REALIZING MARRIAGE EQUALITY IN INDIA VIS-À-VIS MIZO CUSTOMARY MARRIAGE LAWS

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ABSTRACT

After a long drawn legal battle against the criminalization of homosexual relations, the Supreme Court declared the same as unconstitutional as far as it was concerned with consenting adults in private. However, it has now opened the doors for several other topics to be discussed including marriage equality in pursuance of which several petitions are currently pending in several High Courts as well as the Supreme Court. What makes this a need of the hour is the inherent heteronormativity of Indian marriage laws although the same do not contain an express prohibition on homosexual marriages. The Mizo Marriage, Divorce and Inheritance of Property Act, 2014 however marks a departure from the usual marriage laws in India in that it specifically terms same sex marriages as void. Given the special constitutional status enjoyed by Mizoram, there is a possibility that marriage equality may not be realized there even if there is a statute made by the Indian Parliament to that effect. This paper shall specifically analyze the right to marry as an internationally recognized

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human right as well as its constitutional status as a fundamental right, roadblocks to achieving marriage equality in India in the light of the Mizo customary laws, and the tussle between fundamental rights and the constitutional protection accorded to personal and customary laws vis-à-vis the same.

Keywords: *Right to Marry, Same Sex Marriage, Customary Law, Fundamental Rights, Mizo tribe.*

INTRODUCTION

While India has uniform criminal laws, the same is not true on the civil side. Amid a growing clamour for a uniform civil code, India continues to host a plethora of personal laws based either on one's religious identity or tribal status, as the case may be. Thus, India has statutory as well as customary laws governing people on the basis of religion while the people classified as Scheduled Tribes fall under the ambit of uncodified customary laws. Owing to their antiquity, it is not a forgone conclusion that several facets of such personal and customary laws may not resonate with contemporary sensibilities and even be incompatible with our constitutionally guaranteed fundamental rights.

India is precariously placed between two categories of countries, one which not only consider homosexuality to not be a crime but have also recognized same sex marriages and the other where homosexuality has been criminalized and is punishable, by death, *inter alia*.

2018 was a watershed year for the LGBTQIA+ movement in India as consensual sexual activities between adults in private was

decriminalized. It provided a closure to the long-drawn battle fought against section 377 of the Indian Penal Code by spirited individuals and organizations in India. While it drew the curtain on a significant woe tormenting people in same sex relationships i.e., criminal prosecutions, it finally opened the doors for discussion on several other germane topics, primarily in the realm of family law, more specifically, marriage. The discussion is imperative due to the heteronormativity of Indian family laws given their stress on heterosexuality. While a cursory look at the different marriage laws in force in India brings to fore its recognition of only heterosexual couples, there is no express bar on homosexual marriages except for the Mizo Marriage, Divorce and Inheritance of Property Act, 2014 which specifically terms such marriages as void.

In this background, this paper delves into the right to marry as an internationally recognized human right as well as its possible interpretation as a constitutionally guaranteed fundamental right, possible issues cropping up with the idea of achieving marriage equality in India pursuant to the legalization of same sex marriages in India in the context of the Mizo customary laws, and the tussle between fundamental rights and the constitutional protection accorded to personal and customary laws vis-à-vis the same.

CONCEPTUALIZING RIGHT TO MARRY AS AN INTERNATIONAL HUMAN RIGHT

Several international human rights treaties recognize right to marry as a human right such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural

Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), *inter alia*.

CEDAW calls upon States to eliminate marriage related discriminations against women and to "ensure that men and women enjoy the right to enter into marriage; to have the freedom to choose their spouse and that too, with their free and full consent."[3] In the same vein, the UDHR[4], the ICCPR[5] and the ICESCR[6] obligate the State to ensure that marriages are contracted pursuant to "free consent of the intending spouses." Further, the UDHR and the ICCPR recognize "the right of men and women of marriageable age to marry and to found a family." In addition to this, the UDHR, ICCPR and ICESCR call upon the States to "provide widest possible protection and assistance to the family." The European Convention on Human Rights[7] also recognizes "the right of men and women of marriageable age to marry and to found a family within the contours of municipal laws."

