

**FORCED MARRIAGE AS AN ANTITHESIS TO RIGHT TO MARRY A PARTNER OF
CHOICE: A CONSTITUTIONAL PERSPECTIVE**

***SHRIRANG ASHTAPUTRE & **SALONI BAHETI**

ABSTRACT

*Marriage, a sacrament believed to be crucially important for seeking salvation in several religions, is, from a modern perspective, a tool of oppression of women at the hands of the patriarchal elements of society by curtailing all their rights and freedoms. In traditional societies and even across some places today, women lacked the autonomy, i.e., to make decisions for the welfare of the self. That is to say, they virtually lacked the freedom to choose or decide various things for themselves and more than often, these rights were vested with their “men”. Any woman, who tried to exercise these freedoms, was often outcast or executed as the case be and it is unfortunate that in several places in India, this trend continues even today. Be it noted, that rural societies have time and again resorted to honour killings in a constitutional democracy such as India, merely because a few women sought to exercise their right to choose a partner of choice for the sake of marriage, which is their fundamental right. It is unfortunate, that young couples are threatened even today, merely for going against the wishes of their parents and near kin by establishing before them, their willingness to marry a person of their choice. Notably, the Judiciary, recognizing their rights, has accorded them appropriate protection of the law in such instances and this trend was witnessed yet again in a verdict rendered by the High Court of Jammu And Kashmir And Ladhak, namely **Sugra Fatima v. Union Territory of J&K**. Assessing the nuances of the said judgment in detail, the Authors, through the medium of this article, have attempted to shed light on the jurisprudence of choosing a life-partner of choice in India besides showcasing the negative implications of prohibiting the righteous exercise upon women. In a nutshell, the Authors opine that permitting women to marry a person of choice can lead to a significant social development in society, as it can certainly give rise to a few inter-caste and inter-faith marriages, which would then, in the long run, serve the Government in achieving its purpose of national integration and upholding the values of secularism.*

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* Law Graduate, ILS Law College, Pune

** Advocate, Indore

INTRODUCTION

Marriage, as an institution, is largely perceived by scholars to be a patriarchal construct, considering the obligations are essentially imposed largely on the females in terms of upholding the very fabric of her family and ensuring the thorough continuation of its lineage by producing healthy offspring, preferably male. Importantly, catering to all the needs of their husband and their relatives was deemed to be her very purpose and right from her childhood itself, women, at least in the context of the medieval era, were essentially trained to become loyal and dutiful wives. Probably for ensuring that women did not rebel against such an atrocious system, the very dignity and well-being of the family were associated with the bodily integrity of the women, thereby deeming her accountable for sheltering their interests, even if that meant that they could not enjoy their personal “humanness”. It appears that marriage as an ancient institution virtually accorded females a status equivalent to a second-class citizen, which, they arguably defended under the guise of sheltering their “traditions”, so closely wounded with “religion”. While Hinduism traditionally prohibited inter-caste marriages let alone inter-faith¹, Islam, on the other hand, ideally prohibited the same, but with time, paved the path for such marriages subject to their partner converting to their religion². Anything beyond that was generally deemed as blasphemous and was often met with severe punishments. In the yesteryears, the Panchayats decreed executions against women for merely exercising their freedom and autonomy of choosing a life partner of their choice-honour killings, for merely marrying a person of a different caste or religion or even against the wishes of the family – this is in vogue in several parts of India, even today³. Within the confines of Muslim orthodoxy, recently, a man was stoned to death for marrying a Muslim woman⁴, indicating inter-faith marriages are still frowned upon. In all these instances, it is in some way or the other, the woman, who suffers, either physically or mentally merely because she chose to exercise her right to marry a person of choice. Brainwashed

¹Neha Sahgal, Jonathan Evans, Ariana Monique Salazar, Kelsey Jo Starr, Manolo Corichi, *Attitudes about caste*, Pew Research Centre, (June 29 2021), <https://www.pewresearch.org/religion/2021/06/29/attitudes-about-caste/>.

²Asma Lambert, *What Does The Qur'an Say About The Interfaith Marriage?*, Asma Lambert Blog, (June 25 2022, 12:22PM IST), <http://www.asma-lambert.com/articles/what-does-the-qur-an-say-about-the-interfaith-marriage/>.

