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Case Comment: Supriyo v Union of India - A Struggle for Moving towards Equality: LGBTQ+ Community

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INTRODUCTION

There has been a long struggle for the LGBTQ+ community to get their rights enforced and get a stand in a society where people all over the world were not so flexible in accepting them as a part of society and always looked down upon them. No doubt their struggle continues in society, after getting a bit of acceptance from society, there's again a debate on an important aspect all over the world which talks about same-sex unions and same-sex marriage. In India, though same-sex people can now have physical relations since homosexuality has been decriminalized in the landmark case of *Navtej Singh v Union of India*¹, but still same-sex marriage has not been recognized. However, many countries have given legal status to same-sex marriages, west has seen an increasing trend and acceptance when it comes to same-sex marriages. Denmark was the first country to implement same-sex union laws.² Most industrialized democracies across the globe recognize it legally, with notable exceptions being

¹ *Navtej Singh v Union of India* WP (Crm) No 76/2016

² Kelly Kollman, *Same-Sex Unions: The Globalization of an Idea* (2007) 51(2) *International Studies Quarterly* 329-357 <<https://doi.org/10.1111/j.1468-2478.2007.00454.x>> accessed 12 October 2023

the Czech Republic, Italy, Japan, South Korea and Greece.³ None of the Islamic political systems in the world currently recognize it. Some nations, like China and Russia, limit their support for same-sex unions. This case deals with the rights of same-sex marriage in the context of India.

FACTS OF THE CASE

Two same-sex couples filed a writ petition in the Supreme Court in November 2022 to seek legal status for same-sex marriage in India challenging various provisions of the Special Marriage Act⁴, Hindu Marriage Act⁵, and Foreign Marriage Act⁶. However, many petitions are pending in the High Courts of Delhi and Kerela. The Petition was filed by Supriyo Chakraborty and Abhay Dang, subsequently, another petition was filed by Parth Phiroze Mehrotra and Uday Raj Anand.

They argued that Section 4(c) of the Act⁷ recognizes the solemnization of marriage between a ‘man’ and a ‘woman’ only and thus deprives them of gender equality rights thereby violating the fundamental rights of their community like Articles 14⁸, 19⁹ and 21¹⁰. They went on to support their contention by citing the case of *NALSA v Union of India*¹¹ and *Navtej Sing Johar v Union of India*¹², where homosexuality is decriminalized. However, still, the court is silent on the legal recognition of marrying a same-sex person.

ISSUES RAISED

1. Whether the right to marry is a fundamental right and is extended to the members of the LGBTQ+ community as well.

³ Lien Verpoest, ‘The End of Rhetorics: LGBT policies in Russia and the European Union’ (2004) 68(4) *Studia Diplomatica* <<https://www.jstor.org/stable/26531664>> accessed 12 October 2023

⁴ Special Marriage Act, 1954

⁵ Hindu Marriage Act, 1955

⁶ Foreign Marriage Act, 1969

⁷ Special Marriage Act 1954, s 4(c)

⁸ Constitution of India 1950, art 14

⁹ Constitution of India 1950, art 19

¹⁰ Constitution of India 1950, art 21

¹¹ *NALSA v Union of India* (2014) SCC 438

¹² *Navtej Sing Johar v Union of India* (2018) INSC 790

2. Whether section 4 (c) of the Special Marriage Act is violating the fundamental rights of LGBTQ+ by not recognizing their rights.
3. Whether the Supreme Court had the powers to make additions and amend the statute by replacing the words 'man' and 'woman' with 'spouse'.
4. Whether queer groups in India can enter into and form unions.

ARGUMENTS FROM THE PETITIONER'S SIDE

Petitioners argued that denying the right to marry to same-sex couples would be violative of the fundamental rights guaranteed under Article 14¹³. This would also deny them the right to marry guaranteed under the right to life under Article 21¹⁴ of the Indian constitution since the right to marry is an extension of the 'right to cohabit', 'privacy', and 'choose one's life partner'. Also, the striking down of certain provisions of section 377 of IPC¹⁵ grants them the right to make consensual physical relations with the same-sex person which therefore recognizes their right to be treated at par with the heterosexual couples in every aspect including their marital status and relationships. They argued that the words 'man' and 'woman' under section 4C of the Act makes it restricted to only two genders which is discriminatory to the rights of the third gender and the LGBTQ plus community therefore amendments must be made and the word 'spouse' should be replaced with these words to make it more inclusive. They argued in the fact that the main purpose of marriage is consummation and procreation but adoption rights are granted to homosexual parents who can do the needful and they can adopt a child and raise them the way heterosexual parents do. There have been cases in the past where heterosexual parents were irresponsible and menace to their children and it is not conclusive that homosexual parents can't raise the child.

