is justified on grounds such as health and morality.<sup>75</sup>

Now if we examine the freedom to choose a same sex spouse as an exercise of freedom of conscience under article 25, we would have to analyse whether the same can be restricted on any of these grounds, namely, public order, health, or morality. As far as morality is concern, it is considered as one of the most abstract legal restrictions on rights. Due to lack of a precise definition, morality is one of the most subjective ideas. Morality is the general perception of

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<sup>70</sup> Civil Appeal no. 813 of 2011.

<sup>71</sup> Gautam Bhatia, Proportionality Under Article 25, Freedom of religion Indian constitutional law and philosophy, (Nov. 27<sup>th</sup>, 2022), <https://indconlawphil.wordpress.com/tag/freedom-of-religion-2/>.

<sup>72</sup> Special marriage act, 1954, S 4 schedule 1 /

Hindu Marriage act, 1955, S 5.

<sup>73</sup> Divorce act 1869, S 19.

<sup>74</sup> The holy Koran, chapter 4 "Un-Nisa Qs 22-23.

<sup>75</sup> Ramasheshan P K, Incestuous relationship: A need for regulation or prohibition, prime Legal, <https://primelegal.in/2022/12/03/incestuous-relationship-a-need-for-regulation-or-prohibition/#:~:text=The%20main%20reason%20behind%20making,such%20intercourse%20was%20morally%20prohibited.>

good and evil in a society, and preferring good over evil is the universal idea of morality, though the connotations and denotations of what is good and what is evil may differ. In a society, the definitions of good and evil depend on various sources, such as religious teachings, views of elderly people, and knowledge acquired or imported through other societies. These sources, more often than not, tend to overlap, as the views of elderly people are in turn influenced by the religious teachings.

Now considering the idea of selecting a person of same sex as spouse, I could not find any material suggesting a direct prohibition on same sex marriages. However, an indirect impermissibility can be inferred on the basis of facts like the prescription of only heterosexual marriages by most of the religions, the paucity of example of a same sex marriage in religious scriptures or tales, and more importantly, frequent discouragement to homosexual intercourse on religious grounds.<sup>76</sup> Most of the religious texts in India frown upon homosexuality. The texts like Manu Smriti and Narada Purana even go on to prescribe penal action against person engaging in homosexuality.<sup>77</sup> In modern era, section 377 of the Indian penal code punished homosexuality until 2018.<sup>78</sup> many matrimonial laws provide homosexuality or sodomy by the husband as a ground for divorce,<sup>79</sup> thus furthering the morality against homosexuality. At the outset, I would like to state, that inferring a moral prohibition on same sex marriages on the grounds of mere discouragement to or even prohibition of homosexual intercourse proceeds on the assumption that in every marriage, there must be sexual intercourse. Therefore, this inference would be logically fallacious as it excludes the evidence of marriages, where partners may come together for companionship or other benefits, and may be completely impotent or asexual.<sup>80</sup> In other words, since the premise that marriage is always for sexual intercourse is false, the conclusion inferred thereupon would also be false. The paucity of examples of same sex unions in the past further disables us to proceed with any inference on the views of those scriptures on these marriages. With regards to the fact that only heterosexual marriages are prescribed by most of the religions, it is no ground to infer anything about the morality of homosexual marriages, as mere under inclusion does not necessarily imply prohibition. Furthermore, even though the words like bride and bridegroom, or husband and wife denote specific gender identities, such a perception has been created only because of the long duration

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<sup>76</sup> Baker, Brittney (2014) "Same-Sex Marriage and Religion: An Inappropriate Relationship," e-Research, Vol. 1 No. 3, Article 7, <http://digitalcommons.chapman.edu/e-Research/vol1/iss3/7>.

<sup>77</sup> Prabhash K Dutta, Homosexuality in ancient India: 10 instances, India Today web desk, (July 10<sup>th</sup>, 2018), <https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10>, last visited: June 1<sup>st</sup> 2023.

<sup>78</sup> The Indian Penal Code 1860, No. 45 of 1860, s. 377.

<sup>79</sup> Hindu Marriage Act 1955, S 13(2). Special Marriage Act 1954, S 27(1A). Divorce act 1869, S10(2).

