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Case Comment: Towards Inclusive Legislation: Case Study for Recognizing Same-Sex Marriage Rights in India in Reference with *Supriyo Chakraborty v Union of India*

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INTRODUCTION

The Indian Penal Code, of 1861 prohibits ‘carnal intercourse against the order of nature’ in section 377¹. The State has utilized this provision to deprive people of their autonomy and sense of dignity, including those who are engaged in sexual relationships with members of the same sex. They have lost their sense of identity and personhood due to public mockery and judicial scrutiny. A Division Bench of the High Court of Delhi interpreted Section 377 to prohibit consensual homosexual sexual behaviour between adults in the case of *Naz Foundation v Government of NCTD*². Upon receiving an appeal, the two-judge bench of this court overturned the decision of the Delhi High Court. A three-judge bench of this Court was assigned to hear a writ petition that aimed to declare Section 377 of the IPC unconstitutional and to recognize the rights to sexuality, sexual autonomy, and choice of a sexual partner as guaranteed under Article

¹ Indian Penal Code 1860, s 377

² *Naz Foundation v Government of NCTD* (2009) 160 DLT 277

21 of the Constitution. The petitioners contended that, in light of this Court's rulings in *National Legal Services Authority v Union of India*³ and *Justice KS Puttaswamy v Union of India*⁴, the case ought to be assigned to a five-judge bench.

In response to the reference in *Navtej Singh Johar v Union of India*⁵, the Court ruled that Section 377 is unlawful as it forbids the LGBTQ population from engaging in consensual sexual activity. Section 377 was found to violate Article 14 because it categorized citizens based on their 'sex'. The term 'Sex' fundamentally includes sexual orientation and right to privacy, thus explicitly discriminating between heterosexual people and the LGBTQ community.

The right to sexual privacy encompasses the LGBTQIA+ community's freedom to move about public spaces without interference from the government. The Court ruled that people who identify as LGBTQIA+ have as many fundamental rights as a heterosexual person, which include the freedom to select a partner, the capacity to experience sexual pleasure, the advantage of equal citizenship, and the immunity from discrimination.

BRIEF FACTS OF THE CASE

In November 2022, Supriyo Chakraborty and Abhay Dang filed writ cases in the Supreme Court, arguing that the Special Marriage Act of 1954 was unconstitutional and asking for the legalization of same-sex unions in India. The Union was instructed to reply to the Supreme Court Bench's petitions, composed of Justice Hima Kohli and Chief Justice D.Y. Chandrachud. Similar petitions are pending in the High Courts of Kerala and Delhi. Senior Advocates Menaka Guruswamy and Karuna Nundy pleaded with a two-judge bench in January 2023 to send two comparable cases to the Supreme Court. On January 6th, the Bench decided to list the transfer requests. A five-judge Bench was assigned the case, and hearings were underway on April 18, 2023. Following ten days of testimony, the 5-judge bench reserved judgment for May 11, 2023.⁶

³ *National Legal Services Authority v Union of India* (2014) 5 SCC 438

⁴ *Justice K.S. Puttaswamy v Union of India* (2017) 10 SCC 1

⁵ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1

⁶ 'Plea for Marriage Equality' (*Supreme Court Observer*, 2023) <<https://www.scobserver.in/cases/plea-for-marriage-equality/>> accessed 11 April 2024

ISSUES

1. Whether the right to marry is a fundamental right.
2. Whether non-recognition of queer marriages violates Article 14 of the members belonging to the LBTQIA+ community.
3. Whether LBTQIA+ marriages are eligible to be considered under the Special Marriage Act 1954.
4. Whether LGBTQIA+ couples are eligible to receive ancillary rights like adoption and joint bank account privileges without their marriage being acknowledged.
5. Whether legalizing marriage to the LGBTQIA+ community negatively impact child welfare?

