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Are LGBTQ+ People Second-Class Citizens? - Supriyo @ Supriya Chakraborty and Anr v Union of India

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INTRODUCTION

Marriage is one of the most celebrated and socially supported unions between individuals. Through the lens of stability and societal status, it is dawned upon the couple to perform marital functions. If marriage is such a 'socially accepted' institution then why shall it not be inclusive of the non-heterosexual couples? Why should it discriminate between individuals based on their sexual orientation? Is marriage not a fundamental right? On 17th October 2023, ***Supriyo @ Supriya Chakraborty and Anr v Union of India***[1] became a landmark case by giving a verdict on the long-awaited question 'Will India legalise same-sex marriages?' and took action for the rights of the LGBTQ+ community in India. This case also puts a few provisions of the Special Marriage Act[2] to the test of constitutionality. Furthermore, it traced the extent of the judiciary to end the brawl between judicial activism and its converse, judicial overreach while adjudicating. This reveals its profound influence on societal transformation, its

[1] *Supriyo @ Supriya Chakraborty v Union of India* WP (Civ) No 1011/2022
[2] Special Marriage Act 1954

intricate connection with legislative policy, and its pivotal role in the interpretative processes of constitutional adjudication.[3] Therefore, this case gauges the judiciary's playout in any legal paradox.

BACKGROUND

Battle for the rights of the LGBTQ+ community dates back to Section 377[4] which the Supreme Court avows to be "*a colonial provision which reflected Victorian morality*"[5]. In 1838, Thomas Macaulay drafted Section 377 in the Indian Penal Code 1860 which criminalises any sexual act between two consenting adults of the same sex. It finds its essence in the Buggery Act of 1533. 'Buggery' was defined as an unnatural sexual act against the will of God and man.[6] Soon this act was repealed, and the Offences Against the Persons Act 1861 became the foundation of the criminality for homosexuality law in India. The British government, made amends to legalise same-sex marriage by the Sexual Offences Act 1967. India, however, struggled to fight such an archaic law for a very long time. A significant step was in the case of *Naz Foundation v Government of NCTD*[7], in 2009, where the Division Bench of Delhi High Court interpreted that section 377 was unconstitutional in so far as sexual activity among two consenting homosexual couples is concerned. It also violated Article 14 as homosexual persons did not have equal rights as heterosexuals in matters of choosing a sexual partner of choice. It was also discriminatory as it created a bias towards LGBTQ+ and hence invoked Article 15 as well. Asserting the will for sexual activities based on sexual orientation and gender is a private affair and it therefore is an intrinsic element of Article 21. This further went into appeal and in 2013, in *Suresh Kumar Koushal v Naz Foundation,*[8] a two-judge Bench of this court overruled this judgment considering that the legislature has the authority to amend or repeal a particular law and the judiciary is not entitled to do so. The case of the *National Legal Services Authority v Union of India*[9] was proof that the self-identified gender of 'third gender persons' enjoyed all the guaranteed constitutional rights as given to the male-female binary persons. This means

[3] Prithve R et al., 'A CASE COMMENT: SUPRIYA CHAKRABORTY AND ANR. V. UNION OF INDIA' (2024) 3(2) JLRJS <https://jlrjs.com/wp-content/uploads/2024/02/48.-Prithve-R-Diviyaa-Sri-R- Then dral-A-1.pdf> accessed 22 June 2024
[4] Indian Penal Code 1860, s 377
[5] *Supriyo @ Supriya Chakraborty v Union of India* WP (Civ) No 1011/2022
[6] Chaitanya Kediyal, 'Tracing the history of Section 377 of IPC' (*FACTLY*, 11 July 2008) <https://factly.in/tracing-the-history-of-ipc-section-377/#> accessed 22 June 2024
[7] *Naz Foundation v Government of NCTD* (2009) 160 DLT 277
[8] *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1
[9] *National Legal Services Authority v Union of India* (2014) 5 SCC 438

regardless of gender, a person must enjoy sexual autonomy and choice of sexual partner. *Justice KS Puttaswamy v Union of India,*[10] created a solid framework for a correlation between the right to life and personal liberty under Article 21[11] to be a wholesome right awarding privacy in matters of personal intimacy and sexual orientation. Justice D.Y. Chandrachud was of the view that 'privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation'. Hence a person identifying with any gender in the inclusive spectrum of the LGBTQ+ community, must be treated equally, enjoy constitutional rights and a private space wherein there is enough autonomy to associate sexually with a person of choice regardless of their gender or sex. Keeping these judgments in view, a writ petition was filed to recognize the 'right to sexuality, the right to sexual autonomy, and the right to choice of a sexual partner as a part of the rights guaranteed under Article 21 of the Constitution and to declare Section 377 of the IPC to be unconstitutional'[12]. As per the court's discretion, petitioners demanded that a five-judge Bench hear the matter.

