



# ORIGIN, BACKGROUND AND CONSTITUTIONALITY OF PERSONAL MATRIMONIAL LAWS

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**Abstract:** Personal matrimonial laws, also known as religious or customary laws, play a significant role in regulating marriage, divorce, and related matters within diverse cultural and religious communities worldwide. This research paper provides an overview of the origin, background, and constitutionality of personal matrimonial laws, radiating light on their historical development, contemporary significance, and legal challenges of personal matrimonial laws. It gives an overview of how the constitution is overlaid with the secularity of personal matrimonial laws by pre-independence to the modern times. However, these laws are a subject of criticism and contradiction in regards of gender equality, rights of women and protection of vulnerable individuals under minor communities. Personal laws, their implementation in the constitution by way of constitutional debates and landmark judgments showing how the doctrine of harmonious construction is applied between Article 44 and Article 25 of the Indian Constitution. Apart from these present new laws enacted in modern times with the rights of LGBTQIA+ are also been examined in the research. There is constant discussion and judicial interpretation on the constitutionality of personal matrimonial laws. Courts struggle to strike a balance between the rights of people to exercise their religion and cultural customs and the values of justice, equality, and non-discrimination. Personal laws can provide difficulties when they clash with the fundamental rights that constitutions provide. This has resulted in legal changes, significant rulings, and legislative interventions meant to balance conflicting interests. It emphasizes how constantly changing personal matrimonial rules are, as well as how intricately religious, cultural, and legal standards interact. In resolving the issues raised by personal laws while recognizing the uniqueness and liberty of individuals and communities in areas of marriage and family life, it emphasizes the value of communication, legal pluralism, and human rights values.

**IndexTerms** - Doctrine of Harmonious Construction, Personal Matrimonial laws, LGBTQIA+, Indian Constitution.

## 1. INTRODUCTION

### ❖ CONSTITUTION AND MATRIMONIAL LAWS

The state is defined in international law as “an independent political entity” “occupying a defined territory” “the members of which are united together for the purpose of resisting external force and preservation of internal order.”<sup>1</sup> This may be called ‘police functions’ of the state, viz, preservation of law and order and defense of the country from external aggression.<sup>2</sup> But modern state is not limited to only a ‘police state’ but also carries the role of a social welfare state. The constitution of a country seeks to establish its fundamental or basis of apex organs of the government and administration, describe their structure, composition, powers, and principal functions, define the inter-relationship of these organs with one another and regulate their relationship with the people, more particularly, the political relationship.<sup>3</sup> It may be noted the term “Constitutional law” is broader than the term “Constitution”, as it comprises of the term “Constitution”, relevant statutory law, judicial decisions and conventions.<sup>4</sup> The Preamble is a salient feature of Constitution of India. The Preamble does not grant any power but it gives directions and purpose to the constitution and outlines its whole objective. It contains the fundamentals of the whole constitution such as declaring great rights and freedoms which the people of India intended to secure to all its citizens, throws light on the source of the constitution, viz, the People of India. The Preamble to the constitution declares India to be a ‘Sovereign Socialist Secular Democratic Republic.’<sup>5</sup> India is country of Religion and the state is enjoined to treat all religions and religious sects equally. The Supreme Court has declared secularism as the basic feature of the India Constitution.<sup>6</sup> The court further declared that secularism is a part of fundamental law and an unalienated segment

<sup>1</sup> M.P. JAIN, INDIAN CONSTITUTIONAL LAW, Lexis Nexis Eight edition Reprint 2023

<sup>2</sup> Ibid

<sup>3</sup> Ibid

<sup>4</sup> Ibid

<sup>5</sup> Ibid

<sup>6</sup> Kesavananda Vs State of Kerala (1975) 4 SCC (Supreme Court Cases) 225, AIR 1973 SC 1461

of the basic structure of the country's political system.<sup>7</sup> So as a fundamental right the Right to Freedom of Religion is mentioned under Article 25 to Article 28 of Constitution of India.<sup>8</sup> Apart from that Article 44 of Indian Constitution states that "The State shall secure for the citizens a uniform civil code throughout the territory of India".<sup>9</sup> The Indian Constitution contains a very elaborate scheme of distribution of power. Under the constitution, there is a three-fold distribution of legislative power between the union and the states, made by the three list in the Seventh Schedule of the Constitution.<sup>10</sup> The three list are:

- I. UNION LIST: Subject matters of the list is an exclusive area for the Centre to make and amend laws
- II. STATE LIST: Subject matters of the list is an exclusive area for the states to make and amend laws
- III. CONCURRENT LIST: Subject matters of this list are common and concurrent to both Centre and State and both can make and amend laws.