However, international human rights instruments are also heteronormative in nature. The same is evident in the views adopted by the treaty body established under the ICCPR i.e. the Human Rights

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[3] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 16.
[4] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 16.
[5] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 23.
[6] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 10.
[7] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) CETS 005 (ECHR) art 12.

Committee (HRC) in respect of communications received by it pertaining Article 23 of the ICCPR. In Ms. Juliet Joslin et al. Communication No. 902/1999, the authors, *inter alia*, made a complaint against New Zealand for violation of Article 23 of the ICCPR as being a lesbian couple they were refused a marriage license to marry under the Marriage Act, 1955 which New Zealand maintained only allows for heterosexual marriages. Having exhausted all domestic remedies, they approached the HRC and claimed that the said provision of the ICCPR obligates its States Parties to bestow upon homosexual couples the right to marry and New Zealand has violated its international obligations by denying them.

The HRC noted that Article 23 defines the right by in terms of "men and women" as opposed to "everyone", "every human being", and "all persons". In its words,

> "Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other."

Thus, the HRC found in favour of New Zealand that its mere refusal to allow homosexual couples to marry did not amount to violation of its obligations under the ICCPR. There are several other communications handled by the HRC where they have interpreted Article 23 of the ICCPR as envisaging only heterosexual unions.

INTERPRETING RIGHT TO MARRY AS A CONSTITUTIONALLY GUARANTEED FUNDAMENTAL RIGHT

The Law Commission of India[8] highlighted the importance of autonomy of choices and liberty. The Law Commission made it abundantly clear that the autonomy of every individual in matters concerning their self is constitutionally protected.

In *Shakti Vahini v Union of India*,[9] the matter involved the spate of cases involving honour killing and the NGO called upon the Supreme Court to criminalize the same and urge the State to undertake necessary steps in this regard. The Court observed that the consensual choice made by two adults to get married to each other is accepted under Articles 19 and 21 of the Indian Constitution. It stressed on the elements of choice and dignity of the individual within the framework of right to liberty and observed that the enjoyment of right to life and liberty sans dignity and choice adversely affects the constitutionally recognized identity of a person. Choice is an inseparable part of dignity in that a dignified existence is not possible in the absence of one's ability to make choices. The Court decided that two adults

[8] Law Commission of India, Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework (Law Com No 242, 2012).
[9] (2018) 7 SCC 192.

have the right to marry out of their volition and that any encroachment upon the said right amounts to a constitutional violation. To be able to assert one's choices is a *sine qua non* for enjoyment of life with liberty and dignity. Similarly, in *Lata Singh's case*,[10] the Court held that on attaining the age of majority, a person can marry whosoever he or she likes.

Further, taking *suo motu* cognizance based on a news report,[11] the Court opined that "the freedom to marry a person of one's own choice is an inherent feature of Article 21 of the Constitution of India." A natural corollary of the same lies in that the State is obligated to zealously guard the fundamental rights of its citizens and any violation of these protected rights basically evidences the incapacity or inability of the State to safeguard the fundamental rights of its citizens.

While arguing that same sex marriages should be allowed as fundamental rights under the Constitution, a three pronged approach could be taken to interpret the fundamental rights as such. To begin with, as Indian Courts have already recognized right to marry as integral to right to life and liberty under Article 21 of the Constitution, it could be interpreted as being free from the clutches of heteronormativity. Apart from that, the right of homosexual couples to marry has also been recognized as being protected under the right to privacy. Lastly, the right of same sex couples to marry could also be an extension of the right to

[10] *Lata Singh v State of Uttar Pradesh* AIR 2006 SC 2522.
[11] *Re: India Woman says Gang-raped on Orders of Village Court published in Business & Financial News dated 23-1-2014* (2014) 4 SCC 786.

equality without discrimination on the ground of sex under Articles 14 and 15.

In *Indra Sarma v V.K.V. Sarma,*[12] while dealing with the concept of "relationship in the nature of marriage" in the context of the Protection of Women from Domestic Violence Act, 2005, the Supreme Court decided that domestic relationship between same sex partners is not recognized as "relationship in the nature of marriage" under Section 2(f) the said law while simultaneously acknowledging many countries whose laws have brought same sex relationships within the ambit of domestic relationship.