ARGUMENTS FROM BOTH SIDES

Petitioner’s Arguments:⁷ The petitioners alleged that only marriages between ‘male’ and ‘female’ are recognized under Section 4(c) of the Act. This deprives same-sex couples of work opportunities, retirement benefits, surrogacy, adoption, and other marriage benefits, thereby discriminating against them. The petitioners requested that Section 4(c) of the Act be ruled unconstitutional by the court. Numerous other petitions against other personal laws on the same grounds have been tagged with the plea. The Hindu Marriage Act of 1955 and the Foreign Marriage Act of 1969 are two of the laws that are being contested. They contended that the rights to equality, freedom of speech, and dignity are violated by the refusal to recognize same-sex marriage. Their reliance was based on the recognition of non-binary gender identities in *NALSA v Union of India (2014)*⁸ and *Navtej Singh Johar v Union of India (2018)*⁹ which protected equal rights to anyone who identified as homosexual and acknowledged non-binary gender identities. They further relied on the cases of *Shafin Jahan v K.M. Ashokan* arguing that the right to marry is considered a fundamental right. These judgments held that the State has no right to restrict or regulate an individual's ability to choose a partner, whether that choice is made inside or outside of marriage. Furthermore, two adults have the right to get married when they decide to do so of

⁷ *Ibid*

⁸ *National Legal Services Authority v Union of India (2014)* 5 SCC 438

⁹ *Navtej Singh Johar v Union of India (2018)* 10 SCC 1

their own free will. The petitioners, in this case, claimed that because the Special Marriage Act (SMA) did not recognize non-heteronormative marriages, it infringed their right to equality. They asserted that this discriminated against people who identify as non-heterosexual and heterosexual. The petitioners had contested the Central Adoption Resource Authority Guidelines' Regulation 5(3) of 2020, which limits adoption to single people and married couples who have been together for two years. Moreover, both spouses' approval was required for adoption under Section 57(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act).¹⁰

Respondent's Arguments:¹¹ The Union Government said that acknowledging the right to form a civil union would 'extend the right to incestuous, polygamous, or polyandrous relationships' and produce social chaos. The Union government had contended in April and May of 2023 that the Court's intervention would violate the theory of separation of powers and infringe upon the legislative domain. According to the idea, each of the three branches – the legislature, executive branch, and judiciary – performs certain tasks.

The Decision of the Judges: The five-judge Constitution Bench wrote four rulings supporting marriage equality. CJI D.Y. Chandrachud drafted 247 pages in a 366-page ruling. With 89 pages, Justice Bhat (writing on behalf of Justice Hima Kohli) came next. 17 pages were written by Kaul J, who joined the CJI while still a minor. Narasimha J. has composed thirteen pages.

The Chief Justice was, unusually, one of the minorities. The Chief Justice has been in the minority in a Constitution Bench three times in the last ten years: in the present case, reservations for economically weaker sections (2022), and the challenge to triple talaq (2017).

Justice Chandrachud ruled that 'a fundamental right to marry is not expressly recognized by the Constitution.' It was pointed out to him that Parliament enacts legislation concerning the institution of marriage. State legislatures have the authority to change these laws. He emphasized that because of the positive postulate that is included in the right to marry, certain state legislatures that 'have not created an institution of marriage in the exercise of their

¹⁰ Juvenile Justice (Care and Protection of Children) Act 2015, s 57(2)

¹¹ Plea for Marriage Equality (n 6)