The laws related to marriage and divorce, infant and minors, adoption, will, intestacy and succession, joint family and partition are mentioned in clause (5) of concurrent list and both Centre and State can make and amends matrimonial laws. The legislature can modify the personal laws, such as, Hindu law, or Muslim law.<sup>11</sup>

#### ❖ PERSONAL LAWS: BACKGROUND AND DEFINITION

"Personal law" denotation has been established by both judicial and legislative authorities, but a clear-cut definition is not available yet. Justice Bhagwati in the case of Pradeep Jain vs Union of India<sup>12</sup> has referred to Personal law as the Law "by which an individual is governed in respect of various matters, such as, the essential validity of a marriage, the effects of marriage on the proprietary rights of husband and wife, jurisdiction in divorce or nullity in marriage, illegitimacy, legitimation and adoption, testamentary, and interstate succession to *movables*." The applicability of these laws is solely based on religion. Hindu laws apply only to such persons who are Hindu, Buddhist, Sikh, and Jaina by Religion, whether by birth or by conversion or otherwise. Similarly Muslim Laws applies only to Muslims, Christian Laws applies only to Christians, Parsi laws of Parsi Marriage and Divorce Act, 1986 applies only to Parsi communities. Personal laws are covered under Article 25 of Indian Constitution. As Justice R.M. Sahai has said "Article 25 is very widely worded and.... marriage, inheritance, divorce, conversion, are as much religious in nature and content as any other belief or faith"<sup>13</sup>. This find support from the constituent assembly debates on the Article and on the basis that the Article covered personal laws an amendment was proposed to the effect "Nothing in clause (2) of the Article shall effect the right of any citizen to follow the personal law of the group or the community to which he belongs or profess to belong."<sup>14</sup> The amendment was negated thus keeping the door open to amendment of personal laws under Article 25(2) for providing for social, welfare and reform.<sup>15</sup> This inclusion of personal laws under Article 25(1) was reiterated by Dr. Ambedkar during the parliamentary debates introducing the Hindu Code Bill. Referring to Article 25 he said that by giving the freedom to practice and profess any religion "we are practically giving him the right to practice his personal law".<sup>16</sup> Personal law therefore may be defined as that body of Laws which apply to a person or to a matter solely on the ground of his belonging to or its being associated with a particular religion.<sup>17</sup>

### 1.1 HARMONIOUS INTERPRETATION BETWEEN ARTICLE 25 AND ARTICLE 44 OF INDIAN CONSTITUTION

#### ❖ RULE OF HARMONIOUS INTERPRETATION

The Rule of Harmonious Interpretation states that states that if certain provisions in a constitution appear to conflict with each other, these provisions should be interpreted to effect as reconciliation between them so that, if possible, effect could be given to all. The presumption is that no conflict or repugnancy was intended by the framers was intended by the framers of the constitution between various provisions of the constitution. This principal has been applied to delimit the mutual relationship between the directive principles (Article 44) and Fundamental Rights (Article 25). The principle of Harmonious Construction has been applied to interpret the entries in the various legislative list. The principle of Harmonious interpretation has been applied to Fundamental Rights and Directive Principles so as to give effect to both as far as possible.<sup>18</sup>

#### ❖ CONTRADICTION BETWEEN ARTICLE 25 AND ARTICLE 44

Article 44 was introduced in the background of a legal regime governed by Regulation of 1772 introduced by Warren Hasting which said: "*In all suits regarding marriage, caste, and other religious usages and institutions the law of Koran with respect to the Mohammedans and of the Shaster with respect to the Gendoos shall be adhered.*"<sup>19</sup> Therefore during the pre-Independence era, courts administered personal laws according to the religious text of different religions. Consequently, when in 1949 we enacted the constitution, we included Article 25 and Article 26.<sup>20</sup> However, we also enacted Article 44 of Indian Constitution. By the time mentioned we already has Uniform Civil Code Laws covering every legal matter except those which are governed by various