In *Shafin Jahan v Asokan K.M.*,[13] Shafin Jahan filed an appeal against a decision given by the Kerala High Court nullifying his marriage with his wife Hadiya in pursuance of Hadiya's father's habeas corpus petition that she had been forcefully converted and was likely to be sent to Syria. While providing relief to the petitioner, Chandrachud, D.Y., J. in his concurring opinion maintained that it is integral to Article 21 that one gets to marry of their choice and that society has no role in who one's partner should be, whether within or outside the domain of marriage. He placed the intimate relationship of marriage within the inviolable contours of privacy and personal liberty stating that the State and law cannot dictate the choice of partners. He further stated that it is incumbent upon Courts to uphold these constitutional

In the same vein, in the *Puttaswamy* case,[14] the Supreme Court while upholding the right to privacy held that "when the guarantee of

[12] (2013) 15 SCC 755.
[13] (2018) 16 SCC 368.
[14] *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1.

privacy intersects with gender, they create a private space which endows elements crucial to gender identity with constitutional protection. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual." While rejecting the contention of the Attorney General that the right to privacy cannot be held to be fundamental right as it is a vague and an amorphous concept, Nariman, R.F., J. held that privacy rights have been extended to protect several interests of an individual including the right to marry of same sex couples. Kaul, S.K., J. maintained that it us up to an individual to choose who and how lives in his house and within the contours of what relationship. He stressed that the privacy of one's home must safeguard his family, marriage, reproduction and sexual orientation as these are integral aspects of dignity. Similarly, in *Common Cause v Union of India*,[15] the Supreme Court observed that a person's autonomy is based on his ability to decide on who he wishes to love and who he seeks to partner, to freely decide on numerous facets privy to his daily life.

While deciding on the constitutionality of Section 377 of the Indian Penal Code, 1860 in *Naz Foundation* case,[16] A.P. Shah, C.J. held that "sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15."

In *NALSA v Union of India*,[17] while examining a petition of members of the transgender community that not recognizing their gender identity as being different from the one attributed to them at

[15] (2018) 5 SCC 1.
[16] *Naz Foundation v Government of the NCT of Delhi* 2010 Cri LJ 94.
[17] (2014) 5 SCC 438.

birth is violative of their rights under Articles 14 and 21 of the Constitution, the Supreme Court held that since a perusal of international law and municipal laws and judicial decisions worldwide has evidenced growing acceptance of equality and non-discrimination guarantees on the ground of gender identity or expression the same ought to be applied in the Indian context as well.

Indu Malhotra, J., in *Navtej Singh Johar v Union of India*[18] rightly held that "the word sex is not merely restricted to one's biological attributes but also their sexual identity and character and sexual orientation."

This decision was relied upon in *S. Sushma v Commissioner of Police*[19] wherein a lesbian couple sans parental approval of their relationship approached the Madras High Court praying for issuance of directions to the police to not harass them as well as to ensure their safety and security from any threat or danger posed by their parents. The Court held that the Constitution guarantees people full autonomy over decisions pertaining their personal life, including who they choose as their partner as the right to life and liberty as well as privacy under Article 21 encompasses the right to sexual autonomy.

After the Supreme Court's decision in *Shafin Jahan v Asokan K.M.*[20] that the right to marry a person of one's choice is inherent in

[18] (2018) 10 SCC 1.
[19] (2021) SCC OnLine Mad 2096.
[20] (2018) 16 SCC 368.

Article 21, a slew of similar judgments have followed from high courts all across India.

HETERONORMATIVE MARRIAGE LAWS IN INDIA

Indian laws are a mixed bag in the sense that while a uniform law governs individuals on the criminal side, family law matters are largely subject to personal and customary laws based on religion, tribe etc. of an individual. Thus, when it comes to marriage, individuals are governed by diverse laws depending on which religion, community, or tribe they belong to. The following are provisions from various legislations governing marriage in India. A brief perusal of these provisions evidences a commonality in terms of the heteronormative concept of marriage being envisaged as between men and women of marriageable age.