³B Nagaraju, *From Hyderabad murder of 2022 to Ankit Saxena's killing in 2018: When interfaith relationships met a deadly end*, Firstpost, (May 6 2022, 01:16 PM IST), <https://www.firstpost.com/india/from-hyderabad-murder-of-2022-to-ankit-saxenas-killing-in-2018-when-interfaith-relationships-met-a-deadly-end-10640541>.

⁴Prasad Nichenametla, *Hindu man bludgeoned to death for marrying Muslim girl in Hyderabad* (Deccan Herald, May 5 2022, 02:19PM IST), <https://www.deccanherald.com/national/south/hindu-man-bludgeoned-to-death-for-marrying-muslim-girl-in-hyderabad-1106678.html>.

by patriarchal sentiments, they even supported the notion of “*Svayamvars*” in India, where women got to choose their partner of choice it was out of the question for her to decide whether she wanted to marry at a certain age or for that matter, form a matrimonial bond with an individual beyond the capable men so suggested by her father or other esteemed members of the “Royal family”. Among other social groups in India, this practice was further rigid, with females having to marry a man so chosen by them by the “learned well-wishers” of the family, even if they personally never approved of it. Thereafter, the females were virtually left at the mercy of her in-laws, who were, more than often, ill-treated her and with the lack of a superior divorce mechanism back then let alone the freedom to exercise basic rights, it would not be wrong to conclude that they were trapped in a loop of oppression. Not only was a married woman vulnerable to mental cruelty, but usually, even her bodily dignity and integrity, being vested with her husband, enabled him to exercise his fantasies against her will⁵.

I. SUGRA FATIMA V. UNION TERRITORY OF J& K – AN INSIGHT INTO THE
JUDGEMENT:

Marriage, more than often, not only manifested against the will of the woman but often, mandated her to submit all her rights including her right to make a choice or decide her welfare, which is incomprehensible in the modern era. Unfortunately, this trend continues in India even today despite the Constitution declaring all citizens to be equal and having been interpreted to accord the fundamental freedom and liberty to choose and marry a partner of choice to all its citizens. And where the Legislature is failing to uphold this right of women, the High Court of Jammu And Kashmir And Ladhak, in its quest of keeping the spirit of transformative constitutionalism alive for safeguarding the rights of the masses, in *Sugra Fatima v. Union Territory of J&K*⁶, while lashing at this aforesaid practice, the High Court has rightly stated that:

“Consent of two adults entering into wedlock, ought to have pious primacy over consent of family, clan or community”

Such an assertion requires a thorough investigation of the case at hand, which the Authors have undertaken hereunder, further supplemented by an in-depth review of relevant judgements

⁵Umang Poddar, *Explainer: Why is marital rape not a crime in India – and can the courts make it one?*(Scroll.in, Jan 21 2022, 06:30AM IST), <https://scroll.in/article/1015495/explainer-why-is-marital-rape-not-a-crime-in-india-and-can-the-courts-make-it-one>.

⁶2022 SCC OnLine J&K 472. Hereafter referred to as *Sugra Fatima*.

propounded by the Indian judicial forums, for showcasing the theoretical status of the right of women to choose a partner of choice in robust democracy.

A. FACTS:

In the instant case, the petitioners claimed to be majors and asserted that they had contracted their marriage as per Muslim law. However, since they had solemnized the said union against the wishes of their family, they were apprehensive of physical violence and torture at the hands of their relatives. And for the sake of seeking protection from such harassment, they approached the esteemed High Court of Jammu And Kashmir And Ladakh.

JUDGMENT

Justice M.A. Chowdhary rightly declared the freedom of the petitioners to exercise their free will in choosing a partner of their choice as a matter of Article 19 and Article 21 of the Constitution of India. The Court rightly held that the right to choose a partner of choice was an integral facet of both liberty and dignity which made it mandatory for all judicial forums to shelter the same at every given point of time. Accordingly, the Court sought to assure security to the petitioners, only after it was confirmed that they were majors and had solemnized their marriage in accordance with the prevailing laws.