<sup>7</sup> Ibid

<sup>8</sup> The Constitution of India

<sup>9</sup> Ibid

<sup>10</sup> M.P. JAIN, INDIAN CONSTITUTIONAL LAW, Lexis Nexis Eight edition Reprint 2023

<sup>11</sup> Ameerunnissa Vs Mehboob, AIR 1953 SC 91

<sup>12</sup> 1984 3 SCC 654

<sup>13</sup> Sarla Mudgal Vs Union of India (1995) 3 SCC 635

<sup>14</sup> Ruma Pal, A.M. Bhattacharjee Matrimonial laws and the Constitution, Eastern Law House Second Edition 2017

<sup>15</sup> Ibid

<sup>16</sup> Ibid

<sup>17</sup> Ibid

<sup>18</sup> Re Kerela Education Bill, AIR 1958 SC 956

<sup>19</sup> Ibid Supra Note 14, Chapter 1

<sup>20</sup> Ibid

Personal laws. As Ambedkar observed during the debates of Constituent Assembly on the draft of Article 44, the only province which was not covered was “Marriage and Succession” and it was the asserted intention of those who enacted Article 44 as part of the Indian Constitution to bring about that change and to do what was left undone. Issues were raised both by the minorities as well as Hindus in the constituent assembly. Ambedkar provided the compromise by suggesting that a beginning could be made “that the code shall apply only to those who made a declaration that they are prepared to be bound by it, so that in the initial stage the application of the code may be purely voluntary.”<sup>21</sup> By way of legislation some states have allowed for the voluntary opting out of personal law. For example, the Special Marriage Act 1954 enables any person living in India to get married under that act irrespective of the religion they follow. Chief Justice Gajendragadkar observed<sup>22</sup> that “in any event the non-implementation of the provision contained in Article 44 amounts to a grave failure of Indian democracy and the sooner we take suitable action in that behalf, the better” and that “in the process of evolving a new secular Social Order, a common Civil Code is must”. Also, Justice K.S. Hedge of Supreme Court observed<sup>23</sup> that “religion oriented personal laws were a concept of the medieval times-alien to modern society which are secular as well as cosmopolitan” and that “so long as our laws are religion-oriented, we can hardly build up a homogenous nation”. There were various landmark judgements in which there is a contradiction between Personal laws and Uniform Civil Code. Some of them are:

- I. SHAYARA BANO VS UNION OF INDIA (2017) 9 SCC 1
  - ❖ The petitioner in the above case challenged, *inter alia*, talaq-e-biddat on the ground that the said practice is discriminatory and against the dignity of women. The judgement vindicated the position taken by the government that talaq-e-biddat is against constitutional morality, dignity of women and the principles of gender equality, as also against gender equity guaranteed under constitution. The All-India Muslim Personal Law Board (AIMPLB) which was the 7<sup>th</sup> respondent in the case in their affidavit, *inter alia* contended that it was not for the judiciary to decide matters of religious practices such as talaq-e-biddat, but for the legislature to make any law on the same. They had also submitted in Supreme court that they would issue advisories to the members of the community against the practice.
  - ❖ The Supreme Court on 22<sup>nd</sup> August 2017, in the majority judgement of 3:2, set aside the practice of talaq-e-biddat (three pronouncements of talaq, at one and the same time) practiced by certain Muslim husbands to divorce their wives. This judgement gave a boost to liberate Indian Muslim women from the age-old practice of capricious and whimsical method of divorce, by some Muslim men, leaving no room for reconciliation.
- II. MOHD. AHMED KHAN VS SHAH BANO BEGUM AIR 1985 SC 945
  - The Supreme Court in this case has held that although the Muslim law limits the husband’s liability to provide for maintenance of the divorced wife to the period of *iddat*, it does not contemplate or countenance the situation envisaged by Section 125 of the code of Criminal Procedure, 1973. The court held that it would be incorrect and unjust to extend the above principles of Muslim law to cases in which the divorced wife is unable to maintain herself. The court therefore concluded that if the divorced wife can maintain herself, the husband’s liability ceases with the expiration of the period of *iddat*, but if she is unable to maintain herself after the period of *iddat*, she is entitled to have recourse to Section 125 of the Criminal Procedure Code, 1973. This decision helps in the implementation of The Muslim Women (Protection of Rights on Divorce) Act, 1986.
- III. SARLA MUDGAL VS UNION OF INDIA 1995 3 SCC 635
  - In the decision of this case a two-Judge Bench had issued a direction, through couched in the form of a request, to the state to take steps to secure a Uniform Civil Code relating to our matrimonial or family laws, and the decision was held as a landmark in our legal and constitutional history and was expected to provide for a turning point in our religious oriented personal laws.
- IV. JOSE PAULO COUTINHO VS MARIA LUIZA VALENTINA PEREIRA 2019 SCC ONLINE SC 1190
  - It was held that though Hindu laws were codified in the year 1956, there has been no attempt to frame a Uniform Civil Code applicable to all citizen of the country despite exhortations of this Court in earlier cases. However, Goa is a Shining example of an India State which has a Uniform Civil Code applicable to all, regardless of religion except while protecting certain limited rights.