powers...would be obligated to create an institution.’ He answered in affirmative to whether Supreme Court is the appropriate body to decide whether or not a queer person could be married by emphasizing the value of judicial review. The authority of judicial review, in his opinion, is a crucial component of the Separation of Power theory. As a result, the Court has the authority to investigate any violations of the fundamental rights of LGBTQ people. He further held that the Constitution does not recognize the right to marry as a fundamental right. He made the argument that Parliament enacts laws about the institution of marriage. Changes to these laws may be made by state legislatures. He emphasized that some state legislatures would be required to establish an institution due to the positive presumption contained in the right to marry if they ‘have not created an institution of marriage in the exercise of their powers.’ According to his ruling, queer couples are entitled to form a civil union and to associate with anybody they like. He underlined the need to develop close relationships for human self-development and the necessity of the state recognizing these kinds of partnerships. Article 19, which also protects the freedom of speech and expression and the establishment of associations, guarantees the right to enter into civil unions. This right covers the communication of complicated identities to a consenting party, including sexual identity, partner preference, and sexual desire. He pointed out that the freedom to form associations encompasses the freedom to participate in other associations. Additionally, he emphasized that discrimination based on sex is not permitted. He claimed that since sexual orientation is covered by Article 15, it would be unconstitutional to forbid relationships based only on sexual orientation. According to him, the Union government must acknowledge these kinds of partnerships and provide them with all the same privileges that a married heterosexual couple would receive. Declaring Section 4 of the SMA unlawful, according to CJI Chandrachud, would weaken the progressive laws it includes because the Act was meant to improve relations across castes and religions. Claiming it ‘void’ would return India to the pre-independence period, he claimed, when marriages between members of different castes and religions were forbidden. Additionally, this would compel judges to decide whether to outlaw one type of discrimination while allowing another. A ‘workability model’ could not be recognized because of institutional constraints. He contended that doing so would violate the idea of the separation of powers by causing terms in other SMA sections and other laws to be added or removed. In addition, he mentioned Section

57 of the JJ Act, which establishes requirements for adoption eligibility even if it does not specifically prohibit single couples from adopting children. Because it discriminates against unmarried couples, the regulation is against the JJ Act and breaches Articles 14 and 15 of the Indian Constitution. Additionally, he ruled that a transgender individual in a heterosexual relationship may wed under a 'harmonious interpretation' of the Transgender Persons Act of 2019 and current marriage laws. He reasoned that as the Transgender Persons Act forbids discrimination against transgender people, restricting the legalization of weddings resulting from heterosexual partnerships would be against the country's current legal framework. According to him, the gender identification of an individual determines whether they are transgender, not their sexual orientation. **Justice S.R. Bhat** concurred with the CJI that the right to marry is not expressly recognized by the Constitution. According to him, marriage derives more from society than from the state and exists outside of it. Marriage cannot be outlawed; it can only be used or accommodated by the state. Only unions with government approval can enforce the statutory right to marry. If a basic right to marriage exists, it cannot be operationalized unless it is elevated to the status of Articles 15 and 16, which would necessitate the state imposing requirements to achieve its objectives. However, since the freedom to marry is a social status-granting personal option rather than an absolute right, the Court could not order the state to establish legal or social status. In line with the CJI, Justice Bhat led the majority decision when he stated that 'all queer persons have the right to relationship and choice of partner, cohabit and live together, as an integral part of choice' as already recognized under Article 21. He disagreed with the justification, however, that a new legislation establishing a civil right to a union was necessary. 'Ordering a social institution' would necessitate a 'new universe of rights and obligations' and an entirely new legal structure. This would necessitate the creation of a distinct system for civil union registration, which would also spell forth the requirements for a legally binding union, including eligibility, age, and restriction requirements, as well as provisions for divorce, alimony, and a host of other ancillary rights to marriage. The state doesn't need to acknowledge this 'bouquet of entitlements.' According to him, a categorization is deemed to violate Article 14 if there aren't legitimate grounds for distinction. He maintained that until a category is part of the included class, its omission from a classification does not imply its inclusion. He pointed out that since consenting to sexual contact with

