



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL**
**ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of White Black Legal – The Law Journal. The Editorial Team of White Black Legal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of White Black Legal. Though all efforts are made to ensure the accuracy and correctness of the information published, White Black Legal shall not be responsible for any errors caused due to oversight or otherwise.

WHITE BLACK
LEGAL

EDITORIAL **TEAM**

Raju Narayana Swamy (IAS) Indian Administrative Service **officer**



a professional
Procurement from the World Bank.

Dr. Raju Narayana Swamy popularly known as Kerala's Anti-Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala. He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University. He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru and diploma in Public

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB , LLM degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.



Senior Editor

Dr. Neha Mishra



Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi,

Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.



Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.



Dr. Rinu Saraswat

Associate Professor at School of Law, Apex University, Jaipur, M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.

More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.



Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

THE CONSTITUTIONALITY OF HOMOSEXUALITY AND EVOLVING SOCIETAL PERSPECTIVES IN INDIA

AUTHORED BY - ROSEMOL SEBY

Abstract

Same-sex relationships in India have been stigmatized throughout our history. Nowadays, as judicial and legislative entities in India and society as a whole become more aware of the issue of legalizing same-sex marriage, it has got attention due to the growing recognition of human rights and the global LGBTQ+ rights movement. A marriage inequality caused on the basis of sexual orientation and gender constitutes an intervention against the fundamental rights of the LGBTQ+ and homosexual communities as a whole. Making changes in the provisions of the Hindu Marriage Act and the Special Marriage Act is insufficient; a constitutional declaration of marriage similar as that of the heterogeneous group is required. Society will eventually embrace same-sex marriage as a result of the Supreme Court's recognition of it; therefore, the Supreme Court must spread awareness among the society to recognize same-sex marriage for the betterment of the society. As a result, the focus of this research is to analyse the recognition of the right to marriage for homosexuals in India, given that this practice has been observed in Indian culture and is currently legal in a great number of other nations as well. In addition, it will assess the consequences of such rights' recognition and propose strategies to promote their legal and social approval in India.

Keywords: Homosexuality, Same-Sex Marriage, Decriminalisation, Human Rights, global LGBTQ+ rights movement.

Introduction

The Supreme Court's 2018 ruling in *Navtej Singh Johar V. Union of India*¹ made a significant shift in the constitutionality of homosexuality in India. By striking down Section 377 of Indian Penal Code that had criminalized such acts, this ruling decriminalized consensual same-sex relations between adults. Earlier, Section 377 had been used to harass and prosecute the LGBTQ+ community as it was considered as sexual acts, 'against the order of nature'.

¹*Navtej Singh Johar V. Union of India*, AIR 2018 SC 4321, 2018 Cri LJ 4754 (SC)

In *Navtej Singh Johar V. Union of India*², the Hon'ble Court held that freedom of expression under Article 19(1)(a) includes right to choose sexual partner. This section also assumes characteristics of unreasonableness for it become weapon in the hands of majority to seclude, exploit and harass LGBTQ+ community. Dignity is a separable facet of every individual that invites reciprocative respect from others to every aspect of individual which she/he perceives as essential attribute of his/her individuality be it orientation or optional expression of choice³. Public decency and morality cannot be amplified beyond rational or logical limit and cannot be accepted as reasonable grounds for curbing fundamental rights of freedom of expression and choice of LGBTQ+ community⁴. The Court emphasized the importance of bodily autonomy and the right to privacy, stating that the choice of a sexual partner is a part of the fundamental right to privacy. The Court found that section 377 violated Article 14 and 15 of the constitution, which guarantee equality before the law and prohibit discrimination based on sex, as well as Article 21, which protects the right to life and personal liberty.

THE JOURNEY TOWARDS THE CONSTITUTIONALITY OF HOMOSEXUALITY

Three decades ago, India, which now acknowledges same-sex relationships, once severely persecuted openly gay individuals. Revealing one's sexual orientation back then could endanger one's employment or even life in Indian society. section 377 of the IPC represented India's initial legislation on homosexuality. This law, in effect from **1861 to 2018**, stipulated that being queer in India was punishable by up to 10 years in jail for engaging in "carnal intercourse against the order of nature." The LGBT community in India reached a noteworthy milestone on September 6, 2018, as it worked towards the decriminalization of "consensual sex" among individuals of the same gender. The Supreme Court, in the revolutionary *Navtej Singh Johar v Union of India*⁵, overturned the stipulations outlined in Section 377 of the Penal Code, 1860. In essence, this provision rendered homosexuality illegal through its explicit exclusion of consensual carnal intercourse from its purview. As a result, the ban on engaging in homosexual activities has been repealed. In adherence to a directive from the Central Government, the Supreme Court restricted its analysis of transgender community rights to the constitutionality of the Indian Penal Code, Section 377 of 1860. The matter of acknowledging