ARGUMENTS FROM THE RESPONDENT'S SIDE

They argued that marriage is a sacramental relationship and it arises from the social institution that flows from religion, culture, morals, personal laws, and social applicability that

¹³ Constitution of India 1950, art 14

¹⁴ Constitution of India 1950, art 21

¹⁵ Indian Penal Code 1860, s 377

heterosexual couples can only have this applicability, and also that the right to marry is not absolute. The right to cohabit under one roof can be considered a living relationship but that doesn't imply that the state has to be compelled to recognize LGBTQ-plus marriages. They argued that the intention behind making the Special Marriages Act was to further interreligious marriages and inter-caste marriages between two heterosexual couples and that extending it to recognizing the rights of non-heterosexual couples would defeat the intent of the lawmakers behind making that statute and also that the amendment in such a case would also be conflicting with other statutes and therefore only parliament has the power to make such laws. To legally recognize marriage between homosexual couples would require the creation of a new law which is a legislative action and therefore Supreme Court cannot interfere in the work of the legislature. Also, western examples are not of much significance in a diverse culture like India, and it is not suitable in such an environment. They argued that a child requires both a mother and a father during his childhood unless there is an exception, a child can be best raised by both parents and that it is for the welfare of the child since society would harass and mock that child for the orientation of his parents and would have a serious impact on his mental health.

JUDGEMENT

The Supreme Court rejected the plea for queer persons' right to marry in India on 17th October 2023 the five judge's constitutional bench unanimously agreed that there is no fundamental right to marry and that the Special Marriage Act does not recognize marriage of queers. In the 3:2 judgment, the court opined that same-sex couples do not have the right to form civil unions.

The five-judge Constitution Bench wrote four rulings supporting marriage equality. CJI DY 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.

Judges unanimously formed an opinion that the right to marry is not a fundamental right since if it has to be considered a fundamental right there must be an institution for marriage which has not yet been created it is rather a fundamental freedom and not a right and the court cannot

compel the state to create social or legal status. Chief Justice Chandrachud contended that including same-sex couples under the Act would be a violation of the separation of powers and that the court could not declare the SMA unconstitutional since doing so would forbid interfaith and intercaste marriages: *'This court cannot either strike down the constitutional validity of the Special Marriage Act or read words into the Special Marriage Act because of its institutional limitations. The court, in the exercise of the power of judicial review, must steer clear of matters, particularly those impinging on policy, which fall in the legislative domain. [...] The judiciary cannot legislate.'*

The parliament can make amendments to the statute and the court cannot interfere in its function 'The institution of marriage is not static - all social institutions transform over time and marriage is no exception. Despite vehement opposition to departure from practice, the institution of marriage has changed, it has metamorphosed. It has transformed from the time of our ancestors 200 years ago'. The majority view is that the legislature should bring laws, Justice Hima Kohli, Justice Ravindran Bhat, and Justice Narasimha have a majority opinion whereas CJI DY Chandrachud and Justice Kaul have a dissenting opinion in judgment in favour of introducing civil unions for same-sex couples.

ANALYSIS

The present judgment has created a lot of tussles in Indian Society, wherein a majority of people were disappointed after the judgment and had a meltdown, the Supreme Court however justified that introducing new laws on granting such marital status doesn't fall within the ambit of judiciary and the same may be made by parliament only. As per the current scenario, the struggle towards equal rights has reached halfway, same-sex unions are permissible, that is they can have physical intimacy, live as a couple, can enjoy their privacy but the right to marry is still a struggle, the right to adopt a child for the queer group is still a struggle. There are arguments that if they can still cohabit as a couple in a live-in, why marriage is essential when they still can live happily, the answer to the question is that there is a possibility that there can be cases of cruelty, physical abuse, adoption, and succession, maintenance issues just like the normal couples and there is as such no proper statute to regulate all these issues which is why this matter is relevant and above all is the infringement of their fundamental rights and human

rights. There are certain flaws in the justification of not granting them adoption rights as well. There is no sure-shot formula that the parents of opposite genders can raise a healthy child, things can go otherwise as well, there have been cases where children raised by heterosexual parents have suffered mental diseases, trauma, and all. Also, there have been cases where a single parent has raised his/her child, also even in the LGBTQ+ community itself there has been differentiation, a transgender person can adopt a child as well but not queer groups. The decriminalization of homosexuality is the first step towards equality but still, there's a long and hard journey for the LGBTQ+ community. This judgment, however, has led to a positive step towards their dream, since it is a 3:2 majority and there is a possibility that shortly the government might grant more rights to the community and amendments required can be made by the parliament following this judgment.

CONCLUSION

The Supreme Court in its judgment with a 3:2 decision declined the legal status of marriage to the homosexual citizens of India, however, there is still a light of hope for the community in the future, that a larger bench can reverse the decision. As has been there in the decision of *Navtej Singh Johar v the Union of India*, wherein when homosexuality was recriminalized, at last, the court had to decriminalize it again with resistance by the community. In the present appeal, the court had to decide the constitutionality of the Special Marriage Act and Foreign Marriage Act but still, there are two alternatives left - either the executive make laws on the same and widen the scope of these acts or the judicial route as well by challenging the other aspect of marriage which includes legal rights, marriage gives several legal rights like inheritance, property rights, protection against violence and pension schemes and various other rights which could otherwise not be provided in live-ins and otherwise. Also, the discrimination on such a basis not only attracts Articles 21¹⁶ and 14¹⁷ but also Article 15¹⁸ of the Indian Constitution. Therefore,

¹⁶ Constitution of India 1950, art 21

¹⁷ Constitution of India 1950, art 14

¹⁸ Constitution of India 1950, art 15

there is still hope, and the doors of the room are open for a more positive response from the ends of justice toward this struggle for equality for the LGBTQ+ community.