To such a plea, the Supreme Court in a five-judge bench gave a verdict in *Navtej Singh Johar v Union of India*[13]. Section 377 stood to be unconstitutional as it discriminated between heterosexuals and the LGBTQ+ community. Here the intelligible differentia was based on a 'natural trait' thereby losing all the reasonability and infringing Article 14[14]. Chief Justice of India (**CJI) DY Chandrachud** stated that Section 377 was violative of Article 15[15] as discrimination based on 'sex' includes sexual orientation as well. **CJI DY Chandrachud** and **Justice Dipak Mishra** claimed section 377 to be in gross negligence of sexual privacy which attracted violation of Article 19(1)(a).

In the case of *Navtej Singh Johar v Union of India*[16], Court did not restrict to decriminalizing section 377 but recognised that: "that person finds love and companionship in persons of the same gender; protected the class against discriminatory behaviour; and recognized the duty of the State to end the discrimination faced by the queer community."[17]

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[10] *Justice K.S. Puttaswamy v Union of India* (2017) 10 SCC 1
[11] Constitution of India 1950, art 21
[12] *Navtej Singh Johar v Union of India* (2018) 10 SCC 1
[13] *Ibid*
[14] Constitution of India 1950, art 14
[15] Constitution of India 1950, art 15
[16] *Ibid*
[17] *Supriyo @ Supriya Chakraborty v Union of India* WP (Civ) No 1011/2022

The immediate impact of the Navtej Singh Johar Case was to break the social construct of morality and stigma created by Section 377 and further the constitutional values. It recognised the most minuscule yet the most crucial right associated with the human well-being of sexual minorities to love and be loved despite it results in sodomy as far as two consenting adults are concerned. Such a drastic shift in the morals of society was not welcomed. The queer community kept facing violence, protests and oppression by the extremists despite getting legal recognition for such innate traits of individuals. For instance, a woman who eloped with another woman was beaten, stripped and paraded around the village with a blackened face and a garland of shoes around her neck. However, it has impacted the community deeply in light of advancing the rights of the queer community and providing them legal recognition and protection from the rigour of arbitrary laws.

To further the rights of the LGBTQ+ community and an opportunity for them to tie the marital knot and assume a family of their own, on 3rd January 2023, **CJI Chadrachud** and **P.S. Narasimha** and **J.B. Pardiwala** transferred 11 petitions from Kerala and Delhi High Court to the Supreme Court subsequently. The petitioners argued that the non-recognition of same-sex marriage violates the rights to equality, freedom of expression and dignity as promised in the judgments of NALSA[18] and the Navtej Singh Johar Case. These petitions were later dealt with in the current case in question. Petitioners were of the view that the affirmation and acceptance that comes with legal recognition can significantly improve the mental health and emotional well-being of LGBTQ+ individuals. In this battle for as many rights as heterosexual persons, the LGBTQ+ community will enjoy stable long-term marital relations, choice of marital partner, and an allowance to raise children to have a fulfilling life.

The queer community has also gained global legal recognition for same-sex marriage in almost 35 countries as of 1st October 2023 including giants like the United States and England. The earliest being the Netherlands (in 2001) and the latest being Andorra (in February 2023) and Nepal (in June 2023). India comes at the 36th rank in the list of queer-friendly countries.[19]

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[18] *National Legal Services Authority v Union of India* (2014) 5 SCC 438

[19] Nimisha S Pradeep, 'Fight for equality to continue: Only 35 Countries in the world have legalised same- sex marriage' *The Hindustan Times* (Chennai, 21 October 2023) <https://www.thehindubusinessline.com/data-stories/data-focus/fight-for-equality-to-continue-only-35-countries-in-the-world-have-legalised-same-sex-marriage/article67437931.ece>accessed 25 June 2024

FACTS OF THE CASE

On 14th November 2022, the petitioners Supriya Chakraborty and Abhay Dang, a same-sex couple urged for a writ petition at the Supreme Court followed by another petition of Parth Phiroze Mehrotra and Uday Raj Anand. The petition argued for the legalisation of same-sex marriage and rendered the Special Marriage Act (SMA), 1954 unconstitutional. Special Marriage Act, of 1954 is a secular law that allows two persons, a 'man' and a 'woman' to solemnise a marriage without any discrimination based on religion and is therefore, referred to as a 'special marriage'. Section 4[20] provides the conditions in which a special marriage may be solemnised. Sec 4(c)[21] of SMA states that 'the 'male' has completed the age of twenty-one years and the 'female' the age of eighteen years'. This appears to be just an age-based restriction, however, the inclusion of non-inclusive terms such as 'man' and 'women', narrows down the application of this act particularly to binary couples. Hence, this was alleged to be discriminative against the LGBTQ+ community by recognising heterosexual marriage only and withholding benefits for homosexuals such as surrogacy, adoption, and other health and economic benefits.