someone of the same sex was illegal at the time, the Sexual Misconduct Act's (SMA) only goal was to enable marriages between people of different faiths. He maintained that the goal of legislation cannot be contested just because it does not merit a higher categorization. He further stressed that new information should be included in statutes, but that this should not be utilized to construct something that is conceptually distinct from what the legislature must have intended. He maintained that the goals of a statute should be the primary consideration when interpreting it, and that Parliament only intended for heterosexual couples of diverse religious backgrounds to be eligible for civil marriage under the SMA. Furthermore, he issued a warning that a gender-neutral interpretation of SMA would make it more difficult for women to get justice and enable offenders to victimize them. He added that gender-specific elements of the statute, such as the different legal ages for marriage and divorce remedies, would be impacted by a gender-neutral interpretation. He underlined that laws must be interpreted with the concepts, rights, obligations, and remedies in mind. He led the majority in a case involving gay couples adopting their children together, arguing that the law is meant to shield children from unhappy marriages. The JJ Act alone permits adoption, therefore to be shielded from the laws about succession, custody, divorce, and support, one must be married. The adoption framework does not permit adoption for everyone; instead, it takes into account the rights and protections that come with the institution of marriage. He agreed that adopting a queer couple is not an ethically better option for parents, but the adoption framework does account for the rights and protections that come with being a married couple. He admitted that queer couples are forced to adopt separately because they are not legally recognized, which leaves neither parent nor the child with any legal safeguards. To maximize welfare and benefits for the greatest number of children in need of safe homes, he underlined the critical necessity for the state to allow LGBTQ+ parents and children to use their full range of rights. Concurring with the CJI's opinion of whether transgender people in heterosexual relationships could get married within the existing laws, he held the judgment of *Arun Kumar v Inspector General of Registration*¹². In agreement with CJI Chandrachud's decision of whether queer couples could enter into 'civil unions', **Justice S.K. Kaul** said that the right to create a 'civil union' is a component of Articles 19 and 21 (right to

¹² *Arun Kumar v Inspector General of Registration* (2019) 3 MLJ 385

personal liberty). Furthermore, everyone has the right to form this partnership 'regardless of sexual orientation and gender', according to equality ideals. He disagreed with the Chief's assessment, ruling that the SMA violated Article 14 due to its discriminatory nature towards LGBTQ+ individuals. He mentioned the two-pronged approach that is used to evaluate whether a law infringes on an individual's right to equality. According to the test, a statute must clearly distinguish between various groups. The distinction must be reasonably related to the statute's purpose. Should this connection not be identified, the law or clause contravenes Article 14. According to him, the SMA clearly distinguishes between heterosexual and non-heterosexual people. Nevertheless, there's no good reason to make that distinction. He said that there was no 'nexus' between the SMA's goal of promoting interfaith weddings and the exclusion of non-heterosexual couples. He further recognized that the inclusion of non-heterosexual people violated Article 14 of the SMA. He accepted the Union's contention that changing the definition of marriage could have unintended consequences for a variety of laws. He did stress, nevertheless, that this discrimination is a more subtle kind of social discrimination against individuals who identify as non-heterosexual. He maintained that the right to a civil union would extend all benefits resulting from marriage and said the court lacked an appropriate remedy. **Justice P.S Narasimha** went on to say that marriage is not a right but rather a basic freedom. He concurred with Justice Bhat and stated that it would be against the separation of powers concept to require the state to recognize a civil union.

CONCLUSION

The Supreme Court denied the request for the freedom of queer people to marry in India on October 17, 2023. There is no basic right to marry, and the 1954 Special Marriage Act cannot be interpreted to allow weddings between LGBTQ individuals, the five-judge bench unanimously decided. Every single one of the five judges reached the same conclusion: under the current legal system, transgender people in heterosexual relationships are entitled to marry.

The judges ruled 3:2 in favour of holding that same-sex couples were not allowed to adopt or create civil unions.