Recently, on 05-09-2022, the Supreme Court asked the Centre to make its stand clear, within three weeks, on the feasibility of implementing a Uniform Civil Code (UCC) in the country. A bench comprising of former Chief Justice of India (CJI) U.U. Lalit and Justice S Rabindra Bhat was dealing with a bench of petitions seeking uniformity in laws for age of marriage, grounds of Divorce, succession, adoption, guardianship, and maintenance when it noted that these issues are various “facets” of UCC and directed the Centre to file its response on each aspect. “These petitions are seeking common marriage, divorce, adoption, maintenance, and succession laws. What is the difference between these matters? They are all “facets” of Uniform Civil Code,” the bench said, “Let a comprehensive response be filed, indicating the stand of Union Government in respect of issues in this matter. Assuming we might issue a mandamus (writ giving a direction), can be issue a mandamus itself is in question and whether you intend to place such a bill in Parliament,” the bench said<sup>24</sup>. Appearing for the Centre, Solicitor General Tushar Mehta said that it would essentially be a question of law. “If need be, we will put in a reply in three weeks,” he said<sup>25</sup>. Though the apex court, previously had advised the Centre to give a thought for having UCC, the Judiciary has left it to the legislative wisdom without entering the domain reserved for Parliament.

<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> Ibid

<sup>24</sup> P.M. BAKSHI, THE CONSTITUTION OF INDIA, LexisNexis 19<sup>th</sup> Edition Reprint 2023, Pg 153

<sup>25</sup> Ibid



### 1.3 CONSTITUTIONALITY OF PERSONAL MATRIMONIAL LAWS<sup>26</sup>

A common objection to the Uniform Civil Code is based on Article 25. Article 25 of the Constitution guarantees to all persons “freedom of conscience of religion and the right freely to profess, practice and propagate religion”. During the parliamentary debates in connection with the Hindu Code Bill, Dr. Ambedkar referred to the Article and said “the profession of a particular religion carries with it the personal law of the person.” The intention therefore was to allow different communities to have their own personal law. To sum up the arguments of the objectors was- if the Constitution permits different communities to be differently treated can those laws be challenged as discriminatory?

The answer to the question is twofold:

- Firstly, Article 25 is expressly made subject to the other fundamental rights including Article 13, 14 and 15
- Secondly, Article 25(2)(a) also allows the state to interfere in the personal law of any community in the country although such interference can be only within parameters defined constitutionally, statutorily, and judicially.