² Ibid

³ Id at pg.1

⁴ JN Pandey Constitutional Law, pg. 365, para: 1

⁵ Ibid

the civil rights of the LGBT community was brought up without any thoughtful consideration. However, the subject was re-examined by the Supreme Court in the *Supriyo v. Union of India*⁶ case after a petition was filed. The legislation in question, specifically the Special Marriage Act of 1954, the Hindu Marriage Act of 1955, and the Foreign Marriage Act of 1969, were subject to criticism for their failure to include provisions concerning the registration and recognition of same-sex marriages. It was determined that this breach violated Articles 14, 15(1), 19(1)(a), and 21 of the Indian Constitution. Significant public attention has been directed towards the Supreme Court of India since April 18, 2023, when it began deliberating on a series of petitions petitioning for the legalization of same-sex marriage in India. The Constitution Bench of the Supreme Court is composed of five judges, one of whom is Chief Justice of India D.Y. Chandrachud, Justices S.K. Kaul, Ravindra Bhat, Hima Kohli and Narasimha. And finally, the Supreme Court of India in 2023 held that the right to marry is a statutory right, not a constitutional right. Therefore, only Parliament can recognize the marriage between non-heterosexual couples. Transgender individuals in heterosexual relationships can marry under existing marriage laws, including all personal (religious) laws. In the present scenario, mere decriminalization of same-sex acts is inadequate; legal recognition of same-sex relationships must also be pursued.

To make homosexuality legal in India, the LGBTQ+ community had to go through numerous societal wars to achieve freedom and treatment as equal citizens or human beings. The difficulty of channelling concerns of unpopular minorities through regular legislative contestation justifies the assertive interventions of the Supreme Court. Navtej Singh Johar case actually upheld the doctrine of constitutional morality. The doctrine of constitutional morality is an emphatic guarantee that the Supreme Court of India is committed to protecting all minorities, despite opposition from majoritarian governments. Constitutional morality requires that this court must act as a counter majoritarian institution which discharges the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe. In *Lata Singh v State of UP*⁷, the hon'ble court signified that right to marry as a component of right to life under Article 21, which says no person shall be deprived of his right to life and personal liberty except procedure established by law.

⁶ *Supriyo v. Union of India*, (2018) 10 SCC 1

⁷ *Lata Singh v State of UP*, AIR 2006 SC 2522

In *R Rajagopal V State of Tamil Nadu*⁸, popularly known as Auto Shanker case, court held that the right to privacy or the right to let alone is guaranteed by Article 21 of the constitution. A citizen has a right to safeguard his privacy of his own, his family, marriage, procreation, motherhood, child bearing among other matters. None can be punished anything concerning the above matters without his consent whether truthful or otherwise. If it does so, he would be violating the right of the person concerned and would be liable.

The court in the case of *Shakti Vahini v Union of India*⁹, held that any assembly to scuttle or preventing two consenting adults from marrying is absolutely illegal and laid down preventive, remedial and punitive measures in this regard and the consent of the family or the community or the class is not necessary once two adults decided to enter into wedlock. Rule of law as a concept is meant to have order in a society. Thus it clearly explains the right to choose life partner under Article 21. Also right to live with human dignity is an inseparable aspect of Right to life and is protected under article 21 of the Indian constitution.¹⁰ It has got space under the international domain as well as in the universal declaration of human rights, 1948¹¹ which talked about all individuals being born free and equal in dignity and rights. These rights of human dignity are for everyone, the prisoners, the murderers and the criminals. In *Maneka Gandhi v. Union of India*¹², the court observed that dignity is a sacrosanct human right and if it is lost, the life loses its substance and meaning. An American psychological association defines sexual orientation as a feeling of romance, sexual attraction towards both sexes, and identification of a person based on these attractions, the stretch of attraction ranging from hetero to homosexual ones. Also the Association says that homosexuality is neither a mental problem nor a physical one but the community of LGBTQ+ is just a minority in our society.¹³ In *Francis Caralie Mullin v. Administrator, Union Territory of Delhi and others*¹⁴ and *Common Cause v. Union of India and another*¹⁵ court has been held that the right to life and personal liberty, as envisaged under Article 21, is meaningless unless it encompasses within its sphere individual dignity and right to dignity include right to carry such functions and activities as would constitute the meaningful expression of human self.

