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Non-Heterosexual Marriage: Analysing the Executive-Judicial Dichotomy

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The Supreme Court's Landmark Judgment in Navtej Singh Johar v Union of India (2018)¹ decriminalizing section 377 and, as a result, giving recognition to homosexual couples in India was a celebrated feat with the Judiciary receiving loud applause from the various sectors of society. Fast forward five years, and the Supreme Court finds itself at an impasse in the case Supriyo Supriya Chakraborty v Union of India about whether to legalize same-sex marriage and support the petitioners' cause or uphold the respondents' argument about the current social and religious morality of the country. With both sides arguing vehemently, the Judiciary seems baffled by what it is supposed to do, to do the supposed justice or give the executive its constitutional autonomy to decide upon the issue. In this article, the author proposes a middle ground that could accommodate the concerns of both sides, aiming to find a balanced approach to this complex matter.

Keywords: *homosexuality, same-sex marriage, non-heterosexual marriage, lgbtqia+, section 377.*

INTRODUCTION

The Non-Heterosexual Marriage issue has brought out the Executive-Judicial Dichotomy in the country. Though the dichotomy is provided for by the Constitution of India,² which has

¹ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1

² Constitution of India 1950, art 50

demarcated the workings of its three wings, providing autonomy to each wing and has established a system of checks and balances. However, the Judiciary has a decision to make in the non-heterosexual marriage case as since the case involves enacting a law, the rights for which rest with the Parliament.³

So, should the judiciary deny the petitioner's cause and give the Executive (the respondents in the present case), autonomy? Or should the Judiciary, on the grounds of Articles 14,⁴15⁵, and 21⁶ of the Constitution of India and marriage acts such as Special Marriage Act,⁷ give a judgment for the petitioners? Or is there a middle ground for the judiciary to uphold constitutional and social morality? The present article tries to answer the questions through its various parts. Part II of this paper talks about the distinct roles of the Executive and Judiciary, the Judiciary's historical past judgments supporting the people's cause, and its relation with the executive. Part III of this paper brings into play the Executive pressure on Judiciary and how the Supreme Court has, in some cases, become pliable to the Executive, sacrificing its discretion. The part further reveals how the Judicial-Executive dichotomy seems to fade when an issue involving the interest of the executive is at hand.

Finally, Part IV discusses how it would be wrong to suggest that Judiciary and Executive are completely separate and that there is no provision for cooperation between them. Provisions and historical facts have been relied on to further the debate on Non-Heterosexual Marriage, and a possible solution has been suggested, followed by concluding observations in Part V

SEPARATE ROLES OF THE EXECUTIVE AND JUDICIARY - NON-INTERFERENCE BY THE EXECUTIVE

The Supreme Court in a recent judgment of *Dr. Ashwini Kumar v Union of India* has explained the constitutional setup of India. The power is differentiated among the three organs of the

³ Awstika Das, 'Same Sex Marriage | Judiciary Not Equipped To Deal With Shades Of Gender Within LGBTQIA+ Spectrum, Let Parliament Decide: Centre to Supreme Court' (*Live Law*, 26 April 2023)

<<https://www.livelaw.in/top-stories/supreme-court-same-sex-marriage-equality-judicial-review-parliament-separation-of-powers-solicitor-general-tushar-mehta-cji-dy-chandrachud-227273>> accessed 26 May 2023

⁴ Constitution of India 1950, art 14

⁵ Constitution of India 1950, art 15

⁶ Constitution of India 1950, art 21

⁷ Special Marriage Act 1954

government, the legislature, executive, and judiciary. The division and boundaries of each of the organs are fixed by the constitution to prevent transgression and overlapping by any of the organs on the working of another organ.⁸ The legislature enacts the laws, the executive implements the laws, and the judiciary interprets the laws. The Supreme Court further states that although the modern theory of separation does not hold the belief that the tasks performed by these organs are mutually exclusive and sees a need for a coordinated effort to ensure good governance. It still recognizes the benefits of division of work among the three wings as recognized by the Indian Constitution.⁹