#### ❖ DIFFERENT PERSONAL LAWS FOR DIFFERENT COMMUNITIES

- i. The Hindus, Buddhists, Jains, and the Sikhs are governed by Hindu laws covering Hindu Marriage Act 1955, Hindu Succession Act 1956, Hindu Minority and Guardianship Act 1956, Hindu Adoptions and Maintenance Act 1956, Hindu Widow's Remarriage Act, Hindu Women Rights to Property Act 1937, Hindu Disposition of Property Act, 1916, Anand Marriage Act 1909 and Arya Marriage Validation Act, 1937.
- ii. The Muslims are governed by the uncodified Muslim Laws covering Muslim Women (Protection of Rights on Marriage) Act 2019, Muslim Women (Protection of Rights on Divorce) Act 1986, Muslim Women (Protection of Rights on Divorce) Rules 1986, Muslim Personal Law (Shariat) Application Act 1937 and Dissolution of Muslim Marriage Act 1939
- iii. The Christians are governed by Divorce Act 1869, India Christian Marriage Act 1872, and Marriage Validation Act 1892.
- iv. The Parsis are governed only by the Parsi Marriage and Divorce Act, 1936.
- v. Apart from this for interfaith or inter-religion marriages secular law such as Special Marriage Act 1954, Foreign Marriage Act 1969 and Relevant provisions of Indian Succession Act 1925 are made by law.
- vi. Certain other miscellaneous laws such as relevant provisions of Indian Penal Code, Dowry Prohibition Act 1961, Dowry Prohibition (Maintenance of List of Presents to the Bride and Bridegroom) Rules 1985, Prohibition of Child Marriage Act 2006, and Protection of Women from Domestic Violence Act 2006 have been implemented by the government covering provisions of adultery, cruelty, dowry death, prohibition of child marriage and domestic violence.

### 1.4 PRESENT SCENARIO OF PERSONAL LAWS

Eminent changes had taken place in past years in personal laws over various subject matters and these changes make a huge shift in society. These changes are a combined effort of Judiciary, Legislative and Executive organs of the government. It is a necessity for the laws to change over time because the society is very dynamic in nature and keeps on evolving over time. Some of the changes which is discussed below in brief are abolition of triple talaq, The Personal Law (Amendment) Act, 2019.

#### I. ENACTMENT OF MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019

- ❖ The Apex Court in *Shayara Bano* case and other connected matters, on the 22<sup>nd</sup> August, 2017, in a majority judgement of 3:2, set aside the practice of *Talaq-e-biddat* (three pronouncements of talaq, at one and same time) practiced by a certain Muslim husband to divorce their wives. This judgement gave a boost to liberate Indian Muslim women from the age-old practice of capricious and whimsical method of divorce, by some Muslim men, leaving no room for reconciliation. In spite of the Apex court setting aside *talaq-e-biddat*, and the assurance of AIMPLB, there have been reports of divorce by way of *talaq-e-biddat* (triple talaq) from different parts of the country. It is seen that setting aside triple talaq by the Supreme Court has not worked as any deterrent in bringing down the number of divorces among Muslims. Therefore, it is felt that a need for state action to put into practice the order of Supreme Court and to redress the grievances of victims of illegal divorce. Therefore, to protect the rights of Muslim Women who are suffering from Triple talaq, a bill, particularly, the Muslim Women (Protection of Rights on Marriage) Bill, 2017 was introduced and passed by Lok Sabha on the 28<sup>th</sup> December 2017 and was pending in Rajya Sabha. The abovementioned bill prohibited the practice of Triple talaq and made it void and illegal and declared it as an offence punishable with imprisonment up to 3 years and fine, and triable by a Judicial Magistrate of First Class. It was also proposed to provide subsistence allowance to married Muslim women and dependent children and for the custody of minor children. The Bill further provided to make the offence non-bailable and cognizable. However, apprehensions have been raised in and outside the Parliament regarding the provisions of pending bill which enables any person to give information to an officer in charge of police station to take cognizance of offence and making the offence non-bailable. In order to address the above concerns, it has been decided to make the offence cognizable, if the information relating to the commission of an offence is given to an officer in charge of police station by a married Muslim Women upon whom Triple talaq is pronounced or any person related to her by blood or marriage. It was also decided to make the offence bailable and compoundable at the instance of married women with the permission of the magistrate, on such terms and conditions as he may determine. By rendering all the technicalities and issues in reference of the aforesaid bill, the bill was passed by both Houses of Parliament and assented by the President on 31<sup>st</sup> July, 2019 but this came into force on 19<sup>th</sup> September, 2018 as Muslim