RIGHT TO CHOOSE PARTNER IN CONSTITUTIONAL INDIA - AN INSIGHT

Upon adopting the Constitution of India in its whole in 1950, every individual in the country was assured thorough equality, irrespective of their caste, creed, gender etc. Likewise, the said document, intending to bring about socio-economic equality, employed the facets of equity for assuring due protection to numerous social classes, including women. The very notion of such protection was to essentially sensitize the conservative approach of the society towards women and strengthen the growth of women's rights jurisprudence in India, engendering a scenario where women, after years of oppression in medieval times, were finally at par with men in every sector of life. However, the said protection also permitted the perpetuation of the idea of "romantic paternalism", which in a way, aimed at limiting the fundamental rights of women for "shielding their better interests". A "Mansplaining" of some sort, the Court clamped down heavily on this practice in *Joseph Shine v. Union of India*⁷, citing that it was explicitly prohibited, for stereotyping women under the guise of allegedly catering to their best interests

⁷2018 SCC OnLine SC 1676.

virtually reducing them to a second-class citizenry. Besides striking down the offence of Adultery from the Indian Penal Code, 1860, the Court concluded that nobody could stake a claim upon the life and her choices at any point in time. When read with the findings of the larger bench of the Supreme Court in *K.S. Puttaswamy v. Union of India*⁸, it becomes evident that the right to make choices for the self is a basic facet of the right to personal autonomy, which was interpreted to be closely associated with the right to privacy under Article 19 read with Article 21. That is to say, the right to make decisions for the self was deemed to be a mode of “expression”, exercising which, was deemed to be an inseparable element of “liberty”. Reading this exegesis with the assertions of the Supreme Court of India in *Navtej Singh Johar v. Union of India*⁹, it can be stated that the right to choose a partner of choice either for marriage or for solely engaging in sexual relations is a mode of “expressing” the self in the society, besides being an integral facet of the right to privacy to secure constitutional safeguards with this regard. Hence a fundamental right, this is further supplemented by the fact that public morality as a principle is to be interpreted for constitutional purposes, suggesting, that no form of custom or tradition could supersede the very ethos of the Constitution¹⁰. Parents, relatives or members of the clan cannot, as per the Constitution of India, impose their desires upon their children with regards to marrying a person of choice citing customary or traditional relevance. Thus, a constitutional mandate virtually prohibits the members of the society to impose any obligation upon the individuals who are keen on exercising their freedom to choose a life partner.

Apart from the aforesaid legal observations, the Supreme Court of India has quite explicitly, in *Shafi Jahan v. K.M. Ashokan*¹¹ upheld the right of individuals to marry a person of choice, thereby discouraging the father to take any measures for intervening within the marital union of his daughter. In upholding the right of the petitioner to choose a life partner, the Court meticulously concluded the ambit of “personal autonomy” to be inclusive of deciding on marrying a person. After all, dignity is an inseparable facet of the right to life which further, can be said to be present and be exercised through the medium of the right to choose. That is to say, if the right to choose a partner is curtailed in any form, then the very dignity of that individual is

⁸(2017) 10 SCC 1.

⁹AIR 2018 SC 4321.

¹⁰ShayraBano v. Union of India, (2017) 9 SCC 1.

¹¹2018 SCC OnLine SC 343.

said to have been infringed¹². Marriage, contrary to its traditional perception, is a private affair essentially between the husband and the wife and any intervention within its confines that they believe is illicit is ideally to be halted by the Court of Law for preserving their rights and at the same time, the sanctity of their union¹³. As far as they have the capacity to marry, i.e., specifically that they are majors, there is hardly any near kin could do to prevent it from manifesting through legal means¹⁴ as far as they are doing so consensually¹⁵. In the Indian context, even the Indian Majority Act, 1875 has been interpreted to allow citizens to choose a partner of their choice, with minimum intervention on the part of external agencies¹⁶. Where the right to marry is recognized as a fundamental right in India, it is evident that no person can ideally intervene with this regard; nor can they coerce or threaten their daughter or her husband with physical violence etc. for restraining from exercising the said choice¹⁷. The fundamental right to marry a particular person exists even when the family members disagree once a person decides to marry any individual and even aspects of caste and religion are no barriers to the choice made by the individual and should they be threatened of any consequences by the near kin, the State is under an obligation to assure them due protection¹⁸. Protecting the said right is of utmost importance, for no privileges accorded through the Constitution to women can be curtailed through the means of physical force, threat or even mental cruelty by the members of the society¹⁹. And, if the State neglects its duties towards shielding individuals from exercising their rights, then, they pretty much submit these souls to the mercy of society, which is known for pronouncing brutal sentences against them²⁰. Any laxity in this regard by the Police has been severely criticized by the Judiciary in numerous instances, demanding them to never understate such claims by young couples and assist them accordingly in seeking the protection of the law²¹. Thus, seeking the protection of the Police authorities to that effect is permissible, especially in cases where they are threatened with physical violence etc²². To that effect, the Courts are right

¹²Laxmibai Chandaragi B. v. State of Karnataka, (2021) 3 SCC 360.

