

MARRIAGE EQUALITY - THE JURISPRUDENCE CONSTITUTIONALISM AND COMPARATIVE ANALYSIS OF IT

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ABSTRACT

This article is titled Marriage Equality - The Jurisprudence, Constitutionalism and Comparative Analysis of It All. Before entering its domain, it's imperative to be introduced to the socio-legal institution of marriage equality. The central theme of this article revolves around same-sex marriage or marriage equality as a prerequisite for queer liberation. Queer liberation is a struggle for inclusivity and equality across the gender spectrum which has been vulnerable due to subjugation and granting equal marital rights is a step in that direction. Cambridge Dictionary defines it as marriage between two people of the same sex, thought of as being legally the same as, and of equal importance to, marriage between two people of different sexes.¹ As of 2023, 34 countries have legalized same-sex marriages and included marriage equality in their legal frameworks with the latest being Andorra.² Whereas countries like Iran and Afghanistan have gone to the extremity of criminalizing queer sexual acts with the imposition of the death penalty as a maximum sentence. Before the decriminalization of Section 377 which shall be catered to later in the article, even India mandated imprisonment of life for homosexual relationships thus enabling the State to illiberally decide what's natural and unnatural. Recently even Uganda has passed a draconian Anti-LGBTQ Bill, 2023 that corporally punishes one on being identified as non-binary with the President assenting to its enactment.³ The article is silent on the socio-economic discrimination and vulnerabilities the queer community is being subjected to due to the heteronormative attitude of society. But in pursuance of the legal and jurisprudential support to marriage equality as an institution, the article endeavors to indicate that legalizing the same would lead to queer liberation. Primarily, this article strives to encapsulate the jurisprudence of queer marriage pertaining to its legality in India to

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¹ Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/marriage-equality> (accessed June 12, 2023 4:00 PM)

² Human Rights Campaign, <https://www.hrc.org/resources/marriage-equality-around-the-world> (accessed June 12, 2023 4:00 PM)

³ Oscar Hong, 'Uganda's Anti-Homosexuality Act of 2023- A Regressive law undermining Human Rights and Equality' (The Organization of World Peace, 2023), <https://theowp.org/ugandas-anti-homosexuality-act-of-2023-a-regressive-law-undermining-human-rights-and-equality/> (accessed June 12, 2023 4:00 PM)

underscore it as a legitimate legal need under family law. In furtherance, the article aims to analyze the foreign legal frameworks for queer marriage in the US, the UK and South Africa to emphasize on comparative aspects India can adopt in its legal system. Subsequently, the objective of this article is to advocate the legalization of queer marriage in India.

Keywords: Marriage Equality, Constitutionalism, Jurisprudence, Family Queer liberation.

INTRODUCTION

Marriage is a socially sanctioned sexual relationship. Anthropologist B. Malinowski defined marriage somewhat restrictively as the contract for the production and maintenance of children. Dr. Andrea Hunt defines marriage as a companionate union for affection and sexual gratification.⁴ Even an ex facie comparison of these definitions indicates the evolution the institution of marriage has undergone.

Even legally, marriage has transcended gender boundaries. For instance, in 1968 marriage was defined as being applicable only to a man and woman which renders them husband and wife.⁵ But the 2019 version replaces man and woman with the phrase union of two individuals. Essentially, even the legal definition of marriage has incorporated gender-inclusivity which forms the basis of marriage equality's constitutionalism.

Constitutionalism with respect to marriage equality shall be dealt with in the later part of the article. But to understand that, it's necessary that the readers get a basic idea of what exactly is constitutionalism.

The Constitution is nothing but a massive footnote to the Preamble, says Prof. Upendra Baxi, a noted constitutional scholar. This statement makes it imperative to understand the constitutional morality espoused in the Preamble. Contextually, this article shall delve into constitutional morality viz-a-viz marriage equality. But before that, it's imperative to understand the values on which this document rests.

The Preamble accords the values of liberty, equality and fraternity; virtually inseparable from the Constitution and applicably resulting in justice. Dr. Ambedkar in his final address to the Constituent Assembly pragmatized that these values be practiced not in isolation but in

⁴ Andrea N. Hunt, 'Companionate Marriage' (Wiley Online Library, 2016), <https://onlinelibrary.wiley.com/doi/10.1002/9781119085621.wbefs255> (accessed June 12, 2023 4:00 PM)

⁵ Henry Campbell Black, 'Black's Law Dictionary' (4 edn. 1968)

convolution to one another to ensure that social, economic & political justice is available. The entitlement to these three forms of justice entails liberty. The struggle for the same entails equality. And the recognition of the entitlement of fellow citizens entails fraternity.