Till 6th January 2023, 20 similar cases amounting to 52 petitioners seeking marriage equality for non-binary persons were asked to be transferred to the Supreme Court for a collective hearing by a five-judge Constitution Bench from 18th April 2023. This Hon'ble Bench consisted of Chief Justice of India D.Y. Chandrachud, Justice P.S. Narasimha, Justice S.K. Kaul, Justice Hima Kohli and Justice S.R Bhat. After 10 days of rigorous arguments and hearings, the Bench reserved the judgment on 11th May 2023. On 17th October 2023, a unanimous decision with a 3:2 ratio held that the right to marry shall not be a fundamental right. The court even upheld the constitutionality of the Special Marriage Act, 1954 (SMA) and its challenged provision of Section 4(c). The bench also considered it a matter of judicial overreach to step in the duties of the State's legislature and alter the interpretation of the pure intentions of the statute. Hence LGBTQ+ community was denied the right to marry.

LEGAL ISSUES

1. Whether the Constitution of India includes the right to marry as a fundamental right.

[20] Special Marriage Act 1954, s 4
[21] Special Marriage Act 1954, s 4(c)

2. Whether the judiciary must legalise same-sex marriages and if not, does this violate their fundamental rights under the Indian Constitution?

3. Whether the Special Marriage Act, of 1954 is unconstitutional for excluding non-heterosexual couples.

4. Do LGBTQ+ couples have a right to enter into a 'civil union'?

5. What shall be the adoption right imparted to LGBTQ+ couples??

ARGUMENTS FROM BOTH SIDES

Petitioner's Arguments

Mr Mukul Rohatgi submitted that the existing jurisprudence on the LGBTQ+ community grants them a dignified life, sexual autonomy, and privacy from landmark judgments like Navtej Singh Johar and NALSA. Accordingly, the right to marry a person of their choice is a consequential right stemming from the Court's jurisprudence itself and must be a fundamental right. Denial of the 'right to marry' to homosexuals is a clear violation of Articles 14, 15, 19 and 21 and marriage equality must encompass the full spectrum of sexual orientation and not just gay-lesbian binary.

Violation of Article 14: Non-recognition of same-sex marriage denies the queer community of equal protection by the State in the context of social welfare and beneficial legislation. SMA is arbitrary as it sweeps queer community out of its ambit by its narrow terminology of 'male' and 'female'. It lacks any reasonable justification for the same. There is no intelligible differentia to distinguish between heterosexuals and homosexuals on the sole basis of sexual orientation and varied gender identities. SMA also failed to establish the rational nexus text. The object of SMA is to solemnise marriages of those who may not or cannot marry under their personal laws. The exclusion of LGBTQ couples from the SMA has no rational nexus with this object.

Violation of Article 15: Article 15(1)[22] prohibits discrimination on the grounds of sex, which subsumes sexual orientation. The inclusion of words like 'male' and 'female' under Sec 4 (c)

[22] Constitution of India 1950, art 15(1)

restricts the whole Act to heterosexual marriages and is discriminatory towards the LGBTQ+ community, making SMA unconstitutional. Therefore, SMA must include gender-neutral terms like 'spouse' or 'any two persons' in the position of 'husband', 'wife', 'male' and 'female' throughout the Act. The reference to 'widow' and 'widower' in Schedules II and III must be replaced with 'widow or widower' and 'widower or widow' for inclusivity of non-heterosexuals. References to 'bride' and 'bridegroom' in Schedules III and IV must be read as 'bride or bridegroom', to avoid any discrimination based on sexual orientation, or sexual identity of the parties.

Violation of Article 19: Article 19(1)(a)[23] imparts freedom of speech and expression. Freedom to choose a partner for marriage is a socially valuable form of expression. Article 19(1)(c)[24] provides freedom to form an association or union. The restriction on the right of queer persons to marry is not a reasonable restriction under Article 19(2).

Violation of Article 21: The right to life and personal liberty encompassed in Article 21[25] also includes the right to a happy, dignified life where one is free to choose their sexual partner as per choice. Therefore exclusion from SMA of LGBTQ+ persons is devoiding them of their fundamental right enshrined in Article 21.

CARA guidelines and Regulations 5(2)(a)[26] and 5(3)[27] of the Adoption Regulations 2022 require proof of a 'marital relationship' by a 'married couple' in case of joint adoption. This refrains queer couples to adopt. These sections are contrary to Section 57(3)[28] of the Juvenile Justice (Care and Protection of Children) Act (also known as JJ Act) 2015, which permits joint adoption merely by consent of the couple.