<sup>26</sup> Ibid Supra Note 14, Pg 16

Women (Protection of rights on Marriage) Ordinance, 2018 (Ord. 7 of 2018). The Muslim Women (Protection of Rights on Marriage) Act, 2019 extends to the Whole of India. The act contains 3 CHAPTERS with 8 SECTIONS. Section 3 declares Talaq to be void and illegal, Section 4 deals with punishment for pronouncing Talaq, Section 5 and Section 6 with Subsistence allowance and Custody of Minor Child respectively, Section 7 states offence to be cognizable and compoundable and Section 8 is Repeals and Savings. According to Section 5 of the said act the Muslim women upon whom talaq is pronounced shall be entitled to receive allowance from her husband for her and her children as determined by the magistrate. And according to Section 6 a married Muslim women shall be entitled to custody of her minor children in the event of pronouncement of talaq by her husband in the manner as may be determined by the magistrate.

## II. THE ENACTMENT OF PERSONAL LAW (AMENDMENT) ACT, 2019:

- ❖ In a landmark move towards ensuring gender equality and justice within personal laws, the Personal Law (Amendment) Act, 2019 was enacted by the legislature, marking a significant shift in India's legal landscape. This act addresses critical issues pertaining to marriage, divorce, inheritance, and maintenance across various communities, aiming to modernize archaic provisions and align them with contemporary societal norms. For decades, personal laws in India have been steeped in tradition and often entrenched in patriarchal norms, leaving women vulnerable to discrimination and injustice within their own families. The absence of uniformity and the prevalence of discriminatory practices in personal laws have perpetuated gender disparities and hindered women's rights and autonomy. The amendment introduces provisions that promote gender equality and safeguard women's rights within marriage and divorce proceedings. It establishes mechanisms for equitable distribution of assets and ensures fair treatment for women during divorce settlements. The Act addresses the issue of unequal inheritance rights by ensuring that women have equal entitlement to ancestral property and assets. This provision seeks to dismantle longstanding biases against daughters and widows, empowering them with rightful inheritance shares. Recognizing the financial vulnerabilities faced by divorced or separated women, the Act mandates provisions for adequate maintenance and support. It establishes clear guidelines for determining maintenance amounts, thereby mitigating the economic hardships faced by women post-divorce. The Act prioritizes the best interests of the child in custody disputes, emphasizing factors such as the child's welfare and development. It encourages joint custody arrangements while ensuring that mothers retain their inherent right to nurture and care for their children. The enactment of the Personal Law (Amendment) Act, 2019 signifies a significant stride towards gender justice and women's empowerment in India. By modernizing personal laws and rectifying historical injustices, the Act paves the way for a more inclusive and equitable society. It empowers women to assert their rights, challenge discriminatory practices, and seek legal recourse against gender-based oppression within familial structures. Furthermore, the Act fosters a culture of gender sensitivity and equality, fostering greater social cohesion and harmony. By upholding the principles of fairness and justice, it sets a precedent for progressive legal reforms that prioritize the rights and dignity of all individuals, regardless of gender or social status. The key provisions of the act are
  - a) In the Divorce Act, 1869, in section 10, in sub-section (1), clause (iv) shall be omitted.
  - b) In the Dissolution of Muslim Marriages Act, 1939, in section 2, in ground (vi), the words “leprosy or” shall be omitted.
  - c) In the Special Marriage Act, 1954, in section 27, in sub-section (1), clause (g) shall be omitted.
  - d) In the Hindu Marriage Act, 1955, in section 13, in sub-section (1), clause (iv) shall be omitted.
  - e) In the Hindu Adoptions and Maintenance Act, 1956 in section 18, in sub-section (2), clause (c) shall be omitted.
- ❖ While the Personal Law (Amendment) Act, 2019 represents a significant milestone in India's legal evolution, its effective implementation remains crucial. Addressing deeply ingrained societal attitudes and patriarchal norms requires sustained efforts in education, awareness-raising, and advocacy. Moreover, ensuring accessibility to legal resources and support services for marginalized women is essential for the Act to fulfil its intended objectives. In conclusion, the enactment of the Personal Law (Amendment) Act, 2019 heralds a new era of gender justice and equality in India's legal framework. By challenging entrenched patriarchal structures and promoting women's rights within personal laws, the Act underscores the nation's commitment to fostering an inclusive and progressive society, where every individual is treated with dignity, respect, and equality under the law.

