THE MOMENTUM OF HISTORY – REALISING MARRIAGE EQUALITY IN INDIA

Satchit Bhogle[*]

The Supreme Court in recent years has evolved a vocabulary of privacy, autonomy, and constitutional morality. This has culminated in the recognition of the right to privacy and the right to choose a life partner, among several. However, in Navtej Singh Johar v. *Union of India, which confirmed the decriminalisation of same-sex relations, the Supreme Court outlined the contours of the right to intimate relations in a broad manner. The article argues that the next logical step is marriage equality, or the recognition of same-sex marriage on the same footing as traditional opposite-sex marriage, and that all the jurisprudential ingredients are already present for such recognition. The article argues that the restriction of the definition of marriage to 'one man, one woman' constitutes impermissible sex discrimination under Articles 14 and 15 and is also manifestly arbitrary. The article also recognises that the evolving concept of constitutional morality, which trumps social or popular morality as a means to interpret public morality as a restriction on fundamental rights, may be invoked to dispel arguments that same-sex marriage intrudes on the so-called sanctity of traditional opposite-sex marriage. It further argues that 'one man, one woman' violates the right to privacy and autonomy, and life with dignity under Article 21, along with the freedom of expression, which includes the expression of sexual orientation and self-identified gender. The article also argues that though the personal law that applies to a person depends on their religion, personal laws are religious neither in origin nor in character; though in any case, marriage equality should not be held to violate religious freedom based on the application of the significantly eroded 'essential religious practices' test. Lastly, the article argues that the Hindu Marriage Act and the Special Marriage Act are capable of being interpreted as is to permit same-sex marriage.*

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[*] Graduation from West Bengal National University of Juridical Sciences and Master of Laws – LLM from Duke University School of Law. Currently practicing as an advocate at Bombay High Court.

I. INTRODUCTION

> "A hundred and fifty–eight years is too long a period for the LGBT community to suffer the indignities of denial. That it has taken 68 years even after the advent of the Constitution is a sobering reminder of the unfinished task which lies ahead. It is also a time to invoke the transformative power of the Constitution."[1]

The judgement in *Navtej Singh Johar* v. *Union of India*[2] ('Navtej Johar') is historic for achieving the first step towards the realisation of substantial equality for the LGBTQA+ community. However, it is a personal belief that this has been achieved less by legal argument and more by the LGBTQA+ community's efforts to raise awareness about the cause between the time of the disastrous decision of the Supreme Court in *Suresh Kumar Koushal* v. *Naz Foundation*[3] ('Koushal') and the present day. After all, the Supreme Court in *Koushal* had the benefit of the well-considered judgement of the Delhi High Court in *Naz Foundation* v. *Government of NCT of Delhi* [4] ('Naz Foundation') before it. The Petitioners in Naz Foundation persuaded the Supreme Court not only to entertain a curative petition against the decision in Koushal – only the fifth time since the curative petition was evolved in *Rupa Hurra* v. *Ashok Hurra*[5] ('Rupa Hurra') and necessitating a recognition that Koushal was "oppressive to the judicial conscience" and would "cause perpetuation of irremediable injustice" [6] – but also to hear it in open court rather than by circulation.[7]

[1] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶616 (per Chandrachud, J.).
[2] *Id.*, 1.
[3] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.
[4] Naz Foundation v. Government of NCT of Delhi, (2009) 111 DRJ 1.
[5] Rupa Hurra v. Ashok Hurra, (2002) 4 SCC 388; Gautam Bhatia, *Section 377 Referred to a Constitution Bench: Some Issues*, Indian Const. L. & Philosophy, January 8, 2018, available at https://indconlawphil.wordpress.com/2018/01/08/section-377-referred-to-a-constitution-bench-some-issues/ (Last visited on December 8, 2019).
[6] Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388, ¶42. This is even more remarkable in light of the highly uncertain parameters for entertaining a curative petition. *See* Rupali Samuel, *The s.377 Curative Petition: In Favour of a Broader Jurisdiction for the Supreme Court*, Law and Other Things, February 9, 2016, available at https://lawandotherthings.com/2016/02/the-s377-curative-petition-in-favour-of/ (Last visited on December 8, 2019) and Alok Prasanna, *The Supreme Court's Uncertain Jurisdiction in the s.377 Curative Petition: A Response to Rupali Samuel*, Law and Other Things, February 10, 2016, available at https://lawandotherthings.com/2016/02/the-supreme-courts-uncertain/ (Last visited on December 8, 2019).

While its human rights record is not unblemished, the Supreme Court in recent years has recognised as a Fundamental Rights under Chapter III of the Constitution the right to privacy,[8] the right to choose a life partner,[9] and have now given the decision to decriminalise gay sex,[10] the protection of a five-judge bench. The effects are already being felt: at least two high courts have protected couples in consensual same-sex relationships from criminal proceedings maintainable solely because of the criminalisation of homosexuality.[11] It is, therefore, important that we not squander the momentum of history and crystallise the rights of the community that may not be guaranteed by future courts and governments.

Marriage equality refers to granting the same legal status to unions that fall outside traditional heterosexual marriage between cis-gendered people (i.e., "one man, one woman") as accorded to those that fall within it. It is both an easier and a harder milestone to achieve than decriminalisation of sexual intercourse between partners of the same-sex. It is easier because it is easier to see that the discrimination is on the basis of orientation, and not merely the desire to do a certain act (as argued by the parties in support of §377 in Naz Foundation, Koushal, and Navtej Johar). It is harder because of the centrality of marriage in religion, both as a social institution and literally as a place where marriage as a ceremony is conducted or solemnised. In a sense, religion is being asked not simply to ignore what is happening behind closed doors, but to recognise and celebrate it in the public in the same manner as it does opposite-sex marriages.

The definition of marriage as between one man, one woman can be challenged either at a constitutional level, viz. for violating Article 21 (right to choose a life partner/right to life with dignity/right to autonomy) or Article 14 (discrimination on the basis of sexual orientation); or at a sub-constitutional level, viz. that marriage equality can be read into some or all personal laws as they currently read. Part II clarifies the scope of the article and certain terms used. Part III states why the right to marry is important, and the extent to which legal recognition of same-sex marriages can advance the purposes that marriage serves. Part IV discusses how and to what extent personal laws that are ostensibly based on religious beliefs and practices can be tested on the touchstone of the Constitution. Part V analyses the constitutional law arguments that may justify recognising marriage equality based on recent Supreme Court precedent, but especially Navtej Johar, including whether one, man woman, is an 'essential practice' of any religion, permitting marriage quality to be read into existing statutes. Part VI briefly notes some legal reform beyond recognising same-sex marriage that is required to achieve substantial equality between the treatment of same-sex relationships and opposite-sex relationships. Part VII sums up the discussion and concludes that marriage restricted to 'one man, one woman' is unconstitutional discrimination under Articles 14 and 15, violates constitutional morality, the right to life with dignity under Article 21, and the

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[7] Gautam Bhatia, *The Indian Supreme Court's "Curative" Hearing in the "LGBT Case"*, Oxford Human Rights Hub, October 30, 2017, available at https://ohrh.law.ox.ac.uk/the-indian-supreme-courts-curative-hearing-in-the-lgbt-case/ (Last visited on December 8, 2019).

[8] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

[9] Shakti Vahini v. Union of India, (2018) 7 SCC 192; Shafin Jahan v. Asokan K.M., AIR 2018 SC 1933; Shayara Bano v. Union of India, (2017) 9 SCC 1.

[10] The term is used in the broadest sense to cover all that was decriminalised in Navtej Johar, which is broadly all sexual acts between consenting adults previously considered "carnal intercourse against the order of nature" under §377 of the Indian Penal Code.

[11] Sreeja S. v. Commissioner of Police, 2018 SCCOnline Ker 3578; Daniel Crasto v. State of Maharashtra, 2019 SCCOnline Bom 188.

right to expression of sexual orientation under Article 19. It further concludes that marriage equality should not be held to violate religious freedom, and that in any case, the Hindu Marriage Act and Special Marriage Act are capable of being interpreted to permit same-sex marriage.

II. A NOTE ON APPROACH & SCOPE

I have always understood legal scholarship to require studying the existing state of the law and its valid interpretations and being largely indifferent to its conclusions. However, this article assumes the desirability of achieving marriage equality. The reasoning in this article applies on an individual basis, regardless of the gender identity of either or both parties. The term 'same-sex marriage' is used to distinguish it from traditional opposite-sex marriage, and the term 'marriage equality' is used as a general term encompassing marriages between two consenting adults of whatever sex, gender identity, or sexual orientation.