¹³ Savita Diwaker v. State of U.P., 2020 SCC OnLine All 1357.

¹⁴Babita @ Roji v. State of U.P., 2017 SCC OnLine All 1993.

¹⁵Sapna Devi And Ors. v. State of U.P. And Ors., Criminal Misc. Writ Petition No. 15134 of 2018.

¹⁶Jyoti Alias Jannat and Anr. v. U.P., 2003 (4) AWC 2844.

¹⁷ Lata Singh v. State of Uttar Pradesh, AIR 2006 SC 2522.

¹⁸Shivani And Another v. State of Uttarakhand And Others, Criminal Writ Petition No. 512 of 2021.

¹⁹ Vikas Yadav v. State of Uttar Pradesh and Others(2016) 9 SCC 541.

²⁰ Ravi Kumar v. State of Haryana, CRM-M-23537-2020.

²¹Id.

²² Amna Begum v. State of U.P., 2017 SCC OnLine All 1798.

in providing ample scope to such couples-in-distress, to approach the nearest Police Station or even the Commissioner if the need is, for sheltering themselves against apprehension of being threatened by their near kin²³. This is the righteous mechanism for seeking due protection from family members who are against such a marital union and are indulging in some of the other forms of torture against them, thereby destroying the peace and harmony they are ideally guaranteed to.

The harassment levelled by parents and relatives against individuals who exercise their right to marry a person of choice against their wishes is a feudal barbaric practice that needs to be halted at the earliest, for safeguarding their autonomy and liberty so guaranteed to them by the Constitution of India, 1950²⁴. Society cannot restrict the right of the woman to marry a person of choice under the guise of “classhonour”, for the said notion is illegitimate and unacceptable in India²⁵. Despite this constitutional restriction, it is known to take the law into their hands for punishing young individuals for marrying a partner of their choice and their stance is impermissible in a constitutional democracy such as ours. Attempts on the part of the “senior” and “well-respected” members of the society to curb the autonomy of the individuals, often through the medium of Kangaroo Courts, referred to as “*Khap Panchayats*” in Haryana and other places by practically executing individuals for marrying a partner of choice has been criticized severely by the Judiciary, compelling it to accord protection to individuals against such illegitimate authorities²⁶. Herein, it is worth mentioning that preventing due protection to a woman who was in a relationship with a man from another community led to an illegal village court virtually punishing her to be “gang-raped”. Likewise, a male youth appears to be more vulnerable to losing his life merely for marrying a partner of choice for allegedly disgracing the honour of the girl, her family, and her community. While taking cognizance of such instances, the Supreme Court declared the need for according maximum protection for women from her relatives and clan in instances where she is either in a relationship or is married to a person of her choice against their wishes and is being threatened by them constantly²⁷.

²³ Vinita Jain Verma v. State of Madhya Pradesh, 2022 SCC OnLine MP 1071.

²⁴ Khushunama And Another v. States of U.P. And Others, C.M.W.P. No. 40564 of 2003.

²⁵ Asha Ranjan v. State of Bihar (2017) 4 SCC 397.

²⁶ Arumugam Servai v. State of Tamil Nadu AIR 2011 SC 1859.

²⁷ Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News dated 23.01.2014, (2014) 4 SCC 786.

As mentioned previously, the very fact that the society associates its “honour” with its females drives them to preserve the same by practically “eliminating” those who “offend” in a fashion which is beyond the acceptable norms. What is abysmal, is that upon finding guilty” the youngsters for marrying a person of choice, the near kin does not hesitate in murdering them²⁸ and so blinded are they, as well as the others in the society for protecting their honour, that nobody takes the bold step of informing the authorities about such heinous crimes²⁹. Any form of homicide for safeguarding honour is arbitrary and unjustified in the country and needs to be dealt with harshly for setting a strong precedent against the consequences of indulging or abetting such gruesome activities³⁰. Certainly, there is a need to eradicate such a practice and only harsher punishments shall make it possible to deter such outrageous and uncivilized behaviour from manifesting again and safeguard the “honour” of the nation in the truest sense³¹. Undoubtedly, this entire system governing honour killings is unconstitutional and the Supreme Court, in *Shakti Vahini v. Union of India*³² has rightly held that such gruesome activities against young couples at the hands of certain individuals forcefully against them for punishing them for behaving against the so-called norms of their communities is not allowed. In the opinion of the Court, permitting the same would be detrimental to the very liberty of the individuals willing to exercise their rights in this regard. The aspects of life and liberty, when read with the notions of dignity and choice are what define a human in any given Constitutional Democracy and depriving citizens of any would make them vulnerable to “animal existence”. Taking a serious note of honour killings across India, the Supreme Court in the aforesaid judgments introduced a series of guidelines for the authorities to follow *tointer-alia* ensure thorough protection of young couples and halt attempts on the part of society to punish those persons who seek to intervene in a marital union illegally. Therefore, it would suffice to say that honour killing as an activity, which is anti-thesis to the right to marry a partner of choice is certainly illegal in India, though, a dire need to introduce a law to that effect is certainly the need of the hour.