## III. RIGHTS OF LGBTQIA+ COMMUNITY

- ❖ Recently, in the landmark judgement in **Supriyo Vs Union of India**<sup>27</sup> ordered on 17<sup>th</sup> October 2023. The background of the case involves the issue of discrimination and violence queer community was facing. Despite the de-criminalization of queer relationships and the broad sweep of the decision in **Navtej Singh Johar Vs. Union of India**<sup>28</sup>, members of the queer community still face violence and oppression, contempt, and ridicule in various forms, subtle and not so subtle, every single day. The State (which has the responsibility to identify and end the various forms of discrimination faced by the queer community) has done little to emancipate the community from the shackles of oppression. In many respects, social morality, and the State's lack of effort to educate the public about matters pertaining to LGBTQIA+ rights are the same causes of the prejudice that the LGBTQIA+ group faces. The nation became the source of its own destiny in 1950 with the adoption of the Constitution, but social conventions and ideas that had been internalized over generations were not completely changed at that moment. Likewise, the decriminalization of consensual homosexual sexual behaviour by this Court did not mean that the stigmatization of LGBTQIA+ individuals ended. The LGBTQIA+ group confronts discrimination in public spaces due to inadequate accommodations for non-binary gender identities. The State's services,

<sup>27</sup> 2023 SCC Online 1348

<sup>28</sup> 2018 1 SCC 791

including public restrooms, security checkpoints, and ticket counters at railway stations and bus depots, are strictly gender-based. Trans women have reported being asked to change to the men's queue at security checkpoints. They are made to accept that they are male in the opinion of a third party, even though they are women and identify as such. Transgender women may experience extreme discomfort while utilizing facilities intended for men, just as cisgender women may. Misgendering someone can eventually have a detrimental influence on their mental health and their capacity to operate in society. The reliefs sought by the petitioner are:

- a. LGBTQ persons have a right to marry a person of their choice regardless of religion, gender, and sexual orientation.<sup>29</sup>
  - b. The Special Marriage Act 1954 is violative of Articles 14, 15, 19, 21, and 25 of the Constitution insofar as it does not provide for the solemnization of marriage between same-sex, gender non-conforming or LGBTQ couples.<sup>30</sup>
  - c. All marriages between couples in which either one or both partners are transgender or gender non-conforming or who otherwise do not identify with the sex assigned to them at birth, may be solemnized under matrimonial statutes regardless of their gender identity and sexual orientation.<sup>31</sup>
  - d. In addition, the petitioners have sought directions to the Union Government, the State Governments, and district and police authorities to adopt and follow a protocol in cases which concern adult, consenting LGBTQ persons who require protection from their families, regardless of whether such persons are married.<sup>32</sup>
- ❖ The apex court decided on various aspects some of which are Queerness is a natural phenomenon which is known to India since ancient times, Queerness is not urban or elite, the rise of Victorian morality in colonial India and the reasons for the re-assertion of the queer identity, there is no universal conception of marriage, the conception of marriage is not static etc.
  - ❖ The apex court also opined on interfaith or inter-caste marriage. Inter-caste and interfaith marriages were uncommon during the colonial era, and there were no established customs or legal frameworks governing such unions. Society subjected individuals in these relationships to discrimination and violence. The Special Marriage Act of 1872 was enacted to allow the solemnization of marriages independent of personal laws. However, it required individuals from different religions to renounce their respective religions to marry. The subsequent enactment of the Special Marriage Act in 1954 allowed individuals to marry without renouncing their religions, providing a more permissive framework for interfaith marriages. Despite legal provisions, couples in inter-caste and interfaith relationships continue to face discrimination and violence from their families, communities, and society at large. Honor killings, more accurately termed as caste-based murders, are unfortunate manifestations of this societal hostility. The judiciary in cases like Shakti Vahini v. Union of India<sup>33</sup>, has intervened to protect the rights of individuals in inter-caste and interfaith relationships. Courts have directed state machinery to take preventive and remedial measures to safeguard couples facing opposition and violence. The court explained the importance of fundamental rights inherent to all individuals in a democracy. It emphasizes that the exercise of these rights should not be contingent upon societal approval or consensus. Parliament and the judiciary have recognized the need to protect these rights, despite opposition from certain segments of society.
  - ❖ The Supreme Court declined to invalidate or amend provisions within the Special Marriage Act (SMA) in response to petitions advocating for the inclusion of same-sex marriages within the Act, originally intended for inter-caste and interfaith unions. The LGBTQ community argued that discriminatory access to marriage, based on sexual orientation and gender identity, violated constitutional guarantees of equality, non-discrimination, freedom of expression, privacy, and dignity, seeking equal marriage rights as heterosexual couples. The government cautioned against judicial pronouncements on this matter, emphasizing the potential complexities. The Chief Justice of India emphasized the judiciary's role in interpreting rather than creating laws, stating that altering the Act's provisions would intrude into legislative territory. The Court also clarified that the right to marry is not a fundamental right and cannot be asserted as such by the LGBTQ community. Consequently, the Supreme Court deferred the issue to Parliament for legislative consideration, affirming that the decision to amend the Special Marriage Act lies within Parliament's purview.