The article does not consider non-traditional marriages or unions, including polygamous/polyandrous marriages, or marriages within prohibited degrees. It also does not examine the question of recognising same-sex marriages conducted outside India. It does not rely on foreign precedents, though some foreign writings are considered. The well of Indian jurisprudence is deep enough to answer the questions posed.[12]

III. WHY THE RIGHT TO MARRY IS IMPORTANT

Marriage serves broadly three purposes:

1. *As a symbolic gesture between the parties* – Considering oneself as being married to another and vice versa has intrinsic value. However, lack of legal recognition does not entirely and by itself prevent two people from living together in the same manner as married spouses, e.g., by living together and foreswearing other intimate partners.[13]

2. *For the recognition of the relationship as such within the community* – In conservative Indian societies, marriage, in its capacity as a socially acceptable form of intimacy, is important: without married status, (heterosexual) couples face obstacles moving together in public, showing intimacy, gaining access to housing and hotel stays,[14] and even being

[12] Though beyond the scope of this article, serious thought must be given to which foreign jurisdictions are referred to for interpretation of the Constitution and Indian law generally. There is a risk of selectively reaching for foreign cases when we know that they agree with the proposition we are trying to canvass. Norman Dorsen, *The Relevance Of Foreign Legal Materials In U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia And Justice Stephen Breyer*, 3(4) INT'L J. OF CON. L. 519, 521 (2005) (per Scalia, J.). This is particularly so if they are jurisdictions that bear no jurisprudential or historical relation to India, such as civil law jurisdictions. Courts in India are justified in raising eyebrows at the uninhibited invocation of foreign precedent, as the Supreme Court did in Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1, and the cases cited therein.

[13] Ruth Vanita, *Democratising Marriage: Consent, Custom and the Law* in LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW 338, 347, 352 (Arvind Narrain & Alok Gupta, 2011) (describing '*maitri* contracts' between women).

[14] Aditya Menon, *Delhi Landlords Will Not Rent Homes To Muslims, Live-In Couples*, India Today, October 1, 2012, available at https://www.indiatoday.in/india/north/story/delhi-landlords-will-not-rent-homes-to-muslims-live-in-couples-117469-2012-10-01 (Last visited on December 8, 2019); Monalisa Das, *No Law Prohibits Unmarried Couples From Staying Together, Still Hotels Refuse*, The News Minute, May 19, 2015, available at https://www.thenewsminute.com/lives/507 (Last visited on December 8, 2019); Ananya Bhattacharya, *Married Couples Only: Conservative India's Moral Policing Extends To Airbnb*, Quartz India, July 18, 2017, available at

thought of as 'normal', respectable members of society. Legal acceptance and social acceptance are not always convergent. However, one certainly guides the other. Indian marriages under most laws do not have to be registered,[15] and most are not, and presenting as married with a corresponding recognition within the community of being married over a period of time is presumed to be a valid marriage.[16] Recognition of same-sex marriage would be a step towards social acceptance.

3. *To adopt the legal rights and obligations associated with being married* – This includes a married party's rights in relation to their spouse, e.g., maintenance and protection from domestic violence; and their rights in relation to the world at large, e.g., inheritance (unmarried partners have no right to inherit from their partner's family, even assuming that a person in a same-sex marriage would be entitled to inherit from their spouse under extant law).

Hence, by acquiring the right to marry a person of their choice, including a person of the same sex, an LGBTQA+ individual will be able to gain greater social acceptance, acquire rights intended to protect married partners, and express their love in a way that many find more meaningful.

IV. CHALLENGING PERSONAL LAWS ON CONSTITUTIONAL GROUNDS

Apart from religious beliefs and purely religious rites, the practice of religion includes acts incidental to religion.[17] India has separate 'personal laws' applicable to Hindus (along with Jains, Buddhists, and Sikhs), Muslims, Christians, and Parsis. These broadly cover marriage and divorce, adoption, and succession to property (and at one time, controversially, maintenance). However, these personal laws are not truly religious either in origin or in character.

Prior to the British colonisation, there existed laws in disparate Indian kingdoms that were based on Islamic scripture as also the *sastras* and the *sutras*. However, these were heterogeneous and based on local custom. The genesis of the separate personal laws is in Warren Hastings' Regulations of 1772, which provided that for cases of inheritance, marriage, caste, and religious usages or institutions, the "law of the Koran with respect to Mahometans and those of the Shaster with respect to Gentoos" would be applied.[18] This had two effects. First, it confined Hindu and Islamic law to the subjects we now know as 'personal law', which previously applied to other subjects.[19] Second, it elevated certain *sastras* to the position of exclusive authoritative texts applicable to all Hindus (whilst making

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https://qz.com/india/1030463/married-couples-only-conservative-indias-moral-policing-extends-to-airbnb/ (Last visited on December 8, 2019).

[15] Law Commission of India, *Compulsory Registration of Marriage*, Report No.270, 2, 4, 10-18 (July, 2017); *See also* Seema v. Ashwani Kumar, (2006) 2 SCC 578, ¶18.

[16] Dhannulal v. Ganeshram, AIR 2015 SC 2382, reiterating A. Dinohamy v. W.L. Balahamy, AIR 1927 PC 185.

[17] Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thritha Swamiar of Sri Shirur Mutt, (1954) SCR 1005 ('Shirur Mutt'); Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388.

[18] M.P. SINGH, OUTLINES OF INDIAN LEGAL & CONSTITUTIONAL HISTORY 118 (Universal Law Publishing Co., 8th ed., 2006); NANDINI BHATTACHARYA-PANDA, APPROPRIATION AND INVENTION OF TRADITION: THE EAST INDIA COMPANY AND HINDU LAW IN EARLY COLONIAL BENGAL (2007).

[19] Marc Galanter, *Displacement of Traditional Law in Modern India*, 24 J. OF SOCIAL ISSUES 4, 65, 69 (1968) ('Marc Galanter').

some allowances for custom) that they had not previously occupied, and something akin to a Hindu common law was created through binding precedents.[20]

Similarly, the Muslim Personal Law (Shariat) Application Act, 1937 ('Shariat Act'), whilst providing the *Shariat* as the law applicable to Muslims, supplanted local customs and usages, and further, was limited to subjects of 'personal law'. Thus, the *Shariat* acquired exclusive jurisdiction over certain matters (and not others) through legislation.[21]

Post independence, India did not restore the pre-colonisation tradition of variegated customs, but amalgamated and/or supplanted them into a uniform Hindu Code. The provisions of the Hindu Code represent a break from the *sastras*, and are founded on socio-political considerations rather than religious foundations.[22] Since the passage of the statutes that formed the Hindu Code, personal laws have been the subject of several legislative and judicial interventions, from the 2005 amendment to the Hindu Succession Act to the issue of maintenance under Islamic law and the abolition of triple *talaq*. Therefore, personal law by character and origin is secular law. Scriptures and customs, while relevant, are not dispositive of any question.[23] Hence, personal law is governed by statute that often has no scriptural basis.

Nevertheless, the courts have insisted that personal law does not constitute 'law' under Article 13 of the Constitution, which states that "all laws in force in […] India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of [Part III], shall […] be void", with laws including "custom or usage […] having the force of law". Notably, in *State of Bombay* v. *Narasu Appa Mali* ('Narasu Appa Mali'),[24] a statute criminalised bigamy among Hindus but exempted Muslims. Since it touched on marriage, this affected the 'personal law' of Hindus. Nevertheless, the Bombay High Court upheld it. Narasu Appa Mali's contribution to the jurisprudence of personal laws is two-fold. First, it held that personal law was not included in the definition of 'laws' in Article 13. Nor was personal law custom or usage, since custom or usage represented a deviation from personal law.[25] Gajendragadkar, J. in his concurring opinion added that personal laws derived their validity not from legislature but from scripture.[26] Second, the Narasu court invoked (even if it did not elaborate on) the 'essential religious practices' test. It drew a distinction between 'religious faith and belief' and 'religious practices', holding that the latter were subject to public order, morality, health, and State social welfare policy.[27]

[20] HENRY SUMMER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 10 (1883); Rajeev Dhavan, *Dharmasastra and Modern Indian Society: A Preliminary Exploration*, 34(4) J. OF THE IND. L. INSTITUTE 515, 529-530 (1992); Donald R. Davis Jr., *Law and Law Books in the Hindu Tradition*, 9(3) GERMAN L.J. 309, 320 (2008).