The Supreme Court of India has had a glorious past of passing on judgments of immense constitutional value. Take into consideration the example of the *Kesavananda Bharati v State of Kerala* (1973) case, where the 13-judge constitutional bench laid down the basic structure doctrine, and the constitution's judicial custody was reclaimed, which is an excellent example of the Judiciary's capabilities.¹⁰

The *Kesavananda Bharati Case* led to the Supreme Court understanding its role as not merely a passive participator in the constitutional setup but rather a wing that needs to play an activist role.¹¹ The Supreme Court, in subsequent cases, expanded its authority, and numerous notable judgments have been cementing the court's identity over the years. Some of these judgments are the *Maneka Gandhi v Union of India* (1978), where the court immensely increased the ambit of Article 21 of the Indian Constitution and realized the goal of making India a welfare state,¹² *Francis Coralie v Union Territory of Delhi* (1981), where it was held that in case any provision or procedure depriving a person of his right to life and personal liberty is being implemented, it should be just, fair and reasonable, these judgments led to the expansion of rights enshrined in Article 21 of the Constitution.¹³

⁸ *Ashwani Kumar v Union of India* (2020) 13 SCC 585

⁹ *Ibid*

¹⁰ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225

¹¹ Justice A P Shah, 'The Supreme Court Then and Now' (2020) 55(40) Economic and Political Weekly <<https://www.epw.in/journal/2020/40/perspectives/supreme-court.html>> accessed 26 May 2023

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

¹³ *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 1 SCC 608

The recent notable Supreme Court judgment that led to the emergence of the non-heterosexual marriage issue is the *Navtej Singh Johar v Union of India* case, decided in 2018 that decriminalized Section 377 and held the provision to be unconstitutional as violative of the rights enshrined under Article 14, 15, 19 and 21 of the Indian Constitution.¹⁴ The 2018 Judgment gave legal recognition to homosexual couples. In continuance, the demand for same-sex marriage has been made in the current case of *Supriyo v Union of India*. Though there has mostly been smooth engagement between the judiciary and executive, it is not always the case. The current issue and other instances where the judiciary and executive have remained in a tussle are there.

THE ERRATIC JUDICIAL-EXECUTIVE BOND

The executive and judiciary have a dichotomous relation, with both being entrusted with their responsibilities. However, there have been instances where the judiciary and executive have overlapped with one another or where the executive has had a different way than the judiciary, or where the judiciary has succumbed its view to the whims of the executive.

When the elected NDA Government implemented the National Judicial Appointments Commission (NJAC) Act, 2015, it was seen as an encroachment on Judiciary as the Act replaced the Collegium system and instead came up with an independent commission to appoint judges in which only 50% of the members were of judicial capacity, providing a veto power to any two members of the collegium if they disagreed with the recommendations.¹⁵ The Supreme Court stood its ground against the executive and, with a 4:1 majority, struck down the provision as unconstitutional.¹⁶

However, the judiciary is only sometimes this straightforward or confident in dealing with the executive. Take the example of the controversial Supreme Court verdict in *ADM Jabalpur v Shivkant Shukla*, where the 5-Judge Bench, with a 4:1 majority, had held that Articles 21 and 226 remain suspended in case of National Emergency.¹⁷ The only dissenting judge, Hans Raj

¹⁴ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1

¹⁵ Dishka Munjal, 'Explained | Why is the NJAC verdict at the centre of the impasse over appointment of judges?' (*The Hindu*, 09 December 2022) <<https://www.thehindu.com/news/national/explained-why-is-the-njac-verdict-at-the-centre-of-the-impasse-over-appointment-of-judges/article66227448.ece>> accessed 28 May 2023

¹⁶ *Ibid*

¹⁷ *Union of India v Bhanudas Krishna Gawde* (1977) 1 SCC 834

Khanna, had to suffer repercussions and was later denied the CJI position, even though he was the senior-most Supreme Court judge.¹⁸ The judiciary has stayed quiet or has been unable to take the cases first-hand and discuss them in court. Be it the Kashmir trifurcation issue,¹⁹ the Citizenship (Amendment) Act's Constitutional validity,²⁰ the Electoral Bonds issue,²¹ and misuse of colonial-era laws like the Sedition and Unlawful Activities (Prevention) Act (UAPA), 1967.²² In a recent case of *S.G. Vombatkere v Union of India* (2022), the Supreme Court has ordered that all the cases involving sedition law shall be suspended as the Union Government reconsiders its provision.²³ Though this is a positive development, however, the sad reality is that the majority of these issues are swept inside the carpet and kept on hold for years i.e., for an indefinite period of time.