The Hindu Marriage Act, 1955 while lying down the conditions of a valid Hindu Marriage clearly stipulates 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."[21] In the same vein, the Indian Christian Marriage Act, 1872 while stipulating requisites for certification of marriages of Indian Christians provides that "the age of the man intending to be a married shall not be under twenty-one years, and the age of the woman intending to be married shall not be under eighteen

[21] The Hindu Marriage Act 1955, s 5(iii).

years."[22] Similarly, the secular law of marriage, i.e., the Special Marriage Act, 1954 requires that "the male has completed the age of twenty-one years and the female the age of eighteen years."[23] as a necessary condition for solemnization of special marriages. The Parsi Marriage and Divorce Act, 1936, as a requisite for a valid Parsi marriage requires "the male to have completed twenty-one years of age and the female eighteen years of age."[24] Further, the Foreign Marriage Act, 1969 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"[25] for solemnization of foreign marriages. The Dissolution of Muslim Marriages Act, 1939 and the Muslim Women (Protection of Rights on Divorce) Act, 1986 also perceive of marriage as "a relationship between a man and a woman." Although the Adoption Regulations, 2017 in some places use language that seems to include homosexual marriages such as prospective adoptive parents, spouses, married couple; a look at other provisions which talk about prospective adoptive father and mother and the requirement of a marriage certificate while registering makes it evident that it recognizes only heterosexual unions.

In 2021, the Delhi High Court had clubbed together several writ petitions filed by homosexual couples seeking registration of marriages under laws such as the Hindu Marriage Act, Special Marriage Act and

[22] The Indian Christian Marriage Act 1872, s 60(1).
[23] The Special Marriage Act 1954, s 4(c).
[24] The Parsi Marriage and Divorce Act 1936, s 3(1)(c).
[25] The Foreign Marriage Act 1969, s 4(c).

Foreign Marriage Act.[26] Similar petition was also filed by a gay couple in the Kerala High Court seeking registration of their marriage under the Special Marriage Act. In 2022, several couples approached the Supreme Court for registration of their marriage under the said marriage laws.[27] In addition to the petitions in the Supreme Court, several petitions are pending in the High Courts of Delhi and Kerala as of today wherein provisions from all matrimonial laws have been challenged.[28] The Supreme Court began hearing the petitions filed before it in April, 2023 and after continuously hearing the same for ten days, reserved its verdict in May, 2023 which is still awaited. What is noticeable is that the respondents comprising the Central Government, NCPCR etc. have all opposed the petition seeking the registration of same sex marriages under the Special Marriage Act.

MIZO CUSTOMARY LAW ON MARRIAGE

The Mizo customary law on marriage has been codified under the Mizo Marriage, Divorce and Inheritance of Property Act, 2014. The

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[26] 2021 SCC OnLine Del 965, *Udit Sood and ors v Union of India and anr* W.P.(C) 6371/2020; *Abhijit Iyer Mitra and ors v Union of India and anr* W.P.(C) 7657/2020; *Vaibhav Jain and anr v Union of India and anr* W.P.(C) 7692/2020; *Dr. Kavita Arora and anr v Union of India and anr* W.P.(C) 2574/2021.

[27] *Supriyo @ Supriya Chakraborty v Union of India* W.P. (C) No. 1011/2022; *Sameer Samudra v Union of India* W.P.(C) No. 1105/2022.

[28] *Nikesh PP v Union of India* W.P.(C) 2186/2020; *Abhijit Iyer Mitra and ors v Union of India* W.P.(C) 6371/2020; *Vaibhav Jain and anr v Union of India* W.P.(C) 7657/2020; *Dr. Kavita Arora and anr v Union of India* W.P.(C) 7692/2020; *Udit Sood v Union of India* W.P.(C) 2574/2021; *Joydeep Sengupta v Ministry of Home Affairs* W.P.(C) 6150/2021; *Nibedita Dutta v Union of India* W.P.(C) 13528/2021; *Zainab Patel v Union of India* W.P.(C) 13535/2021; *Mellissa Ferrier v Union of India* W.P.(C) 13206/2021.

Act not only applies when both the spouses are Mizos but also if the male involved is a Mizo.[29]

A male through *palai*[30] conveys a proposal for marriage to the head of the woman's family he wishes to marry. Pursuant to her consent, if her family accepts the proposal, the marriage price (*man*)[31] to be paid by the bridegroom is settled by the head of her family in addition to the venue and date for payment of the said marriage price and solemnization of marriage. The marriage price is paid by the man through *palai*. Upon solemnization of marriage, the bride is escorted by *lawichal* from her home to live her bridegroom's home wherein she lives thereafter.