[21] Saptarshi Mandal, *Do Personal Laws Get their Authority from Religion or the State: Revisiting Constitutional Status*, 51(50) Eco. & Pol. Weekly (2016) ('Saptarshi Mandal').

[22] Marc Galanter, *supra* note 19, 79-80 ("[…] the Code entirely supplants the *sastra* as the source of Hindu law […] Very few rules remain with a specifically religious foundation"); Mandal, *id*.

[23] For e.g., The Hindu Marriage Act, 1955, §4(a) (providing generally for the supremacy of the statute over customs and usages); The Dissolution of Muslim Marriages Act, 1939, §4 (providing that apostasy by a married Muslim woman does not automatically nullify her marriage, notwithstanding some interpretations of the *Shariat* providing the opposite). The 2005 Amendment to the Hindu Succession Act also modifies traditional Hindu law, under which a married daughter was not entitled to a share of her father's ancestral property.

[24] State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.

[25] *Id*., 88 (per Chagla, C.J.).

[26] *Id*., 90 (per Gajendragadkar, J.).

[27] *Id*., 86 (per Chagla, C.J.).

Chagla, C.J. held that bigamy was not an 'integral part' of Hinduism. Gajendragadkar, J. held that bigamy was only permissive and not obligatory, and its object (begetting a son) could be achieved by adoption.[28] However, the primary thrust of his reasoning was that Hindu law considered all matters from a religious point of view, and as such, a distinction had to be drawn between 'legitimately religious' matters and other matters.[29]

Narasu Appa Mali has never been explicitly overruled,[30] but its foundational reasoning has been chipped away over the years, albeit unevenly. In *C. Masilamani Mudaliar* v. *Idol of Sri Swaminathaswami Thirukoil* ('Masilamani Mudaliar'),[31] the Supreme Court, without citing Narasu Appa Mali, repeated the proposition that personal laws are derived from scriptures and not the Constitution, but nevertheless held that such would be void under Article 13 if they violated Fundamental Rights.[32] Most recently, in *Indian Young Lawyers Assn.* v. *State of Kerala* ('Sabarimala'),[33] the plurality of the Supreme Court held that the custom barring women between the ages of ten and fifty years from entering the Sabarimala Temple (supported by the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965) violated the petitioners' individual right to worship under Article 25. Misra, C.J. expressed that Article 25(1) recognises a right not only to inter-faith parity, but also to intra-faith parity.[34] Therefore, 'law' under Article 13 cannot exclude the individual right of an adherent of any religion, even if such exclusion is itself a part of that faith. Though the right to enter the temple was restricted to 'Hindus',[35] the reasoning was wholly based on Article 25(1) without reference to Article 25(2).[36] Therefore, there is no reason why this reasoning should not apply to all religions and to matters other than entry into temples.

However, the essential religious practices live on. From *Commissioner, Hindu Religious Endowments, Madras* v. *Shri Lakshmindra Thritha Swamiar of Sri Shirur Mutt* ('Shirur Mutt') to *Sardar Syedna Taher Saifuddin Saheb* v. *State of Bombay* ('Saifuddin')[37] to *Commissioner of Police* v. *Acharya Jagdishwarananda Avadhuta* ('Jagdishwarananda

[28] *Id.*, 94 (per Gajendragadkar, J.).
[29] *Id.*, 94.
[30] Chandrachud, J. disapproved of Narasu Appa Mali in Indian Young Lawyers Assn. v. State of Kerala, 2018 SCCOnline SC 1690, ¶274. He stated that Gajendragadkar, J.'s opinion that personal laws are not 'law' under Article 13 was not correct. He further held that Narasu Appa Mali's reasoning was flawed, but left it to future courts to overrule it (¶278). The remaining judges in the majority in the case did not comment on Narasu Appa Mali, though they concurred in the ruling.
[31] C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil, (1996) 8 SCC 525.
[32] *Id.*, ¶15.
[33] Indian Young Lawyers Assn. v. State of Kerala, 2018 SCCOnline SC 1690.
[34] *Id.*, ¶101.
[35] *Id.*, ¶104.
[36] This ruling narrowly forms a part of the ratio of the judgement. Misra, C.J. was joined by Khanwilkar, J. Chandrachud, J. did not situate his reasoning that permitting the entry of women did not violate the religious freedom of the adherents within either Article 25(1) or 25(2). However, he held that the anti-exclusionary principle ranked higher than religious freedom in the "constitutional order of priorities" (¶233). Therefore, what follows is that regardless of legislation under Article 25(2), barring entry of women into a public temple is constitutionally impermissible. This line of reasoning is therefore supported by three judges of the five-judge bench. Meanwhile, Nariman, J.'s reasoning was based on Article 25(2) (¶173) with reference to the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965. Malhotra, J. (dissenting) stated that the entry of women into the Sabarimala temple was only possible under Article 25(2), and which required legislation and not judicial fiat (¶10.8) and held that Rule 3(b) of the rules framed thereunder was not contrary to the Act (¶10.9).
[37] Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, AIR 1962 SC 853.

Avadhuta'),[38] the courts have scrutinised laws prohibiting or restricting religious practices by examining whether the practice is an 'essential' or 'integral' part of that religion.[39] In Sabarimala, the C.J. (writing for himself and Khanwilkar, J.) applied it to hold that barring the entry of certain women into the Sabarimala temple at certain times was not an essential part of the 'Hindu religion'; on the contrary, it was an essential part of the Hindu religion to allow Hindu women to enter into temples and worship.[40] This test has been criticised for distorting Ambedkar's intent[41] (partially echoed by Gajendragadkar, J. in Narasu Appa Mali) to insulate from the Constitution only matters that are 'essentially religious' and arming the courts with the powers to enquire into what matters are 'essential to the religion'.[42]

Finally, it is clear post-Sabarimala that freedom of religion is an individual right. Unlike Articles 26 and 30, which grant rights to religious denominations and minorities, Article 25 provides that 'all persons' are 'equally entitled' (emphasis supplied) to freedom of religion.[43] For the purpose of personal laws, every person, including those who profess no faith and those whose parents married under the entirely secular Special Marriage Act, is regarded as belonging to one or another religion (with 'Hindu' being the residuary category for those who do not meet the definition of Muslim, Christian, Parsi, or Jew).[44] Nevertheless, this does not mean that an individual who identifies as an adherent of X religion is unable to claim the right to do a certain act as a facet of their religious freedom on the ground that the act is contrary to the tenets of X religion.

In light of the above, India as a secular State can only create secular law. However, the State has chosen to preserve or codify customs and laws that have religious

[38] Commissioner of Police v. Acharya Jagdishwarananda Avadhuta, (2004) 12 SCC 770.

[39] *See also* Mohd. Hanif Quareshi v. State of Bihar, AIR 1958 SC 731; Durgah Committee, Ajmer v. Syed Hussain Ali, AIR 1961 SC 1402; N. Adithayan v. Travancore Devaswom Board, (2002) 8 SCC 106; John Vallamattom v. Union of India, (2003) 6 SCC 611.

[40] Indian Young Lawyers Assn. v. State of Kerala, 2018 SCCOnline SC 1690, ¶¶122-123. This particular ruling, though, does not form part of the ratio of the judgment. Nariman, J. held in favour of the petitioners even on the assumption that the exclusionary rule was an essential part of the religion (¶173). Chandrachud (¶289) and Malhotra, JJ. (¶10.10) criticised the 'essential religious practices' test.

[41] CONSTITUENT ASSEMBLY DEBATE, December 2, 1946 speech by DR. B. R. AMBEDKAR, available at https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-02 (Last visited on December 8, 2019):

> ("[…] we ought to strive hereafter to limit the definition of religion in such a manner that shall not extend beyond beliefs and such rituals as may be connected with ceremonials that are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession should be governed by religion".)

It must be noted that Dr. Ambedkar was speaking in the context of legislation and not judicial review. He followed the above with the following:

> "It is, therefore, quite impossible for anybody to conceive that the personal law shall be excluded from the jurisdiction of the State. Having said that, I should also like to point out that all that the State is claiming in this matter is a power to legislate. There is no obligation upon the State to do away with personal laws. It is only giving a power. Therefore, no one need be apprehensive of the fact that […] the State will immediately proceed to execute or enforce that power in a manner that may be found to be objectionable by the Muslims or by the Christians or by any other community in India."

[42] GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION 149 (2019) ('Gautam Bhatia'). *See also* Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan, (1964) 1 SCR 561, 620-623.