Respondent's Arguments

Navtej Singh Johar was a distinct decision of the court that gave a clear stance on the right to marry and form a family. Any legislation that omits a certain community or class from inclusion does not render the legislation void on this sole basis. At the deception of SMA,

[23] Constitution of India 1950, art 19(1)(a)
[24] Constitution of India 1950, art 19(1)(c)
[25] Constitution of India 1950, art 21
[26] Adoption Regulations 2022, s 5(2)(a)
[27] Adoption Regulations 2022, s 5(3)
[28] Juvenile Justice (Care and Protection of Children) Act 2015, s 57(3)

non-heterosexual persons were not recognised. Therefore, their arbitrary omission from the Act was never a point of debate. Changing provisions of SMA to allow same-sex marriage will constitute a different interpretation of Section 19[29]- 21A[30] of the Act altogether, disturbing the intent of the legislature with which it established the legislation in the first place. This will also have a wide impact on several other legislations, rendering the legislature's power to make laws futile as the judiciary will interpret the rules as per its own will and the object of the legislature to enact a particular law will be defeated. The Constitution does not recognise the right to marry as a fundamental right under Article 21. The right to marry has never been absolute. Any assertion in cases like Shafin Jahan[31] and Shakti Vahini[32] is read in a specific context for inter-case marriages and cannot be applied generally. The state is under no obligation to recognise every relationship. Marriage of heterosexuals required recognition for the sustenance of society.

Keeping in view, the Hindu Marriage Act, of 1955[33] and Muslim law, both recognise marriage as a union of man and woman. If SMA solemnises non-heterosexual marriages, it will violate the age-old personal laws. For instance, nuances like prohibited degree of relationships, social and moral recognition of a couple as male and female or conditions for ceremonial requirements etc.

CARA guidelines and Section 57(3)[34] of the JJ Act protect the child from any case of abandonment by either of the parents and hence it necessitates adherence to Section 5(2)(a)[35] and 5(3)[36] of Adoption Regulation 2022 that requires 'stable marital relationship' for adoption under JJ Act.

OBSERVATION OF THE SUPREME COURT

This landmark judgment encompassed four opinions, namely from the **CJI, Kaul J.**, and **Bhat J**. wrote on behalf of **P.S. Narsimha J.**, **Hima Kohli, J.** with a 3:2 ratio. **CJI DY Chandrachud** was amongst the minority opinion which is considered to be a rare event that

[29] Special Marriage Act 1954, s 19
[30] Special Marriage Act 1954, s 21A
[31] *Shafin Jahan v K.M. Ashokan* (2018) 16 SCC 368
[32] *Shakti Vahini v Union of India* (2018) 7 SCC 192
[33] Hindu Marriage Act 1955
[34] Juvenile Justice (Care and Protection of Children) Act 2015, s 57(3)
[35] Adoption Regulations 2022, s 5(2)(a)
[36] Adoption Regulations 2022, s 5(3)

has happened only 13 times. Some of the observations made by the court on the legal issues are as mentioned:

1. **The implications of this discussion for the right of queer persons to marry:**

A 3:2 ratio with a majority opinion was that LGBTQ+ couples do not possess the right to marry or form a civil union. **CJI DY Chandrachud** and **Justice Kaul** refrained from this opinion and contested that under Articles 19[37], 21[38], and 25[39] on the grounds of freedom of expression and formation of an association, every individual (including queer persons) can form a civil union. Such unions seek legitimacy from the recognition given by the State for the realisation of such rights. He observed that "the right to enter into a union includes the right to associate with a partner of one's choice. For the full enjoyment of such relationships, it is necessary that the State accord recognition to such relationships." The majority opinion was of a different view. **Justice P.S. Narsimha, Justice Ravindra Bhat,** and **Justice Hima Kohli** partially agreed to the rights conferred on the LGBTQ+ community with relevance to the "right to relationship, cohabit and live together, as an integral part of choice." However such rights were accorded under the broad spectrum of Article 21[40] and did not belong to Articles 19[41] and 25[42]. Recognising the right to marry same-sex persons will create a separate institution of marriage which is beyond the powers of the judiciary. To create or establish an institution of marriage, Parliament reserves its role to make legislation and provide legal recognition to an institution of marriage as it deems fit. Therefore, there lies a legislative lacunae in the context of the recognition of same-sex marriages. Another implication of legalising same-sex marriage will be the management of benefits and entitlements that are covenant to a recognised marital relationship. For instance, as soon as a couple marries, one spouse can inherit the property of another in case of his/her death. Now, in the present case, if a queer person gets married and claims inheritance rights, there is a vacuum for a specific enactment that can assist the inheritance rights of a same-sex spouse. Hence, as a consequence, a change in the whole system that governs the inheritance laws will be required. Similarly, other tangible benefits that the State provides with the prerequisite of marriage are (i) matrimonial rights like