Marriage price (*man*) to be paid by the bridegroom to the bride's family is a characteristic feature of Mizo marriage. The Act classifies *man* into two, *man pui*[32] and *man ang*[33]. In other words, they can also be termed as the main marriage price and subsidiary marriage, respectively. *Man pui* is the main marriage price while *man ang* is the share of the marriage price distributed by the head of family among the near relatives of the bride. It is also a given that *man pui* shall not be less that 420 rupees.[34]

[29] The Mizo Marriage, Divorce and Inheritance of Property Act 2014, s 2.
[30] ibid at s 3(s). '*Palai*' is a person who negotiates the bride price with the bride's family on behalf of the bridegroom's family.
[31] ibid s 3(o). '*Man*' means marriage price paid to the head of the bride's family by the bridegroom.
[32] ibid s 3(p).
[33] ibid s 3(q).
[34] ibid s 4.

The recipients of *man ang* and the quantum of it are as follows:[35]

1. *Sumhmahruai*: It is a share for bride's father or brother and normally amounts to 60 rupees.
2. *Sumfang*: It is also a share for the bride's father or brother and normally amounts to 50 rupees.
3. *Pusum*: It is a share given to the bride's maternal grandfather and if he has pre-deceased, it is given to the bride's maternal uncle and amounts to 40 rupees.
4. *Palal*: It is a share for a person chosen by the bride as her father in the area where she has been married to and who takes care of her as his own daughter. It amounts to 30 rupees.
5. *Niar*: It is a share for the bride's paternal aunt. However, in her absence, it is given to a female relative of the bride who acts as an aunt. It amounts to 20 rupees.
6. *Naupuakpuan*: It is a share for the bride's elder sister of the bride. In her absence, it is given to a female relative of the bride who acts as her sister. It amounts to 20 rupees.
7. *Nu man*: It is paid to the birth mother of the bride. It is given only is such circumstances where the bride's father and mother are either not married to each other or have divorced. It normally amounts to 20 rupees.

[35] ibid Schedule II.

In addition to the *man pui* and *man ang*, there are other optional marriage prices which are given to persons outside the family circle. These are non-refundable in the event of separation or divorce of the married couple. Such marriage prices are as follows:[36]

1. *Thian Man* or *Mo Thian Man*: It is paid to the bridesmaid and ranges between 2 to 3 rupees.
2. *Lawichal*: It is paid to the one who leads the bride's procession to the bridegroom's house and amounts to 2 rupees.
3. *Khualkai*: It is paid to the family who the bride lived with at their house in case when the groom is from another place.
4. *Chhuatkil Kaiman*: It is paid to the one in whose house the marriage takes place in case the marriage is not solemnized at the bride's house.
5. *Chharsutphawi*: It is paid to the bride's elder sister as compensation if the bride i.e., the younger sister gets married before her.

A perusal of the definitions of 'marriage' and 'couple' evidence that the Mizo law perceives of it as involving a man and a woman. The definition of marriage[37] clearly shows that it is deemed to mean "union of a man and a woman who are both major as husband and wife". Further, the procedure of marriage laid down under the Act also

[36] Mercei Gangte, 'Gender and Customary Law: A Case Study of Mizo Tribe in North East India' (2016) 46(1) Indian Anthropologist 22.
[37] (n 24) s 3(r).

solidifies the same. In the same vein, 'couple' is defined as "a husband and wife who are married under the Act or any other law for the time being in force".[38]

However, unlike the other marriage laws discussed above, Section 10 of the said Act expressly declares the "living together as husband and wife of two persons of the same sex as void *ab initio*". In other words, the Mizo law is the only existing law in India which expressly prohibits same sex marriage.

MIZO CUSTOMARY LAWS ON MARRIAGE VIS-À-VIS FUNDAMENTAL RIGHTS

Assuming that same sex marriage is recognized as a constitutionally guaranteed fundamental right by the Supreme Court or the Parliament of India enacts a legislation to that effect, it is important to understand that owing to certain constitutional nuances, the Mizos may not instantly get to enjoy the same.