[43] Indian Young Lawyers Assn. v. State of Kerala, 2018 SCCOnline SC 1690, ¶¶ 144(ii), (per Misra, C.J.), ¶¶174, 177 (per Nariman, J.), ¶291 (per Chandrachud, J.), ¶15.6(ii) (per Malhotra, J.).

[44] The Special Marriage Act, 1954, § 2(1)(c).

origins. This does not render such laws non-secular, even if different laws are applied to persons of different religions. They are still largely creations of statute, and enforced by the State in the same manner as any other laws.[45] This view is supported by numerous legislative and judicial interventions in the matter of personal laws, which divorces and further distances them from scripture. In essence, Indian personal law is secular law. They are therefore all times subject to the limits and mandates of the Indian Constitution.

Postscript: Subsequent to the writing of this article, the Supreme Court has agreed to refer the correctness of the essential religious practices test, amongst several questions, to a larger bench.[46]

V. THE CONSTITUTIONAL FOUNDATIONS OF MARRIAGE EQUALITY

There were four separate judgements passed in Navtej Johar (Misra, C.J. (with Khanwilkar, J.), Nariman, J., Chandrachud, J., and Malhotra, J.). Though they were unanimous in reading down §377 of the Indian Penal Code to exclude from its purview sexual intercourse between consenting adults, the judgements do not state that they are in concurrence with each another or any of them. The ratio of the judgement must be pieced together from the points of agreement between the four separate judgements. Therefore, stray comments picked from the separate judgements, while well publicised, may not actually be law.[47] Nevertheless, Navtej Johar is precedent that forms the bulwark of the argument for attacking marriage as defined as "one man, one woman" under Articles 14, 15, 19, and 21 of the Constitution.

A. *DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AS SEX DISCRIMINATION*

Sexual orientation is not explicitly mentioned as a prohibited ground for discrimination under Article 15. However, a common feature of the Constitution is providing a constitutional concept, whilst also providing conceptions of its application in specific cases.[48] Thus, Article 14 states the broad right to equality and freedom from non-discrimination, while Article 15 underlines non-discrimination under five specific grounds and Article 17 prohibits one particular form of discrimination, i.e. untouchability.[49] Hence, the non-discrimination principle under Article 14 goes beyond the enumerated grounds under Article 15

The conclusion of *National Legal Services Authority of India* v. *Union of India* ('NALSA')[50] was the equation of sexual orientation with sex as a prohibited basis for

[45] Saptarshi Mandal, *supra* note 21.
[46] Kantaru Rajeevaru v. Indian Young Lawyers Assn., 2019 SCCOnline SC 1461, ¶¶ 5, 7.
[47] For example, Chandrachud, J.'s criticism of judgements on Article 15 such as Air India v. Nergesh Meerza, (1981) 4 SCC 335 on their failure to consider the intersectional nature of sex discrimination (Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶¶438-439 (per Chandrachud, J.)) is not considered by any other judge on the bench.
[48] Gautam Bhatia, *supra* note 42, 65. *See also* Gautam Bhatia, *supra* note 42, 91-92 (commenting on the holding in State of Kerala v. N.M. Thomas, (1976) 2 SCC 310 that Article 16(4) permitting the State to make special provisions for the reservation of appointments or posts for underrepresented groups is a facet of, and not an exception to, the rule in Article 16(1) prohibiting discrimination on specified grounds).
[49] *Id*., 48.
[50] National Legal Services Authority of India v Union of India, (2014) 5 SCC 438.

discrimination in the application of law under Article 14.[51] The Supreme Court held that the term "person" under Article 14 is gender-neutral and includes all genders.[52] It also held that "sex" in the context of discrimination under Article 15, includes "gender identity", and the same is fluid or a spectrum as opposed to merely a binary of male and female.[53] It therefore concluded that sex discrimination under both Articles 14 and 15 (amongst several provisions in the Constitution) includes discrimination on the basis of gender identity and sexual orientation.[54]

However, there is a gap in the Supreme Court's reasoning. NALSA was decided after Koushal and before Navtej Johar. The Court therefore refrained from any discussion on § 377 IPC.[55] However, it considered discrimination on the basis of 'sexual orientation' as defined as an "individual's enduring physical, romantic and/or emotional attraction to another person"[56] as a separate issue.[57] The Supreme Court held that Article 14's application to all "persons" would include all people. However, this was in the context of both violence as well as discrimination in access to public spaces (which is specifically set out in Article 15(2)) primarily owing to transgendered persons' outward non-conformity with traditional gender roles and expression of gender identity.[58] Whilst stressing that gender identity and sexual orientation are different concepts,[59] the Court seemed itself to confuse the two, describing sexual orientation as 'self-defined' and which 'may or may not change' after transitioning between genders, without reference to authority. Since this was a case filed directly in the Supreme Court without any specific cause of action, the Court's quotation from the affidavits in support of the petition illuminate the facts of which the Court was cognisant. None of the three accounts quoted[60] refers to sexual orientation or discrimination on that basis. Similarly, the description of the transgender community, with which the Court was concerned,[61] does not refer to alternative sexual orientations. At the same time, the Court was conscious of persecution on the basis of sexual orientation, e.g., through §377.[62] Therefore, while NALSA states that Article 14 does apply to persons of all sexual orientations, its reasoning does not explain why discrimination on the basis of sexual orientation constitutes sex discrimination analogous to that faced by the transgendered that should be adjudicated in a case concerning discrimination on the basis of gender identity. NALSA's wholesale incorporation of the *Yogyakarta* Principles into the fundamental rights matrix of the Indian Constitution[63] (in the same manner as the Convention on the Elimination

[51] *Id*., ¶83.
[52] *Id*., ¶82.
[53] *Id*., ¶¶21-21, 81 (per Radhakrishnan, J.). But *see id*., ¶113 (per Sikri, J.) (concurring with Radhakrishnan J., but confining his own observations only to those persons identifying as a third gender that is neither male nor female, rather than all those who do not identify with their gender assigned at birth). Naz Foundation is a judgement that directly recognises sexual orientation as sex discrimination, but after it was overturned by Koushal, was not restored but replaced by Navtej Johar).
[54] National Legal Services Authority of India v Union of India, (2014) 5 SCC 438, ¶¶82-82.
[55] *Id*., ¶20.
[56] *Id*., ¶22.
[57] *Id*., ¶22.
[58] *Id*., ¶66.
[59] *Id*., ¶22.
[60] *Id*., ¶¶11-12.
[61] *Id*., ¶14 (per Radhakrishnan, J.); *Id*., ¶¶113-115 (per Sikri, J.).
[62] *Id*., ¶19.
[63] *Id*., ¶60; Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶320 (per Nariman, J.) and ¶¶528-529 (per Chandrachud, J.).

of all Forms of Discrimination against Women was incorporated in *Vishaka* v. *State of Rajasthan* ('Vishaka'))[64] provides considerable support to the constitutional protection of non-heterosexual persons (see below), but once again, its provisions relating to non-discrimination on the basis of sexual orientation are swept in in the course of the Court's reliance on those provisions for the purpose of non-discrimination on the basis of sex.

However, the Court is not wrong in propounding that sexual orientation is inseparable from sex: a gay man is gay precisely because he is attracted to males, and he is denied the right to marry a man solely because he is a man.[65] The heteronormative institution of marriage presupposes that men will marry women and vice versa. It therefore classifies men into two categories: those who want to marry women and those who want to marry men, and rules that the former can marry and the latter cannot.[66] Likewise, it rules that women who want to marry men can marry, but those who want to marry women cannot. The provisions of the various marriage laws are elaborated on below, but the tradition of marriage in India under whatever law has been heteronormative. This classification can be attacked on three grounds: that it constitutes sex discrimination under Article 15, that it is impermissible class legislation and/or arbitrary under Article 14, and that the classification falls foul of the *Yogyakarta* Principles incorporated into the Constitution.