[37] Constitution of India 1950, art 19
[38] Constitution of India 1950, art 21
[39] Constitution of India 1950, art 25
[40] Constitution of India 1950, art 21
[41] Constitution of India 1950, art 19
[42] Constitution of India 1950, art 25

permanent alimony and maintenance; (ii) childcare-related benefits like joint adoption and surrogacy rights (iii)property benefits like securing ownership of property in case of intestate succession (iv)monetary benefits like entitlement to pensions, funeral expenditures for deceased spouse; (iv) evidentiary privilege which involves right to not be a witness against the spouse or privileged communication during marriage accorded in Indian Evidence Act, 1872[43]. Separate enactments and legislations may pre-exist to make these rights enforceable. The judiciary does not consider itself well equipped to impart such a 'bouquet of entitlements'[44] without any legislation that may pre-exist.

2. Challenges of the right to marry:

a. Have the courts ever recognised the right to marry?

The Supreme Court held that there is no express recognition of a right to marry in the Constitution. Petitioners sought justification for the Constitution guaranteeing the right to marry in *Shafin Jahan v Asokan K.M*[45] and *Shakti Vahini v Union of India*[46], to which the Court was of the view that the context in which a certain judgment has been made must be given due diligence. In Shafin Jahan Case, the Court held that religion and caste shall not be a barrier to one's right to choose a marital partner. Similarly, in Shakti Vahini, any State and non-state entities were forbidden to interfere in the right to marry a person of choice.

b. Whether there is a fundamental right to marry?

The Constitution of India, under Articles 245[47] and 246[48] read with Entry 5 of the Concurrent List gives authority to the State legislature to enact, regulate, or amend the socio-legal institution of marriage. Supposing the Court recognizes the right to marry as a fundamental right, now the State will be forced to create an institution of marriage that it has not created in the first place using its authority from the Constitution. Therefore, **Justice DY Chandrachud** condemned such judicial overreach and he valued the theory of separation of power and recognised the prudent usage of judicial review.

[43] Indian Evidence Act 1872
[44] Indian Evidence Act 1872, s 122
[45] *Shafin Jahan v K.M. Ashokan* (2018) 16 SCC 368
[46] *Shakti Vahini v Union of India* (2018) 7 SCC 192
[47] Constitution of India 1950, art 245
[48] Constitution of India 1950, art 246

4. The challenge to the Special Marriage Act 1954 (SMA):

SMA passed the test of constitutionality and was held to be completely valid. SMA is primarily a milestone for the formation of a progressive law that caters to the solemnization of inter-caste and inter-faith marriages. **CJI** submitted that rendering such a neoteric law 'void' would take modern India back to its pre-independence days. However, **Justice Kaul** has an interesting departing outlook. He opined that SMA was to ease and promote inter-faith marriages which has absolutely no correlation with the distinction between heterosexuals and non-heterosexuals. Therefore, it was discriminatory and hence violative of Article 14. Justice Bhat contended that a law shall be read in the context of its object as to why was it made. SMA was formulated to facilitate marriage of inter-caste and inter-faith nature. Just because an act portrays irrelevancy to a section of society, it does not invite impunity. Interpretation of statutes is always done keeping in view the intent of the legislature. The judiciary cannot become creative and trespass the domain of legislature. This connotes that SMA shall be interpreted in a way that furthers the solemnisation of heterosexual couples who cannot or may not marry according to their personal laws. Any discrimination in the marriage of a particular heterosexual couple by the provision of SMA will lead to deviance from the object of the act and will render it unconstitutional. On the contrary, the object of SMA portrays the will of the legislature to not include same-sex marriages and hence there lies no relevance to the solemnisation of queer marriages in SMA.

DECISION

On 17th October 2023, a landmark verdict came with a majority ratio of 3:2 where it was held that the right to marry cannot be considered to be a fundamental right. The Bench did not recognise same-sex marriage and such non-recognition did not violate fundamental rights such as Article 19(1)(a)[49] or Article 21[50] of the Constitution. Section 4[51] of SMA was held to be constitutional. The term 'Couple[s]' mentioned in Section 57(2)[52] of the Juvenile Justice Act,

[49] Constitution of India 1950, art 19(1)(a)
[50] Constitution of India 1950, art 21
[51] Special Marriage Act 1954, s 4
[52] Juvenile Justice (Care and Protection of Children) Act 2015, s 57(2)

2015 refers to married couples, and Regulation 5(3)[53] of the Adoption Regulations, 2022 also constitutional to uphold 'two years marital relationship' eligibility for adoption rights. Recognition of civil union of same-sex couples under the pressure of Article 19(1)(c)[54], Article 19(1)(e)[55] and Article 25[56] has failed as it requires the formation of a separate institution. The State has the power to recognise such institutions. Transgender persons i.e. third-gender persons can marry under the personal laws and SMA, provided it is a heterosexual relationship.