Reading the aforesaid observation with the averments of the High Court of Jammu and Kashmir AndLadhak, it appears that the Court, in the instant case, has rightly accorded protection to the

²⁸Manoj-Babli honour killing case, Criminal Appeal No.479-DB of 2010 and Criminal Revision No.2173 of 2010

²⁹ Sanjay v. State Of Haryana, CrI. Appeal No.578-DB of 2005.

³⁰ State of U.P. v. Krishna Master AndOrs. (2012) 12 SCC 324.

³¹B.Dilipkumar v. The Secretary To Government, Writ Petition No.26991 of 2014 and MP.No.1 of 2014.

³² (2018) 7 SCC 192.

young couple, provided, they can prove that they are majors and that they have married in accordance with the rules and rituals permitted under the Muslim Law. However, it has drawn attention yet again to the failure of the Legislature to take strict measures by introducing robust legislation against Honour Killing in India. While the verdict rendered in *SugraFatima* does not explicitly deal with the said offence, it does address the issue of apprehension to hurt from the near kin and therefore, merely relies on Judiciary's guidelines and interpreting a series of pre-existing provisions for assuring justice won't be sufficient is the firm assertion of the Authors.

CONCLUSION

The Law Commission of India³³, in August 2012, stated that the perceptions of elders cannot compel young individuals to not exercise their fundamental freedom to marry a person of choice and utilizing force to that effect for preserving "honour" is unjustified. It went to the extent of suggesting a Bill for protecting young couples against such atrocious activities by the members of the society and in a way, tackling authoritarianism and superstition through constitutionalism. Certainly, such protection is quintessential for ensuring the righteous protection of the rights of women in the Indian society, who choose to exercise their free will in matters righteously permitted by the Constitution of India. Above all, it would not only help deal with better, the issues of casteism and communalism better and enable the educated members of the society to exercise their rights in a fashion that would aid the Government in its role of bringing about national integration. Eradication of caste is certainly necessary, for unless the same manifests, *inter-alia*, it is impossible to ensure thorough equality between men and women. As far as the castesystem continues to operate, it will, as per the findings of the High Court of Rajasthan, create an adequate environment for caste-based panchayats to thrive, which will not only compel the individuals, especially women, affiliated therein to submit all their rights to a selected, few elders, but also permit them to undertake executions for exercising their constitutional rights merely against their will³⁴. Enacting legislation to that effect would be perceived as India's commitment to fulfilling its promises so made in the international realm that of upholding the dignity of women by incorporating the essence of the Universal Declaration of Human Rights, 1948, International Convention on Economic, Social and Cultural Rights, 1976, United Nations

³³ Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework. Report No.242.

³⁴LaxmiKachhawaha v. The State of Rajasthan AndOrs., AIR 1999 Raj 254.

Convention on the Elimination of all types of Discrimination against Women, 1979, to which, it is a signatory³⁵. In simple words, these covenants prescribe for sheltering the freedom of women to exercise their fundamental rights without the fear of being subjected to any violence on the part of the society to that effect – prohibiting women to marry a partner of choice is a restraint on her privilege to achieve the optimum pleasure of being a human and therefore, any such restraints are impermissible.

In 21st century India, individualism is the guiding factor for the Government and the Judiciary for deciding the fate of human rights in India and certainly, the lack of central legislation to that effect implies the failure of the authorities and elected representatives to permit the society to dictate the constitutional rights of the masses in general. To that effect, the verdict of *Sugra Fatima* is a reminder for the concerned to consider enacting a robust law, which would primarily discuss measures for strictly penalizing honour killings and dealing effectively with apprehensions of injury to young couples against the near kin, to begin with.

³⁵Vishakha v. State of Rajasthan, (1997) 6 SCC 241.