MARRIAGE EQUALITY AND INDIAN CONSTITUTIONALISM

EQUALITY JURISPRUDENCE-

That being said, the quest for marriage equality is the demand of the queer community, a sexual minority; to uphold this very constitutionalism and ensure its posterity by way of legal recognition. This section accentuates how queer marriage is constitutionally legitimate by analyzing the evolving equality jurisprudence in India.

As far as gender and sexuality jurisprudence is concerned, Anuj Garg pronounced by a 2-judge bench of the Supreme Court is crucial considering the jurisprudential value of S.B Sinha's judgment rather than the actual dictum. It diluted the scope of 'discrimination on the basis of sex'. Gautam Bhatia writes *Anuj Garg is perhaps one of the most progressive judgments to have come out of a Court whose record on sex equality has been patchy, to say the least.*⁶ Though prima facie Anuj Garg deals with sexual discrimination between males and females, as emphasized earlier, the judgment serves as a liberal foundation for the judicial thought of Navtej. It regards privacy as intrinsic to one's equal status preventing the State from applying the doctrine of intelligible differentia arbitrarily i.e., reasonableness should stand the privacy test. Secondly, it highlights the fact that gender and sexual equality are an integral part of human rights by quoting the ECHR.⁷ While diluting sex equality, the SC for the first time recognized that both gender and biological differences constitute sex. It also held that legislations which don't cater to gender equality are open to judicial scrutiny.⁸ Inclusivity with respect to sexual orientation was discussed in the canvas of Navtej and formed the basis of the principle of indirect discrimination expounded by Justice D.Y Chandrachud.

While both Indu Malhotra and Chandrachud JJ., invoked intelligible differentia in exposing the unreasonableness of Section 377, only Chandrachud J., invoked indirect discrimination to

⁶ Gautam Bhatia, 'Grounding Progressive Jurisprudence for Sex Equality- Anuj Garg vs Hotel Association' (Indian Constitutional Law Philosophy, 2014), <https://indconlawphil.wordpress.com/2014/02/20/grounding-a-progressive-jurisprudence-of-sex-equality-anuj-garg-v-hotel-association/> (accessed June 12, 2023 4:00 PM)

⁷ Anuj Garg vs Hotel Association (2008) 3 SCC, Paras 20 and 39

⁸ Anuj Garg vs Hotel Association (2008) 3 SCC, Para 41

strike it down. *A provision challenged as being ultra vires the prohibition of discrimination on the grounds only of sex under Article 15(1) is to be assessed not by the objects of the state in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights. Any ground of discrimination, direct or indirect, which is founded on a particular understanding of the role of the sex, would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex*, he wrote.⁹ Therefore, he technically carried forward the line of thought that sexual orientation and gender identity are inclusionary to sex under Article 15.

The point to make in explaining this equality jurisprudence viz-a-viz queer marriage is that its entitlement comes within the scope of constitutionalism. And barring the LGBTIA++ community is akin to a violation of Article 15. Moreover, the failure to recognize it under the statutes is tantamount to the exclusion of a sexual minority from 'equal protection of laws' under Article 14. That being said, if any law governing marriage fails to recognize queer marriage within its purview, then it's the constitutional responsibility of the legislature (by law formulation) and judiciary (by judicial review) alike to interpret the statutes as inclusive to the prerogative.

PRIVACY JURISPRUDENCE

As a socio-legal institution, marriage is integral to the privacy, autonomy and individualism of a citizen; values which judgements discussed below have promulgated into Article 21's language. Legal scholars entail it as dignity jurisprudence. We attempt to cardinalize how dignity jurisprudence extends to queer marriage.