Ahead of delving into the complexities, the expressions 'law' and 'law in force' as used in Article 13(3) of the Constitution need to be deciphered.[39] Article 13(3)(a) embraces a wide definition consequently encompassing custom or usage having the force of law thereby not

[38] ibid s. 3(c).
[39] "In this article, unless the context otherwise requires, —
(a) 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
(b) 'laws in force' includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."

restricting it to legislature made law alone. At this juncture, it is pertinent to note that Constitutional amendments lay beyond its purview.[40] Article 13 clearly stipulates that "any 'law' which is contrary to fundamental rights is void thereby permitting the its testing vis-à-vis the standard of fundamental rights.[41]

Before attempting to respond to whether such customary laws which are contrary to fundamental rights should be declared void, a far more important questions takes precedence i.e. whether personal laws are 'law' under Article 13? Courts in India have dealt with this question time and again in terms of whether 'law' under Article 13 includes personal laws governing Hindus or other communities. Courts have decided cases where personal laws have been contested for being contrary to fundamental rights. However, these judgements can be divided into two distinct categories viz. those wherein personal laws were adjudged as being beyond the scope of Part III of the Constitution of India, and those wherein they were as being within its purview.

A thorough scrutiny of the judgements where personal laws were adjudged as being beyond the scope of Part III of the Constitution of India clearly indicate that the courts have taken an evasive approach while deciding such cases by not wanting to interfere so as not to hurt the feelings of the communities governed by such laws. To put it succinctly, the courts have adopted two approaches.[42] Apropos the first one, the courts have taken the stance that the contested personal laws were not in contravention of fundamental rights. Apropos the second

[40] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225, AIR 1973 SC 1461.
[41] ibid.
[42] M.P. Jain, *Indian Constitutional Law* (7th edn, Lexis Nexis 2014) 676.

one, the courts have ruled that personal laws are outside the ambit of Article 13 consequently rendering them incapable of being contested on the ground of being violative of fundamental rights.[43]

In *State of Bombay v Narasu Appa Mali*,[44] the Bombay Prevention of Hindu Bigamous Marriages Act 1946 was challenged as being contrary to fundamental rights under Articles 14, 15 and 25 of the Constitution. It was held that "personal law was not included in the 'law' referred to in Article 13(3)(a) and was not the 'law in force' saved by Article 373(2) and defined in Article 13(3)(b)." It was further held that "the expression 'laws in force' in Articles 372(1) and (2) does not include personal law as they cannot be interpreted as authorizing the President to interfere with the personal law of any community."

Chagla C.J. opined that since the legislature is responsible for the welfare of the State, it is their prerogative to determine the law required to achieve social reform. Gajendragadkar J. supported the stance taken by Chagla C.J. and observed that since the personal law topics are contained in the Concurrent List, therefore, it falls under the domain of the legislature. He further states that personal law was deliberately kept out of Article 13 as the Constitution framers did not want them to fall under the ambit of Part III thereby exposing them to challenge for being contrary to fundamental rights.

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[43] ibid.
[44] *State of Bombay v Narasu Appa Mali* (1951) SCC OnLine Bom 72, AIR 1952 Bom 84.

The Bombay High Court's approach has been emulated by High Courts across the country as well as the Supreme Court in similar matters.

In *Shri Krishna Singh v Mathura Ahir*,[45] while deciding on the question of appointment of mahant in a math, the Supreme Court held that the Part III of the Constitution does not interfere with personal laws. In *Maharishi Avadhesh v Union of India,*[46] the Supreme Court while faced with a challenge against the Muslim Women (Protection of Right on Divorce) Act 1986 for being in contravention of several fundamental rights and directive principles rejected it while stating that these matters fall within the domain of the legislature."

In *Madhu Kishwar v State of Bihar*,[47] the Court while refusing to declare tribal customary inheritance laws as being in contravention of fundamental rights held that each case was to be decided upon its merit. K. Ramaswamy lamented the Court's inability to allow its platform to be used to bring changes in customary laws. He pointed out that doing so would open a Pandora's box as similar claims would incessantly continue to bring a plethora of laws in consonance with the Hindu Succession Act and the Indian Succession Act as models. He stressed that amendments to legislative provisions through judicial decisions should ideally be avoided.