<sup>80</sup> Supra note 76.

of their usage in that particular sense. Going one step further, even though the words like man and woman are strictly used to convey the expressions male and female, such an interpretation may become outdated in light of the increasing dynamics of gender identities, for instance, if two females wish to marry each other, one of whom is a trans gender and identifies herself as man, the marriage can still be held to be between a man and a woman, and it is doubtful whether the texts prescribing a marriage strictly between a man and a woman would hold it to be valid or not.

Thus, we do not find sufficient material to hold same sex marriages contrary to religious morality. However, even if we had sufficient material in religious texts proving the immorality of same sex marriages, we are yet faced with one more constitutional problem. I have already established that the freedom of conscience, which is provided in the first part of article 25 provides an individual the choice to follow as well as deviate from any religion, or to adopt a new religion. But since this very freedom of conscience can be restricted on the grounds of morality, if we define the morality in terms of religious teachings of the majority, the exercise of this freedom of conscience would become impossible as every deviation from these religious teachings would be hit by morality and thus restricted. To solve this problem, we can rely on the concept of constitutional morality, which is based on all the ideals mentioned in the preamble to the constitution and also in common law principles of human rights and justice. Liberty, equality, non-discrimination, individual dignity and fraternity of persons are at the forefront of it.<sup>81</sup> Many antique practices, perceptions and prescriptions, which had become a part of general morality, have been read down by the supreme court and high courts as unconstitutional solely because they did not comply with constitutional morality. The most relevant example of it is the decriminalisation of consensual homosexuality by the supreme court in the case of *Navtej*.<sup>82</sup> Proceeding on this line of argument, the same sex marriage instead of being contrary to morality, is itself a part of constitutional morality as it would involve protection of freedom of conscience, equality, and dignity.

Public order is yet another ground to restrict the freedom of conscience, which warrants for a precise definition. In strict sense, public order is defined as absence of public disorder.<sup>83</sup> In India, the government has invoked this ground to restrict various religious practices which are *prima facie* injurious to environment, social and public peace, communal harmony, etc.

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<sup>81</sup> Pratap Bhanu Mehta, What is constitutional morality, [https://www.india-seminar.com/2010/615/615\\_pratap\\_bhanu\\_mehta.htm](https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm).

<sup>82</sup> *Supra* note 69.

<sup>83</sup> *Supra* note 55.

With regards to health, I could not find precedent in Indian jurisprudence about any religious practice being restricted on this ground. Therefore, I am unable to contemplate the exact meaning of health and the grounds to consider while restricting any practice on health grounds.

The noteworthy fact about the Indian jurisprudence on article 25 and the freedoms flowing therefrom is that the judiciary has evolved the essential to religion practice test, where the court instead of going into the validity of the grounds of restriction by the state, first examines whether the restricted practice forms an essential practice of that religion whose followers have approached the court. Only if the answer is in the affirmative, the restriction has to be on any one or more grounds given in article 25 and otherwise the state can unrestrictedly restrict the practice which is not established as essential to that religion.<sup>84</sup> In most of these cases, the court has reached a negative conclusion on the question of the essentiality of the practice, thus excusing itself from the task of deciding the validity of the restrictions as per the standards laid down under article 25. Therefore, the analysis of these grounds may appear inadequate in this paper.

## **VI. SIGNIFICANCE OF LOCATING THE RIGHT TO MARRY THE PERSON OF ONE'S OWN CHOICE IN THE FREEDOM OF CONSCIENCE INSTEAD OF ANY OTHER FUNDAMENTAL RIGHT, AN ANALYSIS FROM THE PERSPECTIVE OF SAME SEX MARRIAGES**

The analysis in this part is not concentrated to establish that the freedom of conscience is the most valuable freedom available under the Indian constitution in every case, rather the focus is on the special relevance of this freedom of conscience in claiming the right to choose the person of same sex as a spouse. In my view, there are mainly 2 reasons which justify the invocation of freedom of conscience in advocating for same sex marriages.