All members of the Bench concurred that there is violence and discrimination against LGBT people in the nation. To resolve this matter, CJI Chandrachud directed:¹³

1. The federal government, state governments, and union territories guarantee the LGBTQ community's equal access to goods and services.
2. Governments should educate the public about the fact that LGBT identification is a natural state rather than a mental illness.
3. Provide hotline numbers and safe havens to support LGBTQ+ individuals who are victims of violence and discrimination.
4. Outlaw forced surgeries on intersex children, outlaw conversion therapy for changing one's gender identity or sexual orientation, and forbid hormonal therapy or other medical procedures as a 'condition' for recognizing a person's gender identity.
5. Additionally, CJI Chandrachud mentioned that police harassment of queer couples frequently results in violence and harsh treatment. He gave police orders to stop harassing queer people, make sure they are not forced to go back to their 'natal families', protect their right to free movement, protect queer people who are being abused by their families, and carry out initial inquiries before filing a First Information Report (FIR) against a queer couple.
6. Finally, the Bench charged a powerful committee led by the Cabinet Secretary with defining rights and benefits for the LGBT community. The committee ought to take into account things like granting access to the deceased person's body, ration cards for LGBT partners as members of their family, joint bank account opening, and visitation rights for inmates.

CRITICAL ANALYSIS

Expanding further, the Court concluded that the Indian Constitution doesn't explicitly ensure the right to marry. This means people have the freedom to form family and relationship bonds beyond the traditional concept of marriage, while also recognizing the discrimination faced by the LGBTIQ+ community. Both the majority and minority opinions agree on the importance of

¹³ 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 11 April 2024

the 'right to relationship', which asserts individuals' freedom to maintain close associations with others.

However, diverging from the prevailing viewpoint, the author argues for the recognition of intimate relationships, emphasizing their intrinsic value. From the aforementioned case laws of *Navtej Singh Johar v Union of India*¹⁴ and *NALSA v Union of India*¹⁵, it is noted that homosexual people are at par with heterosexual people in terms of equality and rights guaranteed to both of them. From *Shafin Jahan v K.M. Ashokan*¹⁶, it is observed that the right to marry is a fundamental right under the Indian Constitution. The State has no right to restrict or regulate an individual's ability to choose a partner, whether that choice is made inside or outside of marriage. Furthermore, two adults have the right to get married when they decide to do so of their own free will. The irony in these case laws revolves around the misconstrued interpretation of the law. Homosexual people are guaranteed equal protection of their rights; however, they are not permitted to enter into marriage unions like their heterosexual counterparts. Right to Marry is a Fundamental Right provided to all citizens of India, but it is interpreted differently for two citizens based on their sexual orientation. The judgment of *Supriyo Chakraborty v Union of India* emphasizes the importance of having a partner, however, it restricts homosexual couples to either legally entering into a marriage or adopting a child to have a family.

Therefore, the author is opposed to the judgment because it violates Article 14¹⁷ (Right to Equality) and Article 21¹⁸ (Right to Life and Personal Liberty) of the Indian Constitution. How can we say that the citizens of our country are being protected by these fundamental rights when a certain section is oppressed and discriminated against based on their sexual orientation? The need for practical measures to challenge discriminatory laws is the need of the hour.

In the realm of rights, progress is typically gradual, and taking even small steps is better than doing nothing. This recent ruling should offer an insight that breaking the traditional, stereotypical norms is required for us to progress as a society. A family might not necessarily

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

¹⁵ *National Legal Services Authority v Union of India* (2014) 5 SCC 438

¹⁶ *Shafin Jahan v K.M. Ashokan* (2018) 16 SCC 368

¹⁷ Constitution of India, Art 14

¹⁸ Constitution of India, Art 17

have a male as the breadwinner, a female as the caregiver, and children. A union of two male parents and two female parents with their children should also be considered as a family.

Research has shown that non-binary couples are just as eligible for the upbringing of children as a binary couple. This judgment is an opportunity to establish a more inclusive set of rights, prompting a closer examination of equality and autonomy in relationships. It highlights the importance of judicial impartiality towards all types of relationships, allowing individuals to choose connections based on personal significance, free from bias.