[45] (1981) 3 SCC 689.
[46] 1994 (supp) 1 SCC 18.
[47] (1992) 1 SCC 102, AIR 1996 SC 1864.

In *Ahmedabad Women Action Group* case,[48] while dealing with a Public Interest Litigation to declare polygamy and unilateral Talaq by Muslim husbands to their wives sans their consent and resorting to judicial process be declared as void on the grounds of being violative of Articles 13, 14 and 15 of the Constitution of India, the Supreme Court observed that it does not concern itself with issues involving state policy. They held that the remedy was not to be found by knocking on its doors but elsewhere.

In *P.E. Mathew v Union of India*,[49] a challenge was posed to Section 17 of Indian Divorce Act, 1869 was for being violative of fundamental rights. Although the Kerala High Court found that Article 17 adversely affected the parties and merited an amendment, they fell short of adjudging it *ultra vires* saying that they would not decide contrary to the Supreme Court's decision in the *Ahmedabad Women Action Group* case.[50] They observed that since the subject matter of the case came within the ambit of the Concurrent List, it was unto the State to make amendments if felt necessary and that the remedy, therefore, lay with the Legislature and not with the Courts.

An opposing trend is evident in several other decisions where personal laws were found to be within the ambit of Part III of the Constitution. The same have been discussed hereafter.

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[48] *Ahmedabad Women Action Group and ors v Union of India* (1997) 3 SCC 573, AIR 1997 SC 3614.
[49] AIR 1999 Ker 345.
[50] (n 43).

In *Srinivasa Iyer v Saraswathi Ammal*,[51] a challenge was posed to the Madras Hindu (Bigamy Prevention and Divorce) Act 1949 for being in contravention of fundamental rights. The Court held that personal law is 'law' and is 'law in force' or 'existing law', as defined in the Constitution. They premised this upon the fact that customs, usages and statutory laws are intermingled with personal law in such manner that it is literally impossible to tell them apart.

In *Gazula Dasaratha Rama Rao v State of Andhra Pradesh*,[52] the Supreme Court dealt with a petition to declare the Madras Hereditary Village-Offices Act 1895 void to the extent of its inconsistency with fundamental rights. The Constitution Bench observed that 'law' under Article 13 includes custom or usage therefore customs must succumb to fundamental rights. In *Sant Ram v Labh Singh*,[53] while holding a customary right of pre-emption violative of fundamental rights, the Supreme Court observed that customs and usages must be held to be within the purview of 'all laws in force'.

In *Madhu Kishwar* case,[54] provisions of the Chhota Nagpur Tenancy Act, 1908 were challenged for being violative of Articles 14, 15 and 21 of the Constitution as they denied tribal women inheritance rights on the basis of their sex. The Court did not declare tribal customary laws as violative of fundamental rights stating that doing so would lead to chaos but they observed that the essentiality of customs

[51] (1951) SCC OnLine Mad 272, AIR 1953 Mad 78.
[52] (1961) 2 SCR 931, AIR 1961 SC 564.
[53] (1964) 7 SCR 756, AIR 1965 SC 314.
[54] (n 42).

inconsistent with or repugnant to constitutional scheme yielding to fundamental rights.

In the *Sabarimala* case,[55] the Supreme Court held that the exclusionary practice of not allowing women of menstruating age i.e. 10 to 50 years to enter the Sabarimala temple based on custom and usage must yield to fundamental rights. The Court specifically overruled the *Narasu Appa Mali* decision saying that it provided immunity to customs and usages by keeping them out of the purview of Part III.

This discussion evidences ambiguity in the stance adopted by the judiciary. In order to steer clear of repercussions in the light of the delicate issues involved and feelings of concerned communities, the Courts have pushed the ball in the court of the Legislature.[56] To put it succinctly, the Courts have failed to take a uniform stand in finding an answer to whether fundamental rights prevail in the event of conflict with personal and customary laws or vice versa. The *Shayara Bano* case[57] is possibly the best example of this. On the question of whether personal law is law under Article 13, while Nariman, J. and Lalit J. opined that it may be necessary to have a relook at the Narasu Appa judgement; Khehar, C.J. and Nazeer, J. held that it should be taken as the declared legal position as it has been emulated in several Supreme Court judgements including two Constitution Benches.[58]