Legislation that discriminates on the basis of sex must be subjected to strict scrutiny. Therefore, applying NALSA, strict scrutiny must apply to discrimination on the basis of sexual orientation as well. The government would have to show a compelling governmental interest sought to be advanced by the discrimination, as well as narrow tailoring of the law to qualify as the least restrictive means to pursue such qualifying interest.[67]

There is really no object to restricting marriage to 'one man, one woman.' The notion that the State may legitimise sexuality purely within marital boundaries for procreation alone has been held to be obsolete and irrational.[68] Besides, if the purpose of the law of marriage was to prevent unions that could not result in procreation, then marriages involving impotent/infertile individuals or individuals unable to procreate by reason of old age, disease, or injury would be void (and not merely voidable in certain circumstances). Nor could it be said post-Navtej Johar that one is natural and the other unnatural.[69] Nor can any argument be made that the discrimination is founded on morality or the protection of traditional notions of marriage, as public morality is not only trumped by constitutional morality, but also by positive rights including privacy, autonomy, and free expression (see *infra*). Chandrachud, J. in Navtej Johar held that substantive equality between the sexes is undermined by discrimination that silences or makes invisible, and places deliberate and systematic barriers to, the public expression and view of relationships that tend to undermine the

[64] Vishaka v. State of Rajasthan, (1997) 6 SCC 241.
[65] Andrew Koppelman, *Why Discrimination Against Gay Men and Lesbians is Sex Discrimination*, 69(2) NYU L. REV. 197 (1994).
[66] Categories like "men" and "women" are used for simplicity's sake. Sexual orientation, like gender identity, exists on a spectrum, and defies neat categorisation as "attracted to men" and "attracted to women" in the same manner in which gender identity is not limited to "identifies as a man" and "identifies as a woman".
[67] Subhash Chandra v. Delhi Subordinate Services Selection Board. (2009) 15 SCC 458, ¶ 88.
[68] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶478 (per Chandrachud, J.).
[69] *Id*., ¶418 (per Chandrachud, J.).

heteronormative gender binary.[70] This would not only apply to intimate relationships out of wedlock (as in Navtej Johar), but even in the most intimate relationship of marriage.

Similarly, classification under Article 14 requires satisfying two conditions, namely, first that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and second, that the differentia must have a rational nexus to the object sought to be achieved by the statute in question.[71] As stated, there is no constitutionally valid object that is sought to be achieved by restricting marriage to 'one man, one woman'. By definition, there is a difference between same-sex and opposite-sex couples. However, even if there was some object sought to be achieved, to what could this differentiation hold a rational nexus?

Thus, under the standard conceptions of the non-discrimination principle under Articles 14 and 15, marriage as defined as one man, one woman fails. We do not know whether the legislative design was out of hostility towards same-sex relations or innocently on account of heteronormativity. It makes no difference to these tests. However, in the backdrop of the Victorian morality of natural and unnatural relations (as derived from Abrahamic religion) that underpinned §377, there is some evidence to suggest that there was legislative animus against homosexuals, at least in those personal laws that were derived from Abrahamic religions.[72] In that sense, the legislative intent may itself be capricious, which would void one man, one woman under the emerging test of manifest arbitrariness.[73]

Lastly, there is recourse to the *Yogyakarta* Principles that grant rights analogous to marriage equality. While the *Yogyakarta* Principles do not explicitly require that States recognise same-sex unions, whether within the definition of marriage or otherwise, they include the right to the universal enjoyment of human right, regardless of sexual orientation and gender identity,[74] the right against discrimination on the basis of sexual orientation or gender identity and the right to equality before the law,[75] the right to privacy

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[70] *Id*., ¶453 (per Chandrachud, J.).

[71] Dipak Sibal v. Punjab University, (1989) 2 SCC 145, ¶ 9; Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶408 (per Chandrachud, J.), ¶637.2 (per Malhotra, J.).

[72] Thomas Macaulay, *Introductory Report to the proposed Draft Bill, 1837* (describing what would become §377 as:

> "an odious class of offences respecting which it is desirable that as little as possible should be said […] we are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision."),

– quoted in Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals*, 41(46) EPW 4815 (2006).

[73] Shayara Bano v. Union of India, (2017) 9 SCC 1, ¶101 (per Nariman, J.); Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶353 (per Nariman, J.) ("[…] a statutory provision can be struck down on the ground of manifest arbitrariness, when the provision is capricious, irrational and/or without adequate determining principle […]"), ¶521 (per Chandrachud, J.) ("If a law discriminates against a group or community of citizens by denying them full and equal participation as citizens in the rights and liberties granted by the Constitution, it would be for the Court to adjudicate upon validity of such a law."), and ¶637.9 (per Malhotra, J.):

> ("Section 377 insofar as it criminalises consensual sexual acts between adults in private, is not based on any sound or rational principle, since the basis of criminalisation is the "sexual orientation" of a person, over which one has "little or no choice" […] Thus, apart from not satisfying the twin-test under Article 14, Section 377 is also manifestly arbitrary […]").

[74] The Yogyakarta Principles, Principle 1.

[75] The Yogyakarta Principles, Principle 2.

including with regard to family and home,[76] and the right to found a family in its diverse forms.[77] Thus, same-sex partners are entitled to the same rights as regards recognition of marriage and all its attendant rights as opposite-sex partners.

B. *MARRIAGE AS DEFINED AS 'ONE MAN, ONE WOMAN' THROUGH THE PRISM OF CONSTITUTIONAL MORALITY*

Constitutional morality is an approach to constitutional interpretation, which scrutinises laws from the "inherent elements in the constitutional norms and the conscience of the Constitution".[78] Yet it is also an independent ground for challenging the constitutionality of an enactment because it compels the State to promote and advance "a constitutional order of values".[79] Popular morality finds expression in the democratic process and is enacted as law. Nevertheless, the law may not enforce morality simply because it is popular. The plurality in Navtej Johar ruled for the supremacy of constitutional morality over popular morality.[80]

The Supreme Court had previously recognised that social repugnance towards relationships and attitudes contrary to traditional marriage is not a ground for interference with personal autonomy.[81] A previous line of Supreme Court judgements founded this on notions of "evolving social morality", i.e. "classification which may have been valid at the time of its adoption may cease to be so on account of changing social norms".[82] By this, the Court scrutinises the constitutionality of a law not by the morality of the time in which it was enacted, but by the morality of the time when it is called upon to interpret it. However, constitutional morality goes a step further. It disregards the social morality of the present and casts its line into the future, that is, it asks not what is moral today but what ought to be moral for all time.

Misra, C.J.'s construction of 'constitutional morality' includes the often forgotten maxim that everything that is not prohibited is permitted.[83] He held, "[w]hile testing the constitutional validity of impugned provision of law, if a constitutional court is of the view that the impugned provision falls foul to the precept of constitutional morality, then the said provision has to be declared as unconstitutional."[84] This was echoed by Chandrachud, J., who held that the right to privacy "enables an individual to exercise his or her autonomy, away from the glare of societal expectation" and "may be construed to signify that not only are certain acts no longer immoral, but that there also exists an affirmative moral right to do

[76] The Yogyakarta Principles, Principle 6.
[77] The Yogyakarta Principles, Principle 24.
[78] Govt. of NCT of Delhi v. Union of India, (2018) 8 SCC 501, ¶ 63.
[79] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶ 459 (per Chandrachud, J.).
[80] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶¶ 128 (per Misra, C.J.), 349, 351-352 (per Nariman, J.), 459 (per Chandrachud, J.). Malhotra, J. did not refer to constitutional morality. Instead, she relied on S. Khushboo v. Kanniammal, (2010) 5 SCC 600, ¶ 46, which states that social morality, being inherently subjective, cannot be the basis for criminal law that unduly interferes with personal autonomy (Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶641.3). *See infra* for a discussion on the old standard of evolving social morality against the new standard of constitutional morality. Misra, C.J. (with Khanwilkar, J.) and Chandrachud, J. also applied constitutional morality in *Sabarimala*.
[81] S. Khushboo v. Kanniammal, (2010) 5 SCC 600, ¶46.
[82] John Vallamattom v. Union of India, (2003) 6 SCC 611, ¶¶33, 36.
[83] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶11 (per Misra, C.J.).
[84] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶136 (per Misra, C.J.).

them",[85] and "[c]onstitutional morality will impact upon any law which deprives the LGBT individuals of their entitlement to a full and equal citizenship. After the Constitution came into force, no law can be divorced from constitutional morality. Society cannot dictate the expression of sexuality between consenting adults. That is a private affair. Constitutional morality will supersede any culture or tradition".[86] Thus, marriage as an expression of sexuality as also a privilege of citizenship is protected, and cannot be denied on the grounds of any culture or tradition.

