

## RIGHT TO LOVE – AN IDEA GATHERING DUST ?

\*HUZAN BHUMGARA

### Abstract

*The article examines the rights of members of the homosexual community to marry, live-in and adopt two years after the Navtej Johar judgment. The Supreme Court in four distinct but concurrent judgements authoritatively held that same-sex couples were entitled to all the rights under Part III of the Constitution of India. We analyse how the judgement in Navtej Johar did not only legalize sexual relations but also accorded the full ambit of Fundamental Rights to LGBTQ people. Despite this a number of rights to marriage and family life have not been recognised and there continues discrimination based solely on sexual orientation. We also seek to analyse the implications of the same on our Constitutional and social jurisprudence.*

### Introduction

In 2018 India became the 120<sup>th</sup> country in the world to legalise same-sex relations. The five - judge Bench of the Supreme Court in Navtej Singh Johar vs. Union of India stated that history owed an apology to the LGBTQ community owing to their ignominy and ostracism by the society at large. Two years since, it is important to analyse the degree of inclusivity accorded to LGBTQ persons by the State and its implications on our Constitution and jurisprudence.

### Navtej Singh Johar vs. Union of India

The judgement of the Supreme Court in the case of Navtej Johar was landmark in a number of ways. The most significant of which was the striking down of Section 377 of the Indian Penal Code thus decriminalising homosexuality. It is interesting to note that while the premise of the petition was not well-defined, the judgement of the Court was far reaching in its scope. Each of the four opinions discussed the concept of same sex relations and their place in Part III of the Constitution. Justice Malhotra in her concurring opinion has stated that

innate and intrinsic traits of people cannot be viewed as reasonable grounds for discrimination under Article 14. Justice Malhotra and Chandrachud both extended the interpretation of the word 'sex' in Article 15 (1) to include sexual orientation, autonomy and expression. Chief Justice Dipak Misra (speaking for himself and Justice Khanwilkar) centered his judgement around the right to choice of all citizens and how the same is necessary for the operation of not just people of the LGBTQ community but the Constitution at large. All four judgements stressed on the principle that any form of discrimination against the LGBTQ community was incompatible with the fundamental right of dignity.

## **Protection of Live-in Relationships**

It is heartening to note that most Courts have taken note of the Navtej Singh Johar judgement and have ensured police protection for same-sex couples who chose to reside together. Justice Monga of the Punjab High Court noted that social ethos and philosophy amongst same sex couples has evolved so as to facilitate them to live with the partner of their choice and that the State is entitled to protect such arrangements under Article 21 of the Constitution of India. The Orissa High Court went onto hold that the full range of fundamental and human rights are to apply to any couple belonging to the LGBTQ community. The Courts in India<sup>1</sup> have shown sympathy and understanding for the apprehensions of the families of the couple, but have gone onto hold that the right to self-determination and sexual autonomy is supreme.

## **Right to Love and Marriage**

However this humanistic approach is not uniformly extended. While being pro-active in securing the basic right to protection, the executive and judiciary have neglected to ensure that same sex couples get the same rights that heterosexual couples do. Despite a number of judgements of the Apex Court that hold that love and intimacy are fundamental rights, there have been no statutory amendments to enable same-sex marriages to be performed in India. In the 2014 case of Re: Gang Rape ordered by Village Elders, the Supreme Court

---

\*ILS LAW COLLEGE

<sup>1</sup> This would include the High Court of Delhi, Kerala, Gujarat and Uttarakhand in addition to the High Courts of Punjab and Haryana and Orissa.

acknowledged that marriage was a Fundamental Right and went onto impose a positive obligation upon the State to protect it.

Following the decriminalisation of homosexuality, a number of same-sex couples chose to get married. However these marriages have been regarded as purely ceremonial and the spouses could not claim any legal benefits from one another. In early 2020, a gay couple from Kerala filed a petition challenging the constitutionality of S.4 and Schedules I and II of the Special Marriage Act on the grounds that it only allowed marriages between a man and woman. The petition highlights a conflicting development of Indian jurisprudence wherein the right of marriage is accepted and celebrated on one hand and yet a section of citizens have to specifically pray for its enforcement. While the success of the petition would mark a watershed moment, it would also lead to an incongruent situation wherein same-sex couples of some States would have greater rights than those residing elsewhere. This lopsided development of the law in relation to homosexual couples makes certain that they are treated as second class citizens, years after they have been guaranteed all Fundamental Rights.

## **Right to Family**

Justice Misra in his analysis of privacy as a fundamental right has made note of the right to family under international law. He points out that this right is enshrined in Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights, both of which are binding on India. Justice Chandrachud has also acknowledged these principles in the Navtej Johar judgement stating that heteronormativity should not force an individual to face discrimination in terms of private and family rights.<sup>2</sup> The Bench in the constitutional case of KS Putuswamy unanimously held that the choice of family life is integral to the dignity of every individual.<sup>3</sup> Despite such authoritative precedent the law of adoptions has not been extended to same-sex couples. Further the Assisted Reproductive Technology Regulation Bill, 2020 and Surrogacy (Regulation) Bill, 2019 explicitly state that homosexual couples cannot benefit from such provisions to have a child. The reasoning provided for this inequality in the legislations was that it was to protect the

---

<sup>2</sup> Para 470

<sup>3</sup> Para 298

rights of the child, echoing the theme that same-sex couples were inferior or unfit in some way.

## Conclusion

The United States Supreme Court in the case of Obergefell v. Hodges held that the decriminalisation of homosexuality meant that the rights accorded to all American citizens would automatically be applicable to same-sex couples. Based on this the US Supreme Court struck down a number of laws as they invalidated the civil liberties of some of their citizens. Unfortunately the Indian Supreme Court has looked the other way rejecting a petition to direct the State to frame adequate law and policy on homosexual rights. This trend by both the executive and judiciary of not completely according rights to the community affects not only individual persons but also the legal system at large. It marks the development of jurisprudence that often looks the other way when it comes to placing constitutional morality over popular values. It seems to mould a practice of law wherein lofty ideals are emphasized without any checks and balances to protect them or any directions to adequately implement them. It is hoped that this is remedied expeditiously and that in the years to come equality and dignity is accorded to every citizen by both the letter and the spirit of the law.