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[55] *Indian Young Lawyers Association and ors (Sabarimala Temple, In Re) v State of Kerala and ors* (2019) 11 SCC 1, 2018 SCC OnLine SC 1690.
[56] (n 37) 919.
[57] *Shayara Bano v Union of India* (2017) 9 SCC 1, 2017 SCC OnLine SC 963.
[58] *Shri Krishna Singh v Mathura Ahir* (1981) 3 SCC 689; *Maharishi Avadhesh v Union of India* 1994 (supp) 1 SCC 18; *Mohd. Ahmed Khan v Shah Bano Begum* (1985) 2 SCC 556; *Danial Latifi v Union of India* (2001) 7 SCC 740; *John Vallamattom v Union of India* (2003) 6 SCC 611.

Apropos Mizo customary laws of marriage being in consonance with the fundamental right to equality as well as life and liberty as guaranteed under the Constitution of India, the discussion in the preceding paragraphs evidences the lack of clarity or rather the existence of ambiguity in terms of the fate of a customary personal law which is in contravention of the constitutionally guaranteed fundamental rights. Although there are several decisions which have rightly declared the challenged provisions as being contrary to the fundamental rights, it has been abundantly made clear by the courts that they have espoused a policy of non-interreference to not ruffle the feathers of different communities governed by these laws. This is, however, only one side of the coin of the relationship between Mizo customary laws and the Constitution. The other side of the coin merits discussion as well due to its far-reaching ramifications on changes sought to be made in the Mizo customary laws.

Pursuant to Article 244(2) of the Constitution of India, several States have been accorded special status under the Sixth Schedule to the Constitution. One such state is Mizoram. This special status is not just limited to Mizoram's inclusion in the Sixth Schedule but extends to those special provisions as well which have been accorded to Mizoram under Article 371G of the Constitution.

Article 371G(a)(ii) of the Constitution states that "any law enacted by the Parliament of India pertaining Mizo customary law and procedure shall be applicable to Mizoram only subject to a resolution being adopted by the Legislative Assembly of Mizoram to that effect."

It is worth noting that "Marriage and Divorce" are listed in the Seventh Schedule to the Constitution of India under Entry 5 of the

Concurrent List. In other words, as per Article 246(2) of the Constitution, both the Parliament and State Legislatures are empowered to legislate on these subjects.

Hence, assuming that the Indian Parliament enacts a legislation legalizing same sex marriages, until the Mizoram State Legislature adopts a resolution accepting the same, marriage equality would be out of the reach of the Mizo people. While not denying the possibility, it would be an uphill task for the Mizoram State Legislature to remove a provision consciously put in the law by them in the first place. Considering that the Mizo customary law is applicable to marriages where only the male is a Mizo, the operation of this law would deny marriage equality to people belonging to every other community who happens to be the partner of the Mizo male. However, the only silver lining appears to be that the law is silent about the fate of marriages where only the female is a Mizo, thereby arguably making it permissible for a Mizo female to enter into same sex marriages with females from other communities.

While the legislative path is bedecked with several obstacles, the judicial path is also not bereft of the same. In case, one decides to challenge the validity of Section 10 of the Mizo Marriage, Divorce and Inheritance of Property Act, 2014 on the round that it is in contravention of fundamental rights guaranteed under the Constitution, there is a possibility that the courts would adopt an evasive attitude as was done in several cases already discussed above thereby pushing the ball into the court of the legislature saying that the remedy lies with the legislature and not with the courts.

CONCLUSION

A perusal of the Indian judgments de-criminalizing homosexuality evidence that criminalization of sexual relations between consenting adults in private was found to be violative of fundamental rights to life and equality, *inter alia*, as guaranteed by the Constitution of India. More importantly, right to sexual identity has been decided as part of right to life and right to equality without any discrimination on the basis of sex. A natural corollary from these constitutional guarantees will hopefully culminate into the eventual legalization of same sex marriages or civil unions. With the recent de-criminalization of homosexuality in India, it is time to venture towards the other facets that a relationship generally veers towards, viz. marriage, divorce, inheritance, adoption etc. in the case of same sex couples governed by Mizo customary laws as well.