A brief watershed moment occurred in 2018 when four Supreme Court judges went public to speak their grievances against Chief Justice Dipak Misra.²⁴ The Supreme Court showed self-expression devoid of executive pressure when it discussed the right to privacy as a fundamental right under Article 21 of the Constitution *Justice K S Puttaswamy (Retd) v Union of India* (2018) case,²⁵ when it struck down Section 66 A of the IT Act, 2000 in the *Shreya Singhal v Union of India* (2015) case as it deemed the provision to be arbitrary,²⁶ other examples are the ban on

¹⁸ Dhananjay Mahapatra, 'Justice HR Khanna lasted 3 days in politics while several others flourished' (*The Times of India*, 01 April 2019) <<https://timesofindia.indiatimes.com/india/justice-hr-khanna-lasting-3-days-in-politics-while-several-others-flourished/articleshow/68662535.cms>> accessed 13 May 2023

¹⁹ Saaket Jain, 'By Keeping Article 370 Matter Pending Indefinitely, the Supreme Court Is Embarrassing Itself' (*The Wire*, 25 May 2022) <<https://thewire.in/law/article-370-jammu-and-kashmir-supreme-court-pending>> accessed 12 May 2023

²⁰ Rijuka Naresh Jain, 'Constitutional Validity of Citizenship Amendment Act, 2019' (2021) Manupatra <<https://articles.manupatra.com/article-details/Constitutional-Validity-of-Citizenship-Amendment-Act-2019>> accessed 21 June 2023

²¹ Diskha Munjal, 'Explained | The electoral bonds scheme and the challenges to it in Supreme Court' (*The Hindu*, 22 September 2022) <<https://www.thehindu.com/news/national/electoral-bonds-scheme-and-supreme-court-pleas/article65905743.ece>> accessed 12 May 2023

²² G Krishna Kumar, 'UAPA misused by all govts irrespective of political differences, says activist' (*The Hindu*, 25 August 2022) <<https://www.thehindu.com/news/cities/Kochi/uapa-misused-by-all-govts-irrespective-of-political-differences-says-activist/article65809911.ece>> accessed 14 May 2023

²³ *S G Vombatkere v Union of India* (2022) 7 SCC 433

²⁴ Ashok Bagriya & Bhadra Sinha, 'Turmoil in Supreme Court as four judges speak out against Chief Justice Dipak Misra' (*Hindustan Times*, 12 January 2018) <<https://www.hindustantimes.com/india-news/4-senior-supreme-court-judges-speak-out-against-cji-dipak-misra-say-need-to-preserve-institution-for-survival-of-democracy/story-UqALGhs4iCbyk4zckVmMbm.html>> accessed 28 May 2023

²⁵ *K.S Puttaswamy (Privacy-9J.) v Union of India* (2017) 10 SCC 1

²⁶ *Shreya Singhal v Union of India* (2015) 5 SCC 1

Triple *Talaq*,²⁷ declaring adultery as no more an offense,²⁸ the recognition of transgender rights,²⁹ and decriminalization of same-sex relationships.³⁰ Though all of these are landmark judgments, it should be noted that the executive was not really concerned about these issues.³¹ This is one of the stark criticisms of the current executive pressure on the judiciary. It is seen that despite an appeal being filed in front of the Supreme Court about the Kashmir Trifurcation issue, the Court has not yet looked into it.