A note of caution must be sounded here. The Supreme Court has remarked that the constitutional scheme is one of a progressive realisation of rights.[87] The phrase is taken from Article 2 of the International Covenant on Economic, Social and Cultural Rights ('ICCPR').[88] However, in that document, States must progressively grant what is a fixed, if widely defined, set of rights. However, this has been interpreted to mean a 'non-retrogression' of rights, i.e., no retreat from a right once recognised.[89] It is conceivable that social morality in the future does not favour greater permissiveness in some regard, but lesser. For instance, it is possible that rights that are recognised (if not placed on a paramount priority), such as the right to eat food of one's preference or the right to subject one's children to circumcision (whether of the male or female variety) may be curtailed in light of a counterbalancing right to life of animals or the right to bodily integrity of children. This 'regression' of rights may come about not through majoritarianism or some perceived 'undesirable' political change, but through 'legitimate' democratic or judicial processes. Therefore, it is unwise to situate any right, including the right to choose a partner of whatever sex, on free-standing concepts decoupled from Articles 14 and 15, 25 and 26, or 21.[90] Nevertheless, constitutional morality has been adopted by the Supreme Court and may be employed in challenging marriage as defined as 'one man, one woman'.

C. *CHOICE OF MARRIAGE PARTNER OF ANY GENDER AS A FACET OF THE RIGHT TO PRIVACY AND AUTONOMY*

The Supreme Court in *K.S. Puttaswamy* v. *Union of India* ('Puttaswamy')[91] unanimously affirmed the Fundamental Right to privacy, including autonomy over personal and intimate choices. Personal autonomy includes both the negative right to not be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in.[92] The plurality in Puttaswamy explicitly stated that sexual orientation was a key component of the right to privacy, and indeed of Articles 14, 15, and 21 of the Constitution.[93]

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[85] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶474 (per Chandrachud, J.).
[86] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶606 (per Chandrachud, J.).
[87] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶¶93-99, 106, 190, 201-203 (per Misra, C.J.).
[88] International Covenant on Economic, Social and Cultural Rights, March 23, 1976, 999 U.N.T.S. 171, Art. 2.1.
[89] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶201 (per Misra, C.J.).
[90] This is supported by some observations in the order arising out of the review petition from the Sabarimala judgement. Gogoi, C.J. observed that there is a need to "delineate the contours of [constitutional morality], lest it become subjective." Kantaru Rajeevaru v. Indian Young Lawyers Assn., 2019 SCCOnline SC 1461, ¶5(iii).
[91] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.
[92] Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1, ¶¶34-35.
[93] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶¶144-145, 298 (per Chandrachud, J., speaking for himself, Khehar C.J.., Agrawal J., and Nazeer J.), ¶645, 647 (per Kaul J.).

The Court had previously upheld the right to marry and choose an intimate partner, albeit in the context of opposite-sex couples. It has held:

> "The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. The absolute right of an individual to choose a life partner is not in the least affected by matters of faith […] Social approval for intimate personal decisions is not the basis for recognising them. Indeed, the Constitution protects personal liberty from disapproving audiences."[94]

In the context of same-sex relationships, the Court has held that the Constitution protects "fluidities of sexual experience" and a "diversity of cultures" as opposed to 'closed categories' of sexuality.[95]

Chandrachud, J. also expressed in general terms the legal foundation for marriage equality:[96]

> "The right to intimacy emanates from an individual's prerogative to engage in sexual relations on their own terms. It is an exercise of the individual's sexual agency, and includes the individual's right to the choice of partner as well as the freedom to decide on the nature of the relationship that the individual wishes to pursue."[97]

And further: "social institutions must be arranged in such a manner that individuals have the freedom to enter into relationships untrammelled by binary of sex and gender and receive the requisite institutional recognition to perfect their relationships."[98] Thus, individuals have a right to choose a partner for intimate relationships, including marriage, according to their sexual orientation and choosing. These are restricted neither by tradition nor by religion nor by social approval nor by binaries of sex and gender. Thus, the Supreme Court has all but recognised a right to marry a partner of the same sex as a facet of the right to privacy and autonomy.

D. *MARRIAGE EQUALITY AS A FACET OF THE RIGHT TO LIFE WITH DIGNITY*

Nariman, J. in his separate judgement in *Puttaswamy* elevated Subba Rao, J.'s dissent in *Kharak Singh* v. *State of U.P.* ('Kharak Singh')[99] to one of three great dissents in the context of Article 21. Subba Rao, J. had stated, in the context of constant police surveillance of a 'history-sheeter', "How could a movement under the scrutinizing gaze of the policeman be described as a free movement? The whole country is in jail […] The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as

[94] Shafin Jahan v. Asokan K.M., ¶88 (per Chandrachud, J.). *See also* Shakti Vahini v. Union of India, (2018) 7 SCC 192; Shayara Bano v. Union of India, (2017) 9 SCC 1.
[95] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶478 (per Chandrachud, J.).
[96] An explicit statement to the effect that same-sex marriage was legalised, with the consequent and necessary changes to the various statutes governing marriage, would be *obiter dictum*, given that Navtej Johar was restricted to the question of §377 IPC.
[97] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶479 (per Chandrachud, J.).
[98] *Id*., ¶482 (per Chandrachud, J.).
[99] Kharak Singh v. State of U.P., AIR 1963 SC 1295.

he would like to do."[100] This is comparable to State action that pushes relationships underground. Misra, C.J. held in Navtej Johar, "An individual in exercise of his choice may feel that he/she should be left alone but no one, and we mean, no one, should impose solitude on him/her."[101] In India, where marriage is often the only socially acceptable intimate relationship, a law prohibiting marriage to a partner of one's choice forces the individual to choose between living a secret life, always in fear of being exposed, and living in solitude. That is an inhibited life. It is not a life with dignity. Therefore, marriage as defined as 'one man, one woman' must be construed as violating the right to life with dignity under Article 21.

E. *SAME-SEX MARRIAGE AS FREE EXPRESSION*

NALSA held that freedom of expression under Article 19(1)(a) includes the right to expression of one's self-identified gender.[102] Similarly, in Navtej Johar, Misra, C.J. concluded: "Any discrimination on the basis of one's sexual orientation would entail a violation of the fundamental right of freedom of expression."[103] Further, Misra, C.J. held that, in the context of dignity as an essential component of Article 21, "When biological expression, be it an orientation or optional expression of choice, is faced with impediment, albeit through any imposition of law, the individual's natural and constitutional right is dented."[104]

Diversity of lifestyle has been recognised in freedom of religion and conscience, cultural rights, and freedom of speech, and is tolerance or respect for such diversity is an aspect of constitutional morality. Therefore, individuals ought to be permitted to marry others of the same sex as an expression of their sexual orientation, including, in the case of heterosexual transgenders, an expression of their self-identified gender.

F. *THE DISTANCE BETWEEN NAVTEJ JOHAR AND THE RECOGNITION OF MARRIAGE EQUALITY*

Navtej Johar stops just short of declaring marriage equality. Misra, C.J. dismissed the argument (albeit in the context of sexual activity) that there is a difference between what is permissible between two adults of the opposite sex and that between two adults of the same sex.[105] He further held that an individual has a right to a "union under Article 21 of the Constitution […] companionship in every sense of the word, be it physical,

[100] *Id.*, ¶29 (per Subba Rao, J.) (dissenting).
[101] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶5 (per Misra, C.J.).
[102] National Legal Services Authority of India v Union of India, (2014) 5 SCC 438, ¶62.
[103] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶268.7 (per Misra, C.J.).
[104] Navtej Johar, ¶144 (per Misra, C.J.). The argument made in this article does not rely on seeing sexual orientation as a natural right, or indeed, the notion of natural rights at all. *See* Tarunabh Khaitan, *Guest Post: Against Natural Rights—Why the Supreme Court should NOT declare the right to intimacy as a natural right*, July 17, 2018, available at https://indconlawphil.wordpress.com/2018/07/17/guest-post-against-natural-rights-why-the-supreme-court-should-not-declare-the-right-to-intimacy-as-a-natural-right/ (Last visited on January 21, 2019). Indeed, other judges on the Court sound a note of caution on the approach, in Navtej Johar, ¶¶414, 418 (per Chandrachud, J.).
[105] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶121 (per Misra, C.J.) ("Such an argument ignores the individual orientation, which is naturally natural, and disrobes the individual of his/her identity and the inherent dignity and choice attached to his/her being.").

mental, sexual or emotional"[106] and quoted with approval Article 12 of the Universal Declaration of Human Rights[107] and Article 17 of the ICCPR,[108] as well as *R. Rajagopal* v. *State of Tamil Nadu*,[109] all of which refer to privacy and freedom from interference in one's family life, though he specifically avoided answering whether a same-sex union would include a same-sex marriage.[110]

However, the following paragraph from Misra, C.J.'s opinion, expressed in the context of sexual intercourse between same-sex partners, could just as easily be read in support of same-sex marriage:

> "The LGBT community possess the same human, fundamental and constitutional rights as other citizens do since these rights inhere in individuals as natural and human rights. We must remember that equality is the edifice on which the entire non-discrimination jurisprudence rests. Respect for individual choice is the very essence of liberty under law and, thus, criminalizing carnal intercourse under Section 377 IPC is irrational, indefensible and manifestly arbitrary. It is true that the principle of choice can never be absolute under a liberal Constitution and the law restricts one individual's choice to prevent harm or injury to others. However, the organisation of intimate relations is a matter of complete personal choice especially between consenting adults. It is a vital personal right falling within the private protective sphere and realm of individual choice and autonomy. Such progressive proclivity is rooted in the constitutional structure and is an inextricable part of human nature."[111]

Therefore, to progress from the right to choose an intimate relationship and the right to choose to marry a person of the same sex requires no jurisprudential leap, but the most miniscule of steps.