Privacy as a natural right can be traced back to 1689 when the Bill of Rights and Claim of Rights Act largely based on the theorization of John Locke were enacted. In India, it was only in 2017 that privacy was recognized in socio-legal jurisprudence when a 9-judge bench of the SC passed a landmark verdict in *K.S Puttaswamy*. The dictum held that privacy is intrinsic to the right to life under Article 21. Citing Locke himself, Dr. Chandrachud writes in the majority opinion that *privacy is a concomitant of the right of the individual to exercise control over one's life. Natural rights are not bestowed by the State. They inhere in human beings because they are human*.¹⁰ They exist equally in the individual irrespective of class,

⁹ Apurva Vishwanath, 'SC invoked indirect discrimination in law to read down Section 377 in 2018' (New Delhi, 16 April 2023)

¹⁰ *K.S Puttaswamy vs Union of India* (2017) 10 SCC, Paras 42 and 46

strata, gender and sexual orientation. This essentially demonstrates that privacy is inalienably implicit in an individual's autonomy constitutionally guaranteed across the spectrum equally. Hereinafter, we focus on marriage as a privacy-oriented institution.

The Supreme Court in *Navtej Singh Johar* reconsidered the aberration it had caused to the *Suresh Kaushal* (2009) judgment of the Delhi HC in 2014. *Naz Foundation* being an extremely liberal judgment of the Delhi HC decriminalizing homosexuality under Section 377 of the IPC, was the earliest of the judgments that invoked the doctrine of constitutional morality to arrive at its decision. While *Navtej* offers a more comprehensive insight to the same, *Naz Foundation* sensitively reassured the LGBT community and admonished the police brutality they were subjected to.¹¹ *Navtej Johar* on the other hand delivered in 4 opinions (Dipak Misra CJ., R.F Nariman, D.Y Chandrachud and Indu Malhotra JJ.,) is a masterclass on how constitutional morality (*which is cast in values of individual liberty, autonomy, equality and freedom of expression*) is placed above public morality (*which is influenced by religious personal laws and culturalism however regressive and discriminatory they are*). It laid down that the State cannot decide what's 'natural' and 'unnatural', not certainly in sodomizing homosexuality which is inherently intertwined to the personal construct.¹² Hence, Nariman J., writes that given the precedent set by *Puttaswamy*, prosecuting same-sex consenting adults demeans their existence considering their fundamental rights under Articles 14, 15, 19 and 21.¹³

Shafin Jahan's vitality shows how the recurring theme i.e., constitutional morality is applicable *ad arguendo* queer marriage. Although the factual matrix doesn't cater to the LGBT community, the jurisprudence puts forth the arguments supporting the legitimacy of queer marriage. The majority judgment of Misra CJ., substantively held that *marriage interlies in one's individual liberty and the right to marry an individual of one's choice is essentially axiomatic to Article 21. And that expression of choice in accordance with the law is acceptance of the individual identity.*¹⁴ Chandrachud's concurrence additionally stated that State intervention in such matters has a chilling effect on the exercise of individual freedom.¹⁵

¹¹ Saurabh Kirpal, *Sex and The Supreme Court* (first published 2020, Hachette Book Publishing India) 33

¹² *Navtej Singh Johar vs Union of India* (2018) 10 SCC, Paras 412 to 416

¹³ *Navtej Singh Johar vs Union of India* (2018) 10 SCC, Paras 355 and 359

¹⁴ *Shafin Jahan vs Asokan K.M and Ors.* (2018) 16 SCC, Paras 52 and 53

¹⁵ *Shafin Jahan vs Asokan K.M and Ors.* (2018) 16 SCC, Para 89

Chandrachud J., in Puttaswamy, opined that privacy is not lost in the public arena and is legitimate in all spheres.

Hence, if privacy is omnipresent and marriage is intrinsic to it as is evident through constitutional morality, then we believe that legalizing queer marriage is a constitutional progression of Navtej and denying them the right to marry; which heterosexual couples possess; is an impingement of their rights and the basic structure therein.

MARRIAGE EQUALITY FROM A FAMILY LAW PERSPECTIVE-

This section analyzes the legality of marriage equality from the perspective of family law. The family has been defined as a collective body of any two persons living together in one house as their common home for a time in the broadest of its sense.¹⁶ It is certainly inclusive to genderqueer persons if we neglect the persuasive value of the later part pertaining to the mother and father (see 16). Neglecting that would be appropriate for the constitutional legitimacy of queer marriage has been established.