Further, in a recent report by the Indian Express, it was shown that how out of the ten most recent and important judgments by the Supreme Court of India, only four of them supported the person defending himself/herself on the grounds of the right to speech.³² However, on examination, it was found that in these four cases, the executive either had no interest or itself supported the petitioner. And, if the government opposed the petitioner, the cases would fail.³³ Thus, it could be seen that if, in an issue, the executive has an interest at stake, it will ensure that to further its political agenda, it will undermine the will of the people to further its interests and ruin the judiciary's autonomy. Saying that the executive and judiciary are completely separate from each other, thus might need to be revised in the current judiciary-executive relation.

THE JUDICIAL-EXECUTIVE HARMONY

S.196 of The Code of Criminal Procedure, 1973 deals with "Prosecution for offenses against the State and for criminal conspiracy to commit such offence." And clearly mentions that no offense shall be taken in cognizance "except with the previous sanction of the Central Government or of the State Government."³⁴

The judiciary has stressed that the S.196 CrPC mandate restricts judicial intervention in cases involving "offenses against the state." Only with the executive's approval can the judiciary

²⁷ *Shayara Bano v Union of India* (2017) 9 SCC 1

²⁸ *Joseph Shine v Union of India* (2019) 3 SCC 39

²⁹ *National Legal Services Authority v Union of India* (2014) 5 SCC 438

³⁰ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1

³¹ Justice A P Shah (n 11)

³² *Ibid*

³³ *Ibid*

³⁴ Code of Criminal Procedure 1973, s 196

intervene in the cases.³⁵ In the *Sagolsem Indramani Singh and Ors. v State of Manipur (1954)* case, the Gauhati High Court had held that “the requirements of Section 196, Criminal P. C, as the law clearly says that it is a condition precedent to the prosecution that sanction shall be obtained from the local Government and it is not open to any subordinate authority to override the provisions of law by saying that the offense falls in any section of the Indian Penal Code and that no sanction is necessary for prosecution under that section.”³⁶ Thus, the judiciary and executive have been required by law to work in tandem. Therefore, judicial independence, even though it implies that the judiciary should be free from executive and legislative pressure, should not lead to sheer arbitrariness or non-accountability as the judiciary is indeed accountable to the Constitutional Process, the Democratic Traditions, and the people of the country.³⁷

In a matter such as same-sex marriage, similar work in tandem thus may be expected from the executive and judiciary. One of the arguments put forward by the respondents is that as the matter involves enacting a law, the Supreme Court is not constitutionally backed to come up with a law on the issue.³⁸ The respondent’s argument has constitutional backing and was accepted by the Supreme Court. But this shall not mean that the issue should be put on hold, and the executive should get complete autonomy over it. Not to mention that the executive’s stand contradicts its past conduct wherein it has stood up for the rights of minority groups such as women and has upheld their well-being; however, it is resistant in doing the same when it comes to the issue of recognizing the marriage rights of another marginal group.³⁹

³⁵ Anushka Singh, ‘The Law of the Executive Sedition and Its Political Functions’ (2022) 57(26-27) Economic and Political Weekly <<https://www.epw.in/journal/2022/26-27/perspectives/law-executive.html>> accessed 28 May 2023

³⁶ *Sagolsem Indramani Singh v State of Manipur (1954)* SCC OnLine Mani 5

³⁷ Shaila Arora, ‘Independence of Judiciary in India’ (2021) 4(2) International Journal of Law Management and Humanities <<http://doi.org/10.1732/IJLMH.26156>> accessed 28 May 2023

³⁸ Debayan Roy, ‘Supreme Court says recognising same-sex marriage up to legislature; but asks Centre to devise means to confer rights without marriage label’ (*Bar and Bench*, 27 April 2023) <<https://www.barandbench.com/news/supreme-court-says-recognising-same-sex-marriage-legislature-asks-centre-devise-means-confer-rights-marriage-label#:~:text=The%20Supreme%20Court%20on%20Thursday,rights%20without%20the%20label%20of>> accessed 28 May 2023

³⁹ ‘A Plea for Marriage Equality’ (2023) 58(12) Economic Political and Weekly

<<https://www.epw.in/journal/2023/12/editorials/plea-marriage-equality.html>> accessed 28 May 2023