G. *MARRIAGE RESTRICTED TO 'ONE MAN, ONE WOMAN' AS A PRACTICE ESSENTIAL TO RELIGION*

Though it has been shown above that personal laws are secular in character and origin, nevertheless, marriage forms a part of the personal law and is held as sacred by several religions. In the context of maintenance, it was held that the personal law of Muslims did not envisage a situation where a divorced wife is unable to maintain herself.[112] Personal law (which provided for payment of maintenance only during the *iddat* period) nevertheless did not occupy the field, but would give way to the uniformly applicable Criminal Procedure Code ('CrPC') (which provided for maintenance even beyond the *iddat* period).[113] However, there is no denying that the definition of marriage forms a 'core' part of personal law.

[106] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶167 (per Misra, C.J.).
[107] "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."
[108] "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation."
[109] R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632.
[110] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶167 (per Misra, C.J.).
[111] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶255 (per Misra, C.J.).
[112] Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556, ¶14; Danial Latifi v. Union of India, (2001) 7 SCC 740, ¶34.
[113] *Id*., 112.

However, this does not mean that marriage law is beyond constitutional scrutiny. After all, the plurality in *Shayara Bano* v. *Union of India* ('Shayara Bano') struck down the practice of triple *talaq* as unconstitutional. This article will show in the parts that follow that not all personal laws explicitly prohibit same-sex marriage.

1. Same-sex marriage under Hindu law

§5 of the Hindu Marriage Act provides that a marriage may be solemnised under the Act between "any two Hindus", provided that certain conditions are met. This provision on its face does not limit marriage to one between a man and a woman.

The conditions that follow use the gender-neutral terms 'party' and 'parties', except sub-section (iii). Sub-section (iii) requires that "the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage". Similarly, the statute uses the words 'bride and bridegroom' or 'husband and wife' elsewhere to describe the parties to a marriage.[114] It therefore appears that the Act did not contemplate marriage except between a man and a woman.[115]

The definition of "degrees of prohibited relationship" under § 5(iv) read with § 3(g)(iv) also do not appear to contemplate same-sex couples as, for instance, it includes brother-sister, uncle-niece, and aunt-nephew pairings but not similar pairings with both parties being of the same-sex. However, such a prohibition on incest presumably exists to prevent inbreeding, which is obviously not a consideration for same-sex couples (or would not have been in the days before artificial insemination).

A Hindu marriage can be solemnised by performing the customary rites/ceremonies of either party.[116] These traditionally include *saptapadi* (seven steps or circuits around the sacred fire) and *datta homa* (invocation before the sacred fire),[117] though not all Hindu communities customarily perform these. It is questionable whether these rites/ceremonies can be performed for same-sex marriages, though there have been instances of Hindu priests doing so in the belief that Hindu marriage is between souls, which are not bound to any particular gender.[118] There is no express bar under the law.

It is especially important that Hindu Law recognises same-sex marriage, given its position as a 'catch-all' law. India has countless religions in infinite forms, yet, for the purposes of personal law, a person who is not a Muslim, Christian, Parsi, or Jew is considered

[114] The Hindu Marriage Act, 1955, §§7(2), 9, 13(2), 24.
[115] Thomas John, *Liberating Marriage: Same-Sex Unions and the Law in India* in LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW 355, 361 (Arvind Narrain & Alok Gupta ed., 2011). But *see* Arunkumar v. Inspector General of Registration, AIR 2019 Mad 265, where a marriage between a man and a transwoman was held to be a valid marriage under the Hindu Marriage Act. Though the marriage is properly classified as one between a man and a woman, it shows the wider interpretation of the Act is possible.
[116] The Hindu Marriage Act, 1955, §7.
[117] S. Nagalingam v. Sigagami, (2001) 7 SCC 487.
[118] Ruth Vanita, *Democratising Marriage: Consent, Custom and the Law* in LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW 338 (Arvind Narrain & Alok Gupta eds., 2011).

a Hindu[119] (including, for the purposes of succession, a Hindu, Buddhist, Sikh, or Jain married to another Hindu, Buddhist, Sikh, or Jain under the Special Marriage Act).[120]

2. Same-sex marriage under Muslim and Christian law

Personal law for Indian Muslims is guided predominantly, but not exclusively, by the *Shariat*, with the Muslim Personal Law (Shariat) Application Act, 1937 ("Shariat Act") providing a wide range of subjects to be governed by the *Shariat*. Certain interpretations have been codified, e.g. apostasy of a married Muslim woman automatically nullifies her marriage.[121]

While a detailed study of the position of Islamic law on same-sex unions is beyond the scope of this article, marriage equality is not traditionally recognised in Islamic law.[122] Certainly, the Quran does not speak of such unions, and regards as 'transgressors' those who seek pleasure outside an Islamic marriage.[123] It would be extremely difficult to argue before a court that same-sex marriage is permitted under Islamic law, especially in light of the opposition by the All India Muslim Personal Law Board ('AIMPLB') during the §377 litigation.[124]

Similarly, while the Bible regards homosexuality as sin[125] (though it must be said that not all Christians believe this to be a correct interpretation of Christianity),[126] the law governing Christians, as with Hindus, is largely supplanted by statute, viz., the Indian Christian Marriage Act, 1872. As with the Hindu Marriage Act, the Indian Christian Marriage Act provides that marriage may be solemnised between two Christians or between one Christian and one non-Christian.[127] However, it is also clear that the Indian Christian Marriage Act does not contemplate same-sex marriages, by use of words such as "the man and the woman" or "husband and wife" to refer to the parties.[128] The Indian Christian Marriage Act has limited scope for custom to deviate from its provisions. The Indian Christian Marriage Act provides for solemnisation either according to the "rules, rites, ceremonies and customs" of the Church of particular churches (which may not necessarily support same-sex marriage) or by officiants licensed by the State under the Act. There is no

[119] The Special Marriage Act, 1954, § 2(1)(c).
[120] The Special Marriage Act, 1954, §21-A.
[121] Dissolution of Muslim Marriages Act, 1939, §4
[122] But *see* generally Junaid Jahangir, *Same-Sex Unions in Islam*, 24(3) J. OF THEOLOGY AND SEXUALITY 157 (2018).
[123] THE QURAN, Chapter 23, Verse 5-7.

[124] The AIMPLB argued to overturn the Delhi High Court's judgement in Naz Foundation during the hearing of Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1. However, it did not make any arguments during the hearing of Navtej Johar. *See* The Indian Express, *Muslim Personal Law Board will not contest if SC scraps Section 377*, July 13, 2018, available at https://indianexpress.com/article/india/muslim-personal-law-board-to-not-contest-if-sc-scraps-section-377-5258406/ (Last visited on December 30, 2018).
[125] Bible Gateway, *Leviticus 18:22*, available at https://www.biblegateway.com/passage/?search=Leviticus+18%3A22&version=NIV (Last visited on February 8, 2020).

[126] *See* for e.g. New York Times, *Debating Bible Verses on Homosexuality*, June 8, 2015, available at https://www.nytimes.com/interactive/2015/06/05/us/samesex-scriptures.html (Last visited on December 8, 2019).
[127] The Indian Christian Marriage Act, 1872, §4.
[128] The Indian Christian Marriage Act, 1872, §60.

requirement under the Act for acquiring such a licence, except that the person be a Christian.[129] However, the word 'solemnisation' generally refers to the ceremonies and procedures necessary to effectuate an otherwise valid marriage. Under Hindu law, these generally include *saptapadi* and *datta homa*. Under Christian law, this could require a proclamation of marriage by a priest. However, these would naturally be circumscribed by the provisions of the Indian Christian Marriage Act setting out the requirements for a valid marriage.