CRITICAL ANALYSIS

To understand the judgment and make an opinion on it, it shall be astute first to understand who this LGBTQ+ community is or as questioned in the judgment, 'Is queerness 'un-Indian'? Who is an Indian? What practices are Indian?' To this, the Supreme Court asserted that '*Queerness is a natural phenomenon which is known to India since ancient times….. The contention of the Union of India that heterosexual unions precede law while homosexual unions do not cannot be accepted given the decision in Navtej Singh Johar where this Court held that queer love has flourished in India since ancient times*.' Other instances that affirm the presence of queerness in India can be seen at the immaculate temples of Khajuraho in Chattisgarh which were built in 1000-1250 A.D. They depict sexual acts between same-sex couples in the form of sculptures[57]. Kautilya's Arthashastra also mentions about homosexuality. Shikhandini, the daughter of King Drupada in the ancient Indian epic Mahabharata, was a transgender warrior who killed Bhishma and even married a woman later.[58] Therefore, queerness is not an alien concept and does not culminate in any unnatural act.

India is one of the most diverse countries with a plethora of cultures and communities with their own set of norms and customs. In such a diaspora, variability in the institution of marriage is inevitable. Heterosexual marriages and homosexual marriages have been taking

[53] Adoption Regulations 2022, s 5(3)
[54] Constitution of India 1950, art 19(1)(c)
[55] Constitution of India 1950, art 19(1)(e)
[56] Constitution of India 1950, art 21
[57] Prabhash K Dutta, 'Homosexuality in ancient India: 10 instances' *India Today* (New Delhi, 10 July 2018) <https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10> accessed 26 June 2024
[58] *Ibid*

place for decades in several tribes and places[59]. For instance, the hijra community forms a union with men in South India. Such unions were known as 'pantis'.[60] Two Adivasi women from Koraput, Orissa defied all the norms and got married according to their tribal customs.[61] Another case of two women from Hamirpur district in Uttar Pradesh divorced their husbands and married each other.[62] Therefore, homosexual marriage is not an urban or elite concept but it portrays the very own culture of India, and hence societal stigma about 'social acceptance' shall not be an issue. Now retrieving to the stance of the judiciary which has refused to recognise same-sex marriages, the author's opinion does not align with the said judgment. How can we as a society deny a community such a basic right only based on their sexual orientation? Since the 4th century BC, the system of Chaturvarnashrama recognises the second stage of life as Grihasthya Ashram which is the 25 years of married life. In this period an ideal marriage involves 'intellectual companionship through the performance of household duties, including upbringing of children and offering reverence (shraddha) to ancestors.'[63] The judiciary has been progressive in promoting legal relationships, companionship, and choice of partner in the Navtej Singh Johar case. Marriage of LGBTQ+ couples shall be seen to be a consequence of such recognitions.

A 3:2 majority unanimously held that the right to marry is not a fundamental right. Indeed, the court has never explicitly adjudged this matter, however, the opinion of the judiciary has been revealed in various precedents. In *Lata Singh v State of U.P.*[64], the petitioner was entitled to marry whomever she wanted to, or *Justice KS Puttaswamy (retd) v Union of India*[65], where the right to privacy was considered to be an intrinsic part of Article 21. In *Shakti Vahini v Union of India*, the court opined that 'the State is duty-bound to protect the fundamental rights

[59] Ruth Vanita, ''Wedding of Two Souls'': Same-Sex Marriage and Hindu Traditions' (2004) 20(2) Journal of Feminist Studies in Religion <http://dx.doi.org/10.2979/FSR.2004.20.2.119> accessed 26 June 2024
[60] Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (The University of Chicago Press 2005)
[61] Satyanarayan Pattnaik, 'Two Orissa girls defy norms, get married' *TNN* (05 November 2006) <https://timesofindia.indiatimes.com/india/two-orissa-girls-defy-norms-get-married/articleshow/322874.cms> accessed 26 June 2024
[62] Chanchal Chauhan, 'UP: In love for 7 years, two women divorce husbands to marry each other' *India Today* (Lucknow, 01 January 2019) <https://www.indiatoday.in/india/story/uttar-pradesh-two-women-divorce-husbands-marry-each-other-hamirpur-1421477-2019-01-01> accessed 26 June 2024
[63] Pooja Mondal, Four Ashramas of Vedic Life: Stages of Life in Realising the Hindu Ideal of Life' (*Your Article Library*) <https://www.yourarticlelibrary.com/society/indian-society/four-ashramas-of-vedic-life-stages-of-life-in-realising-the-hindu-ideal-of-life/39153> accessed 22 June 2024
[64] *Lata Singh v State of U.P.* (2006) 5 SCC 475
[65] *K.S. Puttaswamy (Aadhar/Privacy-3J.) v Union of India* (2015) 8 SCC 735