⁸ *R Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632

⁹ *Shakti Vahini v Union of India*, AIR 2018 SC 1601

¹⁰ *K S Putta Swamy v Union of India*, (2017) 10 SCC 1

¹¹ Universal Declaration of human Rights, 1948, Art.1

¹² *Maneka Gandhi v. Union of India*, (1978)1 SCC 248

¹³ Swati Sharma, "Societal Attitude Towards Homosexuality", SSRN (2012).

¹⁴ *Francis Caralie Mullin v. Administrator, Union Territory of Delhi and others*, 9 (2014)9 SCC 1

¹⁵ *Common Cause v. Union of India and another*, (2016)11 SCC 455

There is no intelligible differentia or reasonable classification between natural and unnatural sex as long as it is consensual in view of the decision of hon'ble Supreme Court in *Anuj Garg and others v. Hotel Association of India and Others*.¹⁶ The right of the lesbian, gay, bisexual and transgender LGBTQ+ community, who comprise 7-8 % of the total Indian population, need to be recognized and protected, for sexual orientation is an integral and innate facet of every individual's identity. A person belonging to the said community does not become an alien to the concept of individual and his individualism cannot be viewed in stigma. The impact of sexual orientation on an individuals life is not limited to their intimate lives but also impacts their family, professional, social and educational life.¹⁷

The sexual orientation which is a natural corollary of gender identity is protected in Article 21 of the constitution and any discrimination meted out to the Homosexual community on the basis of sexual orientation would run counter to the mandate provided under the constitution and the said view has also gained approval of the hon'ble Court in the NALSA case.¹⁸ Thus right to choose ones gender identity is an essential part to lead a life with dignity which again falls under the ambit of Article 21. The respect for individual choice is very essence of liberty under law. Determining right to personal freedom and self-discrimination, the court observed that the gender to which a person belongs is to be determined by the person concerned. Therefore, any law made by discriminating gender would affect the right to live with dignity of individuals and thereby violate Article 21 and become unconstitutional.

In *Shafin Jahan v. Asokan K M*¹⁹ the social values and morals have their space but they are not above the constitutionally guaranteed rights. In our constitutional democracy governed by rule of law, police cannot be authorized to violate the private spheres of individuals, especially in an attempt to discern the reason behind exercising the constitutionally protected individual autonomy to conscience.

The United States Supreme Court, in the case of *Loving v. Virginia*²⁰, which struck down the ban on inter- racial marriage, said that the freedom to marry is a personal right that should be

¹⁶ *Anuj Garg and others v. Hotel Association of India and Others*, (2008)3 SCC 1.

¹⁷ AIR 2018 SC 4321: 2018 Cri LJ 4754 (SC).

¹⁸ *National Legal Services Authority v. Union of India*, 2014 INSC 275

¹⁹ *Shafin Jahan v. Asokan K M*, 2018 (4) Scale 404

²⁰ *Loving v. Virginia*, (1967)388 U.S.1,12.

available to all persons. In *Obergefell v. hodes*²¹, case the US supreme court struck down all state bans on same sex marriages and legalized same sex marriages in 50 states. In India, even though the homosexuality is decriminalized, it has not given recognition to same-sex marriages and the fight towards it is an ongoing process.

The public decency and morality are the grounds which set as the reason for limiting the choice of LGBT community to get married to their choice. But it is the need of the hour to ensure the right to marriage of homosexuals as the society has changed and evolved dramatically over these years. The tradition of marriage is no longer about the idea that marriage is between one man and one woman. It is now defined by the values and morals that the couple shares together. There are hundreds of same-sex couples who raise children in caring, loving and protective environments. In June of 2014, a study by the university of Melbourne was published stating children raised by same sex parents score about six percentage higher than the general population on measure of general health and family cohesion. Other studies done in America in the past few years indicate that children of gay and lesbian parents had fewer social problems, and have had higher academic standings than children raised by heterosexual parents. Same sex marriage is the topic of discrimination and whether homosexual individuals actually have a civil and fundamental right to marry. All individuals including the homosexuals should be entitled to a fundamental right to marry and any action which is against this is unconstitutional and violative of fundamental rights.

There are cases where family reactions range from support to disapproval to violent prosecution in the matters of same sex marriages. While police generally harass such couples, it is dire need to uniformly upheld their right, as adults, to live with whomever they wish irrespective of their sex. There have also been numerous joint suicides by same sex couples when their family oppose their unions and they don't get enough dignity and recognition from the society. So same sex marriage is fundamental right and it should be legally protected to ensure a dignified life to homosexuals in the society. Marriage is a private affair and no person or state has the right to interfere into it. It is an encroachment into the right to privacy of an individual. Right to marriage should be ensured not only to the heterosexuals but also to the homosexuals as well since it is a fundamental to a person to choose a partner of any sex and to form a family and to lead a dignified life.