Therefore, to realise marriage equality under Muslim and Christian law, resort to constitutional arguments to strike down the prohibition in the law may be unavoidable.

3. Seeking refuge under the Special Marriage Act

Even if marriage equality cannot be located within the framework of existing personal law, same-sex marriages can be solemnised under the Special Marriage Act, 1954. The Special Marriage Act has neither a religious character nor a religious origin, and even today enables an individual's right to marry a partner of their choice where not permitted by religious law, e.g., marriage of a Hindu to a non-Hindu,[130] marriage of a Sunni Muslim woman to a non-*kitabiya* without conversion of the spouse to Islam.[131] Even individuals of the same religion, who may marry under their personal law, may instead opt to marry under the Special Marriage Act.

Marriage under the Special Marriage Act has additional benefits. It permits marriages 'celebrated' or solemnised by whatever means,[132] which would include traditional religious ceremonies, to be registered under the Special Marriage Act. Therefore, persons who marry under the Special Marriage Act are not deprived of the opportunity to have a traditional marriage ceremony. The Special Marriage Act also does not disturb a person's succession right, vested interest, or other chance to inherit under intestate succession laws,[133] and therefore, protects those who choose to solemnise their marriage under it to all the benefits they would have received under the personal law applicable to their religion.

The Special Marriage Act, like the Hindu Marriage Act, uses the expansive language of "any two persons" when describing what marriages may be solemnised. Much like the Hindu Marriage Act, the Special Marriage Act probably did not contemplate and was probably not intended to enable same-sex marriage, which is evidenced by language referring to "the male" and "the female" and "living together as husband and wife".[134] Nevertheless, such words can be read to mean 'a male' or 'a female',[135] and "living together as husband and

[129] The Indian Christian Marriage Act, 1872, §§7, 9.
[130] Gullipilli Sowria Raj v. Bandaru Pavani, (2009) 1 SCC 714 (holding that a Hindu and a non-Hindu cannot be married under the Hindu Marriage Act).
[131] Dilbar Habib Siddiqui v. State of U.P., (2010) 69 ACC 997 (holding that a marriage between a Muslim man and a Hindu woman by Islamic rites is void).
[132] The Special Marriage Act, 1954, § 12(2).
[133] However, where one party is legally a Hindu and the other a non-Hindu, a marriage under the Special Marriage Act has the effect of effecting a partition of a Hindu party's Hindu joint family (HJF) (§19). Moreover, while all children of a marriage solemnised under the Special Marriage Act are legitimate, the Act does not permit a child to inherit property of a person other than their parents which they would not be permitted to under the relevant governing law.
[134] *See* Special Marriage Act, 1954, §§ 4(c), 15(a).
[135] Nayantara Ravichandran, *Legal Recognition of Same-sex Relationships in India*, 5 J. IND. L. & SOC. 95, 105 (2014).

wife" can be read to mean living in the manner of a husband and wife, i.e. as spouses, with the attendant social and legal obligations, e.g. cohabitation, mutual support, etc. Therefore, it may be possible to register a same-sex marriage under the Special Marriage Act.

This interpretation has further support. As stated above, the Supreme Court in *Danial Latifi* v. *Union of India* ('Danial Latifi') held that since Muslim personal law did not cover a situation where the divorced wife is unable to maintain herself, the beneficial provision of maintenance under Section 125 of the CrPC could be availed of even by Muslim women. Similarly, though Islamic law broadly does not permit same-sex marriage, two Muslims (or Christians) should yet be able to avail of beneficial legislation like the Special Marriage Act, which permits individuals to marry who may not be allowed to marry under their personal laws.

VI. POSTSCRIPT: BEYOND RECOGNISING SAME SEX MARRIAGE

Beyond mere recognition of same-sex marriage, further legal reform is necessary to achieve substantial equality between the treatment of same-sex relationships and opposite-sex relationships:

1. Though obvious, it must be clarified that a same-sex marriage cannot be nullified for want of procreation. Procreation as the sole reason for marriage is an antiquated concept. Nevertheless, legislative change must be made to statutes providing for failure to procreate/ impotence to be a ground for divorce,[136] or legal recourse must be considered waived by the foreknowledge of the parties that procreation is impossible.[137]

2. Same-sex couples must be treated on an equal footing with opposite-sex couples when considering applications to adopt children. There is no evidence to support a notion that the care and upbringing of a child by a same-sex couple is in any way inferior to that by an opposite-sex couple.

3. Same-sex partners should be equally protected under the Protection of Women from Domestic Violence Act, 2005 (the 'DV Act') and the law providing for maintenance. Though homosexual acts have been decriminalised, the stigma against same-sex relationships still dissuades walking out of abusive relationships.[138] The DV Act only recognises domestic

[136] The Madhya Pradesh High Court has held that the inability to procreate alone is not a sufficient ground for nullifying a marriage, and must be accompanied by a mental disorder that would make it unreasonable for the petitioner spouse to live with the spouse having the mental disorder. Alka Sharma v. Abhinesh Chandra Sharma, AIR 1991 MP 205.

[137] Though it is increasingly possible for same-sex spouses to beget biological children through surrogacy, sperm donation, etc., it would be a prohibitive and impractical requirement for the validity of a same-sex marriage.

[138] *See also* Scottish Home Department, *Report of the Committee on Homosexual Offences and Prostitution*, available at https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/collections1/sexual-offences-act-1967/wolfenden-report-/ (Last visited on December 8, 2019) ("Wolfenden Committee Report") referred to in Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶630 (per Malhotra, J.:

> "We have found it hard to decide whether the blackmailer's primary weapon is the threat of disclosure to the police, with attendant legal consequences, or the threat of disclosure to the victim's relatives, employers or friends, with attendant social consequences. It may well be that the latter is the more effective weapon, but it may yet be true that it would lose much of its edge if the social consequences were not associated with the present legal position.").

violence as committed by a man against a woman.[139] Thus, a man cannot be an "aggrieved person" under the DV Act. Meanwhile, while a woman in a same-sex relationship 'could' by virtue of her gender be an 'aggrieved person', her spouse cannot be a 'respondent'. Further, until and unless same-sex marriage is recognised as equal to opposite-sex marriage, her relationship would not be considered one "in the nature of marriage".[140] As regards maintenance under §125 of the CrPC, only a "wife", i.e. a woman wedded legally to a man, is entitled to maintenance.[141]

VII. CONCLUSION

There is no doubt that marriage restricted to 'one man, one woman' is unconstitutional under the law as declared by the Supreme Court. NALSA held that 'sex' under Article 15 includes 'sexual orientation' and a 'person' under Article 14 includes a person of any gender. Further, Navtej Johar reaffirmed the two-step test requiring intelligible differentia and rational nexus for sex discrimination to be constitutional, and adopted the 'manifest arbitrariness' test. There being no rational object to discriminating between same-sex and opposite-sex relationships, such discrimination should fail both Articles 14 and 15. The plurality in Navtej Johar also recognised constitutional morality rather than social or popular morality as a means to interpret public morality as a restriction on fundamental rights. Constitutional morality requiring tolerance for a diversity of lifestyles, a restricted reading of marriage violates constitutional morality. Navtej Johar also held that sexual orientation and choice of partner (based on recent cases in the context of opposite-sex relationships such as *Shakti Vahini* v. *Union of India* ('Shakti Vahini'), *Shafin Jahan* v. *Asokan K.M.* ('Shafin Jahan'), and Shayara Bano) is a part of the right to life with dignity under Article 21. Expression of sexual orientation, like expression of gender, has also been held to be protected under the right to freedom of expression. Indeed, Navtej Johar came within a hair's breadth of recognising that same-sex partners have a right to marry.

Finally, though marriage may be a 'core' part of personal laws, marriage equality should not be held to violate religious freedom based on the application of the 'essential religious practices' test in Sabarimala and Shayara Bano. In any case, the Hindu Marriage Act and the Special Marriage Act are capable of being interpreted to permit same-sex marriage.

[139] The Domestic Violence Act, 2005, §§2(a).

[140] The Domestic Violence Act, 2005, §2(f). *See also* Indra Sarma v. V.K.V. Sarma, (2013) 15 SCC 755, ¶¶38.5 (observing, *obiter*, that a domestic relationship between same-sex partners does not amount to a "relationship in the nature of marriage" under the Protection of Women from Domestic Violence Act, 2005).

[141] Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav, (1988) 1 SCC 530; Savitaben Somabhai Bhatiya v. State of Gujarat, (2005) 3 SCC 636.