of its citizens; and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage.' The court took a selective reading of its jurisprudence and submitted a restrictive view that may be perceived as an irregularity in deciding the judgments. When a person is accorded the fundamental right of Article 21, the right to privacy, dignity, and the right to choose their partner is ancillary to it. Such rights are intertwined with the right to marry. The Supreme Court may apply transformative Constitutional interpretation to bring socio-legal, legal economic, and political changes. For instance, the right to education and the right to livelihood have been recognised as fundamental rights

The right to marry as a fundamental right is a universal concept recognised under various international conventions. India is a signatory to the Universal Declaration of Human Rights,1948, which under Article 16(1) clearly states that "*Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family*."[66] Article 23(2)[67] of the International Covenant on Civil and Political Rights also asserts the same. The Supreme Court gave no cognizance to such international conventions and disregarded Article 253[68].

The court also upholds the Separation of Power theory and contends that it shall be the duty of the parliament to enact laws and the judiciary can only interpret it. However, in the past, the judiciary has shown a proactive approach by laying out laws and policies related to orders and guidelines such as in the case of Vishakha.[69] Therefore a positive form of judicial activism facilitated by transformative constitutional interpretation shall not be an intrusion into the powers of legislature. The court must recognise the right to marriage as a fundamental right. Parliament may still exercise its powers under Articles 245 and 246 read with Entry 5 of the Concurrent List and that can be treated as a restriction on reasonable grounds to this fundamental right. Parliament does not have enough representation from the LGBTQ+ community which hinders the quality of results.

The Supreme Court did not entirely maintain the status quo but also took progressive steps to better understand and improve LGBTQ+ rights. The Court gave assurance to formulate a

[66] Universal Declaration on Human Rights (adopted 10 December 1948) 217 A(III) (UNGA), art 16(1)
[67] International Covenant on Civil and Political Rights (adopted 19 December 1966) 2200A (XXI), art 23(2)
[68] Constitution of India 1950, art 246
[69] Simran, 'Legislature versus Judiciary' (*PRS Legislative Research*, 04 October 2011) <https://prsindia.org/theprsblog/legislature-versus-judiciary> accessed 22 June 2024

committee that will be chaired by the Cabinet Secretary. This committee may elucidate the scope of LGBTQ+ couples' rights. Various functions that shall be performed by the committee may include recognising queer relationships as a family, particularly for ration cards, joint bank accounts, jail visitation rights and naming the partner as a nominee for a deceased partner.

Marriage as an institution provides offspring who in a natural cycle, maintain the lineage of a family. Non-heterosexual marriages may not necessarily fit to be compartmentalised in such phenomena but this shall not be a ground to forbid their right to marry. The court also showed a nuanced approach and supported the same.

The court also held that the Special Marriage Act, 1954 (SMA) passed the test of constitutionality, however, the author submits that Section 4(c)[70] of SMA has not used a gender-neutral term but makes a classification between queer and non-queer communities by using terms 'male' and 'female'. Such an unreasonable classification does not stand the test of reasonability under Article 14 and hence grossly infringes it.

SUGGESTIONS

Recognition of same-sex marriage and imparting adoption rights to the LGBTQ+ community may increase the adoption rates in India and provide a family to orphans. India is struggling with a low adoption rate which barely touched the mark of 4009 between April 2023 and March 2024 and only 10% of orphaned children are getting adopted annually.[71] Research findings show that the U.S.A. legalised same-sex marriage on 26 June 2015 and since then the city of Los Angeles alone has shown remarkable statistics in child adoption. Almost 114,000 same-sex couples are raising adopted children, including 28,000 male same-sex couples and 86,000 female same-sex couples and same-sex parents are 7 times more likely to raise adopted and foster children.[72] In the case of England, in 2022, more than one in six (540 out of 2,950) adoptions were granted to same-sex couples resulting in the 'greatest proportion on record'