²¹ *Obergefell v. hodes*, 576 US. 644 (2015)

On the other hand, there are strong contentions against legalising same-sex marriages in India as marriage laws in the country are governed by the personal laws/ codified laws relating to customs of various religious communities which recognise only the union of a man and a woman to be capable of religious sanction, and thereby claim legal and statutory sanction. In the case of *O.M Prakash v. Emperor*²², the court explains that the expression public order as public peace, safety and tranquility. Anything which disturbs public order, also adversely affects the peace and safety of the society. So in order to maintain social order, the state has the right to restrict freedom of expression as no freedom can be absolute or completely unrestricted.²³ There are certain situations where reasonable restrictions can be placed on this right of a person for the greater good of the society. In *Mr. X v. Hospital Z*²⁴, the Supreme court made it clear that the right to privacy is not an absolute right, in the following words: 'the right however is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or more or less or protection of rights and freedom of others'. It is not an absolute right and it is subservient to that of security of state. In *Sharda v. Dharmpal*²⁵, the Supreme Court held that the right to privacy in terms of Article 21 of the constitution is not an absolute right and if there were a conflict between the fundamental rights of two parties that right which advances public morality would prevail'. From these it's clearly evident that the state can make laws and reasonable restrictions on the right to privacy as it is essential for establishing public morality in certain situations in the society. Legitimising same-sex marriage in a country like India which is characterised by religious beliefs and faiths would result in public unrest and disorders. A law can only be implemented in a society when the majority of the population are willing to accept it. So reasonable restrictions on right to privacy is necessary to ensure public morality in the society. In *Rohit Shekhar v. Shri Narayan Dutt Tiwari and Anr*²⁶ the court held that the right to privacy and confidentiality is not an absolute right and could be reasonably curtailed. In case of conflict between two fundamental rights, it is the right which would advance public interest and public morality would be enforceable.

Conclusion

In Western nations, the volume of scholarly inquiry and discourse concerning homosexuality increased dramatically during the 20th century. The prevailing notion was that it constituted a

²² *O.M Prakash v. Emperor*, AIR 1956 ALL 241.

²³ *Ramlila Maidan Incident v. Home secretary*, (2012) 2 MLJ CRL 32.

²⁴ *Mr. X v. Hospital Z*, 1998 (8) SCC 296.

²⁵ *Sharda v. Dharmpal*, (2003)4 SCC 493.

²⁶ *Rohit Shekhar v. Shri Narayan Dutt Tiwari and Another*, AIR 2011 SC.

mental condition or disorder. Nevertheless, the ongoing discourse surrounding same-sex marriage within the international community underscores the core truth that marriage, irrespective of gender, is founded upon the principles of companionship, devotion, and affection, with sexual attraction serving as a secondary component. The research findings underscore the significance of equality and human rights with respect to the acknowledgment of same-sex relationships. The legalization of same-sex marriage becomes a matter of fundamental rights because it guarantees equal access to the institution of matrimony and its benefits for all individuals, irrespective of sexual orientation. It fosters social acceptance, inclusivity, and an enhanced perception of equity. Nevertheless, the analysis also recognizes the obstacles and contrasting perspectives that are linked to the societal validation of same-sex marriage. Opponents of legalization have raised concerns regarding implications for social stability, family structure, parental rights, and religious liberty, as well as cultural and religious convictions. Although civil unions and registered partnerships can serve as viable alternatives, they do not offer the identical level of legal recognition and protections as matrimony. While these alternatives might provide momentary relief, they fail to establish complete equality for couples of the same gender. Given the dynamic nature of the legal system, shifting societal perspectives, and established international standards, it is judicious for India to endeavour to obtain legal recognition for same-sex marriage. By promoting social acceptance and inclusion, safeguarding the well-being and rights of LGBTQ+ individuals, and adhering to international human rights standards, the implementation of this measure would be assured. In order to attain this goal, it is imperative to maintain continuous dialogue among a wide range of stakeholders, such as religious communities, policymakers, and civil society organizations, and cultivate sustained public awareness. The implementation of education and sensitization initiatives is critical in addressing prejudices, dispelling misconceptions, and cultivating a more inclusive atmosphere regarding LGBTQ+ individuals. In India, the legalization of same-sex marriage would signify a substantial stride in the direction of social progress, non-discrimination, and equality. It would reassert the foundational values of dignity, equity, and inclusion, which are pertinent to every individual regardless of sexual orientation.