Deepika Singh delivered in 2022 holds no additional value to this article but certain observations by Dr. Chandrachud in the judgment are crucial to reiterate marriage equality as a familial phenomenon. He posits that society has to move away from the confined paradigm of a traditional family unit by discerning the modern yet existing manifestations of family like domestic, unmarried partnerships or queer relationships and adds that these atypical yet existing modern manifestations cannot be excluded from the purview of protection under law.¹⁷

It's a social fact that marriage institutionally is associated with family. Marital bond is considered as a cornerstone of the familial structure. In other words, it's a legitimate legal need as a civil union for familial establishment. Rights like gratuity, adoption, custody, visitation, succession and inheritance of property after a spouse's death are sine qua non in a legal relationship. Marriage is asserted by indicia of benefits that a couple can avail like tax deductions and benefits, life and health insurance, application for a joint bank account, etc.

¹⁶ Henry Campbell Black, Black's Law Dictionary (4th edn. 1968)

¹⁷ Deepika Singh vs Central Administrative Tribunal and Ors. (2022) 1088 SC, Para 26

Consequently, we believe that a modern marriage with respect to social context adjudication¹⁸ read with equal protection of laws under Article 14 has to embrace consenting queer adults in its ambit.

COMPARATIVE ANALYSIS OF FOREIGN JURISPRUDENCE- THE US, UK AND SOUTH AFRICA

Comprehensive scrutiny of foreign jurisprudence like the USA, UK and South Africa indicates that legalizing queer marriage in India is the next logical and constitutionally dynamic step after Navtej.

THE US

In 2015, by the landmark judgment of *Obergefell v Hodges*, the US Supreme Court ruled that states cannot impose a ban on same-sex marriages. However, the journey until this historic decision has been characterized by multiple legal battles fought by the LGBTQ community. In 1996, it faced a massive setback when the Defense of Marriage Act was signed by President Bill Clinton. Section 3 of DOMA explicitly stated that the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife and Section 2 prohibited the states to grant any recognition whatsoever respecting a same-sex relationship.¹⁹ This was the most regressive and stringent legal measure denying marriage equality to the queer community. This Act stripped homosexual couples of necessary benefits and rights discussed earlier in the article.

In 2003, the SCOTUS in a landmark decision of *Lawrence v. Texas*, legalized homosexuality and laws banning the same were, henceforth, considered unconstitutional.²⁰ The State cannot control a person's sexual activity and any efforts in doing so will impinge the one's right to liberty enshrined in the Due Process Clause of the Fourteenth Amendment. This step restored the constitutional right to privacy of same-sex couples in the United States.

The cause of marriage equality gained legal momentum in the early 2010s pioneered by two landmark cases. In 2010, *United States v Windsor* aimed to challenge the federal nature of DOMA and to declare Section 3 as unconstitutional.²¹ The SCOTUS with a 5-4 majority

¹⁸ Deepika Singh vs Central Administrative Tribunal and Ors (2022) 1088 SC, Para 14

¹⁹ Defense of Marriage Act, 1996, s.3

²⁰ *Lawrence v. Texas*, (2003) 539 U.S. 558

²¹ *United States v. Windsor*, (2013) 570 U.S. 744

ruled in favor of the plaintiff with Justice Anthony Kennedy stating that the history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute.

This judgment was limited to Section 3 as a judicial issue but insofar as marriage equality is concerned, we proceed towards Obergefell. It overturned *Baker v. Nelson*, in which Judge C. Donald Peterson opined that there is no irrational or invidious discrimination in states' classification of the marital right nor does it nullify the Fourteenth Amendment.²² It ruled that state laws banning same-sex marriages and limiting marriage only to heterosexual couples are depriving homosexuals of their right to liberty and are rendered discriminatory.²³

In December 2022, Obergefell's legislative version i.e. The Respect for Marriage Act was enacted which officially repealed DOMA. The Act ensures that all states recognise same-sex marriages and provide homosexual couples with all the benefits and rights that they are entitled to.²⁴ The RMA goes as far as to ensure that in the case Obergefell is overturned, even states barring same-sex marriage will have to recognise the marital status of homosexual couples who got married elsewhere.