[70] Special Marriage Act 1954, s 4(c)
[71] Srishti B. Dutta, 'Adoption In India Crosses 4000, Reaches Pre- Pandemic Levels But Process Remains Tedious' *India Times* (02 April 2024) <https://www.indiatimes.com/news/india/adoptions-in-india-finally-cross-4000-reach-pre-pandemic-levels-but-process-remains-tedious-govt-data-631315.html> accessed 22 June 2024
[72] Rachel Dowd, 'Same-sex parents are 7 times more likely to raise adopted and foster children' (*School of Law, William Institute*, 27 October 2020) <https://williamsinstitute.law.ucla.edu/press/lgbt-parenting-media-alert/> accessed 22 June 2024

with an increase in adoption rates by 17% since the previous year.[73] Due to years of victimisation, stigmatisation, discrimination and oppression, the LGBTQ+ community has suffered from grave mental health issues. In 1948, even the World Health Organisation listed homosexuality as a mental disorder in its International Statistical Classification of Diseases and Related Health Problems (ICD).[74] However such extreme opinions have gradually subdued and homosexuality has received its due recognition in recent times. A study titled '*The Anticipated Impact of LGBTQIA+ Marriage Equality Legislation on Indian Society and Mental Health*', introspected the improvement of well-being after same-sex marriage legalisation and the stability achieved by such long-term relationships. 'While the legalisation of marriage will not guarantee societal acceptance, many respondents mentioned that legalisation of marriage would create a stronger sense of community and social support and enable them to secure essential rights,' said Megha Sharda, a neuroscientist and co-author of the study.[75] Queer couples with such affirmation and social acceptance can significantly improve their mental health. They shall be entitled to all the rights that are a consequence of the right to marry at par with heterosexual couples.

CONCLUSION

On 17th October 2023, a landmark verdict came with a majority ratio of 3:2 where it was held that the right to marry cannot be considered to be a fundamental right. The Bench did not recognise same-sex marriage and such non-recognition did not violate fundamental rights such as Article 19(1)(a) or Article 21 of the Constitution. Section 4 of SMA was held to be constitutional. Recognition of civil union of same-sex couples under the pressure of Article 19(1)(c), Article 19(1)(e) and Article 25 has failed as it requires the formation of a separate institution. The State has the power to recognise such institutions. Transgender persons i.e. third-gender persons can marry under the personal laws and SMA, provided it is a heterosexual relationship.

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[73] Joe Ali, 'Huge increase in same-sex couples adopting is good news 'for LGBTQ+ people and children' *Pink News* (06 March 2023) <https://thepinknews.com/2023/03/06/same-sex-couples-adoption-lgbtq/> accessed 22 June 2024

[74] Jack Drescher, 'Out of DSM: Depathologizing Homosexuality' (2015) 5(4) Behavioral Sciences 565-575 <https://doi.org/10.3390%2Fbs5040565> accessed 22 June 2024

[75] Alisha Dutta, 'Study finds legalisation of same:sex marriage to have positive impact on mental health of LGBTQ+ individuals' *The Hindu* (New Delhi, 17 April 2023) <https://www.thehindu.com/news/national/study-finds-legalisation-of-same-sex-marriage-to-have-positive-impact-on-mental-health-of-lgbtqia-individuals/article66745345.ece> accessed 22 June 2024

The judgment encompassed a few remarkable directions[76] that may uplift the situation of the LGBTQ+ community:

- The Union Government, State Governments, and Governments of Union Territories shall not discriminate against the freedom of queer persons to enter into union with benefits under law;
- The Court gave assurance to formulate a committee that will be chaired by the Cabinet Secretary. This committee may elucidate the scope of LGBTQ+ couples' rights.

With the analysis of such a crucial judgment, the author may have shifted from the majority judgment to further the liberal and transformational neoteric jurisprudence. The Supreme Court despite knowing the kind of atrocities the LGBTQ+ community faces, refused to give legal recognition to their marriage which is a clear violation of their fundamental rights. The question that shall always linger in the minds of the people is whether LGBTQ+ persons are second-class citizens who shall never achieve the same rights as heterosexual people. Are they any less of a human that they are forced to fight for such basic rights? With such a dissenting view, the author at the same time also believes in electoral democracy which is an essential element of Constitutional democracy hence, the LGBTQ+ community may have experienced disappointment with this judgment, but there is a long way to go. Queer persons must start representing themselves in the Parliament and demand inclusive legislation for better advocacy of their rights. The courts asserted it to be a legal lacuna. Fighting for justice has never been easier and therefore the court quotes the song 'It's My Life and It's Now or Never'[77]. It is indeed our life and we shall have our rights

[76] R. Sai Spandana, 'Plea for Marriage Equality: Argument Matrix' (*Supreme Court Observer*, 15 May 2023) <https://www.scobserver.in/reports/plea-for-marriage-equality-argument-matrix/> accessed 22 June 2024
[77] *Ibid*