While the Supreme Court declined to legalize same-sex marriage, it extended various rights to the LGBTQ community. The Chief Justice highlighted that while the legislature can grant the right to marry, LGBTQ individuals have the right to choose their partners and enjoy intimate associations. The Court directed the government at the central, state, and union territory levels to enforce these rights and ensure that LGBTQ individuals are not discriminated against based on their sexual orientation. It emphasized that queerness transcends caste, class, and socio-economic status and instructed the government to establish hotlines and safe houses for LGBTQ couples, prohibit forced operations on inter-sex children, and prevent compulsory hormonal therapy. Additionally, the Court deemed the Central Adoption Resources Authority's circular, prohibiting LGBTQ couples from adopting, unconstitutional. Although the bench had differing views on certain adoption rules for queer couples, it instructed the government to prevent harassment of LGBTQ individuals by law enforcement and protect their freedom of movement. The police must conduct preliminary inquiries before registering FIRs against LGBTQ couples, ensuring the complaints disclose cognizable offenses, following the Lalita Kumari vs Government of UP<sup>34</sup> case guidelines. The Chief Justice of India endorsed the proposal put forth by Solicitor General Tushar Mehta on behalf of the Centre, which suggested the establishment of an expert panel led by the Cabinet Secretary. The panel's mandate is to deliberate on extending a range of rights and privileges to LGBTQ couples, excluding the right

<sup>29</sup> Ibid

<sup>30</sup> Ibid

<sup>31</sup> Ibid

<sup>32</sup> Ibid

<sup>33</sup> (2018) 7 SCC 192

<sup>34</sup> (2014) 2 SCC 1

to marriage, which are currently accessible to heterosexual couples. The committee will examine various rights, including those pertaining to government services, goods, banking, and other relevant areas.

#### REFERENCES

- [1] M.P. JAIN, INDIAN CONSTITUTIONAL LAW, Lexis Nexis Eight edition Reprint 2023
- [2] Kesavananda Vs State of Kerala (1975) 4 SCC (Supreme Court Cases) 225, AIR 1973 SC 1461
- [3] The Constitution of India
- [4] Ameerunnissa Vs Mehboob, AIR 1953 SC 91
- [5] 1984 3 SCC 654
- [6] Sarla Mudgal Vs Union of India (1995) 3 SCC 635
- [7] Ruma Pal, A.M. Bhattacharjee Matrimonial laws and the Constitution, Eastern Law House Second Edition 2017
- [8] Re Kerela Education Bill, AIR 1958 SC 956
- [9] P.M. BAKSHI, THE CONSTITUTION OF INDIA, LexisNexis 19<sup>th</sup> Edition Reprint 2023, Pg 153
- [10] 2023 SCC Online 1348
- [11] 2018 1 SCC 791
- [12] (2018) 7 SCC 192