THE UK

UK's journey to attain marriage equality began as early as 2004 when the Supreme Court Appellate committee pronounced the judgment in *Ghaidan v. Godin-Mendoza*. The case primarily revolved around the succession of property of the deceased queer spouse as the Rent Act, 1977 only permitted succession for heterosexuals. It held that the said action infringes Article 14 and Article 8 of the ECHR tantamounting to denial of the right to housing and family life on the grounds of sex discrimination.²⁵ The negation of this distinction in *Ghaidan* culminated in the legislative protection of same-sex couples. In the same year, the Civil Partnership Act was passed which allowed same-sex couples to enter into a civil partnership per se but not akin to marriage as a sui generis institution.²⁶ This

²² *Baker v. Nelson*, (1972) U.S. LEXIS 1164

²³ *Obergefell v. Hodges* (2015) 576 U.S. 644

²⁴ Respect for Marriage Act, 2022

²⁵ *Ghaidan v Godin-Mendoza* , [2004] UKHL 30

²⁶ Civil Partnership Act, 2004

discrepancy was challenged in the case of *Wilkinson v. Kitzinger* wherein the marriage of a British lesbian couple was deemed as a civil partnership instead.²⁷

The Marriage (Same-Sex Couples) Act, 2013 is one of the most exhaustive and liberal legislation assenting to the marital relationship between queer couples supplementing religious, non-religious, contractual and legal requirements.²⁸ It only requires the fulfillment of an opt-in activity i.e., giving consent, applying for registration, solemnization, granting a certificate and its consequential effect of an opt-out activity which includes amendments to the Marriage Act, 1949²⁹ to make it inclusive to queer couples. Significantly, same-sex marriage has also been provisioned to be solemnized by the Church (territorially and extra-territorially) thereby safeguarding the individualism of those who prefer a religion-based marriage. Section 12 allows formal gender change procedure with a retrospective effect consistent with their gendered right of self-identification. Section 11 extends all the benefits availed by heterosexual married couples in England and Wales to same-sex couples as well.

SOUTH AFRICA

In 2006, South Africa became the first African country to legalize queer marriage. Prior to this, it was also the only country to constitutionally abolish discrimination on the basis of sexual orientation. Marriage equality was attained through a precedent of *Minister of Home Affairs v. Fourie* that led to the formulation of the Civil Union Act, 2006 which recognized queer unions within the definition of marriage.³⁰ The Constitutional Court took an unprecedented step in interpreting the equality clause as extending to the LGBT community and conferring it the right to marry as a panacea.

The Civil Union Act allowed two persons above the age of consent (18) to enter a marital bond or civil partnership.³¹ Section 1 of the Act specifically defines civil union as a voluntary act of two persons solemnized either by a way of marriage or civil partnership. It significantly amended the Marriage Act, 1961.³² Gender neutrality and gender inclusivity are inherently grounded in its language evident through the definition of civil union as the 'spouse' in a marriage or a 'partner' in a civil partnership. The Preamble of the Act constitutionally

²⁷ *Wilkinson v Kitzinger*, [2006] EWHC 2022 (Fam), [2007] 1 FLR 295, [2007] 1 FCR 183, (2006) Times, 21 August, [2006] All ER (D) 479 (Jul)

²⁸ Marriage (Same Sex Couples) Act, 2013, s.3, s.4(a), s.11, s.12

²⁹ Marriage Act, 1949

³⁰ *Minister of Home Affairs v. Fourie* (2005) CCT

³¹ Civil Union Act, 2006, s.1

³² Marriage Act, 1961

justifies recognition of queer marriage by referring to sections 9(1)- positive obligation on the State to guarantee equal protection of laws, 9(3)- negative liberties to the citizens against discrimination, 10- right to dignity and 15(1)- freedom of conscience.

CONCLUSION

Queer marriage is legal in 34 countries globally, the latest one being Andorra. Right from a country in the conservative African continent to a self-governed territory fighting for international recognition. Recently even Each of these countries has institutionalized marriage equality in sync with their social, political, religious and economic paradigms. Marriage equality is a human rights issue. Human rights are central to an individual's dignity and dignity is embedded in one's inalienable rights. As established by us in the article, marriage equality is an inviolable prerogative of the queer community. That's why depriving a section of society of its fundamental right to marry contravenes one's dignity. And doing so impedes the development of the institution of marriage. As rightly opined by Justice Anthony Kennedy, the ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution, even as confined to opposite-sex relations—has evolved over time. Justice Kennedy has also famously said that they(queer community) ask for equal dignity in the eyes of the law. The Constitution grants them that right. As the focal point of our article suggests, even Indian constitutionalism and jurisprudence grants them that right. And the fight for that right becomes even more concrete by the comparative analysis of it.