The respondents have put forward an argument that the issue at hand is an ‘urban-elitist’ concept, and thus it only takes into view the approach of a minuscule minority.⁴⁰ However, the Supreme Court has pointed out that there has been no submission of data that supports this view.⁴¹ Further, even if the law regarding same-sex marriage is implemented, there are fears that it may not be supported by the public and lead to revolt on the ground level considering the current social morality of the country. The court cannot deny this possibility as it has suffered repercussions in the past by passing on overly progressive judgment hastily e.g., in the *Sabarimala Temple* case.⁴²

Therefore, a possible way to solve this anomaly is that the executive could hold a referendum exclusive to every state of the country. The executive argument that it is an urban-elitist concept will thus be checked. What further could be done is that in the states/UTs, where there is support for same-sex marriage, laws particular to the state could be made. Though India is, as stated by Article 1 of the Indian Constitution, a ‘Union of States,’⁴³ still such a referendum and exclusive law-making would not be new to it. The same has already been done in 1967 when a referendum was held in Goa, where it was allowed to decide its own future and whether it wanted to be an independent union territory or wanted to merge with Maharashtra.⁴⁴ The Goans voted to remain a Union Territory on January 16, 1967. Though this day is called opinion poll day, it was actually a plebiscite⁴⁵ or a referendum.

⁴⁰ Krishnadas Rajagopal, ‘Same-sex marriage is a ‘mere urban elitist view’: Government to SC’ (*The Hindu*, 17 April 2023) <<https://www.thehindu.com/news/national/same-sex-marriage-is-a-mere-urban-elitist-view-government-to-sc/article66746390.ece>> accessed 29 May 2023

⁴¹ Ananthkrishnan G, ‘CJI Chandrachud: No data from Govt that same-sex marriage elitist idea’ (*The Indian Express*, 20 April 2023) <<https://indianexpress.com/article/india/cji-chandrachud-no-data-from-govt-that-same-sex-marriage-elitist-idea-8565721/>> accessed 29 May 2023

⁴² Samanwaya Rautray, ‘SC refers Sabarimala case to 7-judge bench, no stay on entry of women’ (*The Economic Times*, 14 November 2019) <<https://economictimes.indiatimes.com/news/politics-and-nation/sc-refers-sabarimala-case-to-a-larger-seven-judge-bench/articleshow/72049884.cms?from=mdr>> accessed 29 May 2023

⁴³ Constitution of India 1950, art 1

⁴⁴ Aaron Pereira, ‘What is Goa’s “Opinion Poll Day”?’ (*The Indian Express*, 18 January 2019) <<https://indianexpress.com/article/explained/what-is-goas-opinion-poll-day-asmitai-dis-5543720/>> accessed 29 May 2023

⁴⁵ *Ibid*

Meanwhile, the executive could provide same-sex couples with cohabitation rights and the same has been discussed in the courts.⁴⁶ This is how the current discussion in the Supreme Court could end up being fruitful and provide the executive with a futuristic approach to the issue.

CONCLUSION

The issue of non-heterosexual marriage is complicated and has brought out the dichotomy between the Executive and the Judiciary. The paper has discussed this dichotomy, the impact of executive interest on judicial decisions, the varying degree of executive-judicial dichotomy, and instances where executive-judicial interests seem to merge. Though the issue has perplexed the judiciary, a referendum is a creative solution as discussed in the paper. The Constitution of India has not provided a referendum but has already been implemented once in the country in the 1967 Goa Opinion Poll. However, it should be remembered that a referendum is a complicated process involving huge costs and a certain level of knowledge on the part of the voters. Therefore, even if the court accepts the idea, it will take a separate commission to be formed to discuss the possibility and logistics involved in a successful referendum on the issue. Suggestions and examples may be taken from countries like the United Kingdom, which do have referendums and have inspired the majority of the principles of the Indian Constitution.

⁴⁶ Padmakshi Sharma, 'Centre Agrees To Consider Grant of Certain Rights to Same-Sex Couples Without Legal Recognition as Marriage' (*Live Law*, 03 May 2023) <<https://www.livelaw.in/top-stories/same-sex-marriage-centre-agrees-to-certain-rights-same-sex-couples-without-legal-recognition-marriage-227819>> accessed 30 May 2023