First: the reasons cited to oppose the same sex marriages are often sourced in religious and moral teachings. If we exclude religious objections to same sex marriage, hardly anything remains.<sup>85</sup> In light of this fact, presenting the case for same sex marriage on the very grounds of the freedom of conscience would make an exact counter argument, which would also be a constitutional challenge to the misconceived notion of preferring the ideals of majority religions as morality to restrict the same freedom of the others or minorities.

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<sup>84</sup> The Commissioner Hindu Religious Endowment Madras v. Shri Laxmidhar Tirtha Swamiyar of Shirur Mutt, A.I.R. 1954 S.C. 282.

<sup>85</sup> Miles Kimball, The case for gay marriage is made in the freedom of religion, (Jan. 11<sup>th</sup> 2014), <https://qz.com/165430/the-case-for-gay-marriage-is-made-in-religious-freedom>.

Second: the freedom of conscience, unless its exercise is contrary to some other fundamental rights, is subject to very few and purely scientific restrictions such as public order, health, etc. and thus, if it is claimed to justify same sex marriage, the state will have to present sufficient scientific material in order to restrict it by a law. This places the case of same sex marriage at a higher pedestal, because the restriction on the ability of the state to restrict this right is not so grave in other provisions. For example, if mere equality under article 14 or 15 is claimed to justify same sex marriages, I can point out 2 weaknesses in the case. Firstly, that the article 14 is subject to reasonable classification, where any intelligible differentia can be made to meet any legitimate aims of the state.<sup>86</sup> Though public order or health or morality may also be one of these legitimate aims, but there can be many more. And secondly, the entire ground of equality is based on the premise that the right to choose a spouse is available to other class of persons under article 21, and the equality would be to be entitled to the same right, therefore, the right to enter into a same sex marriage no longer remains on the special pedestal, and in the extreme circumstances, may even lose its existence if the judgements holding such a right under article 21 are overruled by a larger bench on any constitutional ground.<sup>87</sup> Lastly, even if you claim the right separately under article 21 independent of its availability to other class of persons, such a right is not so difficult for the state to restrict by a constitutionally valid law, as there are no limitations as to the grounds on which the right to life and personal liberty can be restricted or even deprived by a procedure established by law, provided that such a procedure is fair, just and nonarbitrary.<sup>88</sup>

## VII. CONCLUSION

In light of the above analysis, the following propositions can be stated in conclusion:

- i. Marriage is a universal phenomenon which has varying manifestations across societies and generations with one constant factor that its origin can be traced in religions.
- ii. the evolution of this social institution has helped the right to autonomy in spouse selection the social, legal and most importantly constitutional recognition.
- iii. This autonomy has kept evolving gradually, and in recent times, the autonomy is being claimed for choosing same sex person as spouse. Various constitutional ideals such as liberty, equality and dignity are at the forefront of this claim, and equally important is the aspect of freedom of conscience in this regard.

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<sup>86</sup> Supra note 42.

<sup>87</sup> *Keshav Mills Co. Ltd. v The Commissioner of I.T.*, A.I.R. 1965 S.C. 1636.

<sup>88</sup> Supra note 41.

- iv. The freedom of conscience available under article 25 of the Indian constitution provides all persons the autonomy to follow or deviate from their religion and also to adopt a different religion or to create their own.
- v. Since non-prescription of same sex marriage is itself a religious belief, deviating therefrom by performing same sex marriage would equally be protected under freedom of conscience.
- vi. In a constitutional and secular democracy, ideals of a particular religion or religions cannot be construed as general morality to restrict freedom of conscience of others I.E., nonbelievers of those religions. The only morality which can restrict any fundamental right is the constitutional morality.
- vii. By locating the autonomy to select the same sex spouse in the freedom of conscience, the claim receives a twofold strength. On one hand it helps to constitutionally counter the religious objections to same sex marriage, and on the other hand, it protects the same sex marriage from unrestricted possibilities of restrictions, as the freedom of conscience, unless it conflicts with any other fundamental right, can be restricted on very few grounds such as public order, health, morality, which are difficult to prove.

Thus, the element of the freedom of conscience is very significant for the realisation of the goals, which the members of society have chosen to strengthen the constitutional ethos and thereby to promote a cordial relationship between social institutions and the democratic ideals.

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