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Examining the Same-Sex Marriage Verdict: Assessing the Fundamental Right to Marry

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The Hon'ble Supreme Court's constitutional bench unanimously, in its controversial judgement on the issue of same-sex marriage, which runs 366 pages, ruled against the recognition of the fundamental right to get married. This judgement with C.J.I. in dissent depicted the hesitation of the judiciary to get involved in issues concerning the sacred institution of marriage. Although the court recognised the hardships faced by the LGBTQ+ community, they refused to recognise same-sex marriage under existing marriage laws or to elevate it to a fundamental right. This article will analyse the implications and debated stances of the verdict. It will talk about how the judgement is symbolic of the looming social stigma, will provide the author's views regarding the clash of judicial activism and legislature's authority, the intervention of the state in the institution of marriage, and will contrast the verdict with earlier judicial decisions related to marriage outlining the conflict between social and constitutional morality. It will also discuss the broader implications of the judgment beyond the non-heterosexual people, having its effect on the marital rights and personal autonomy of individuals. This judgement met with widespread unrest, signifies the prolonged struggle of the queer community for their acknowledgement and equal treatment. It will also provide a critical view of the reasoning of the bench utilised to reach the decision that needs to be corrected sooner or later.

Keywords: *queer community, same-sex marriage, fundamental rights, judicial activism, matrimonial rights.*

INTRODUCTION

On 17th of October 2023, the Hon'ble Supreme Court of India decided on the long-awaited issue of same-sex marriage. The 5-judge bench unanimously negated the demands of non-heterosexual couples to give their union social recognition by giving them the right to marry. The bench, moreover, unitedly decided that there does not exist any fundamental right to get married, shattering the high hopes of the petitioners in the Indian justice system.

Although one of the standout points of this judgement was that, the C.J.I.'s opinion comprised the dissenting minority, which happens once in a blue moon in the Indian judiciary; since the onset of the Supreme Court, this has happened only 13 times, the bench was univocal about the non-existence of the fundamental right to get married. This attempt of non-heterosexual couples to get the right to marry only led to a worse situation, as it appears now that even heterosexual couples do not have a fundamental right to get married.

In the case, petitioners insisted the court give their union legal and social recognition by bestowing them the fundamental right to marry. They wanted the apex court to read down the Special Marriage Act 1954 or interpret it in a gender-neutral manner by alternating words like "husband" and "wife" with unbiased terms like "spouse" and "party" with the aim of including their marriage in the act. In contrast to their demands, the court conversely ruled that recognition of same-sex marriage under S.M.A.[1] could be given only by the legislature through adopted law. They believed that reading down S.M.A. or broadening its domain would be judiciary trespassing into the arena of the parliament.

Even though they acknowledged the discrimination faced by the queer community, yet left them in vain with no remedies available, it also laid down a recommendation to form a committee chaired by the cabinet secretary to define the scope of prerogatives available to the queer community. This case becomes significant in the light of liberalising India and makes the struggle for the protection of the LGBTQ+ community's rights and promotion of social justice more challenging. This represents the still existing resistance in the minds of the judiciary to end

[1] Special Marriage Act 1954

the social stigma about same-sex marriage. This negation of recognition of love irrespective of sexual orientation turns the clock back. It crushes the aspiration of the queer community, which is already fighting a long-drawn battle for their recognition.

ANALYSIS

Judicial Activism v Legislative Authority: C.J.I. D.Y. Chandrachud, well known for his progressive stance in various judgements, held back from recognising the right to marriage as a fundamental right. He stated that his reasoning for this is that there is no explicit recognition of it as a fundamental constitutional right. According to him, an institution cannot be elevated to the realm of a fundamental right based on the content accorded to it by law. He reasoned that marriage is a part of the concurrent list and is, therefore, the duty of the state legislature to regulate it.[2]

Conversely, the Hon'ble Apex Court has given a broad interpretation to Article 21[3] in many instances since several rights which are now considered to be an inherent part of the constitution were not part of the original text; however, they are now recognised as valuable rights thanks to the broader interpretation of the constitutional courts; for example, Right to Privacy was elevated to a fundamental right in the landmark judgement of KS Puttaswamy v U.O.I.[4] The right to a clean environment was also included in Article 21 in Virender Gaur v State of Haryana[5], even though various legislations already existed to protect the environment then. Interestingly, this apex court decision was not considered an overreach of the legislature's power. The whole bench in the present case was hesitant to interpret and broaden the Special Marriage Act rationale behind it being the encroachment on the powers of the legislature. However, such an interpretation is not uncharted water for the Indian judiciary. If this reasoning is applied exclusively, all these judicially created fundamental rights must be diluted, which will surely take the Indian justice dispensing system decades back.

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[2] *Supriyo v Union of India* (2023) SCC OnLine SC 1348
[3] Constitution of India 1950, art 21
[4] *K.S. Puttaswamy (Privacy-9J.) v Union of India* (2017) 10 SCC 1
[5] *Virender Gaur v State of Haryana* (1995) 2 SCC 577

Although the C.J.I. applied Article 38[6], which advocates for the welfare of the people to recognize the right of non-heterosexual people to form civil unions, he hypocritically was reluctant to utilize the same in allowing them to marry and in identifying the same as a fundamental right. On the one hand, he recognizes the right to form an association or civil union; on the other, denying the right to create a matrimonial union is disheartening. If procreation is not the primary purpose of marital unions, then why marriage is not an extension of the right to life is a question all are looking for answers to.

QUESTIONING STATE INTERVENTION IN THE INSTITUTION OF MARRIAGE

In the opinion of Justice S. Ravindra Bhat, marriage is an institution that existed before the state and, therefore, has its origin in society, not the law. This makes the institution of marriage independent of the state's control. According to him, marriage is a personal choice and preference that the courts cannot regulate and enforce. The courts cannot compel the state to create a social institution of marriage for non-heterosexuals by giving them the fundamental right to marry. He differentiates the marriage system in India from that in the United States, where there is a licensed marriage system. However, this reasoning of the reputed judge is flawed in many aspects. He avoided conducting a deeper analysis of this reasoning, which would have clarified that such an institution also exists in India and is effective when state intervention is needed to resolve disputes. His stance was also openly criticized by the C.J.I. for being reluctant to protect the rights of the queer community, whose hardships and discrimination received ample recognition throughout the judgement from the bench. According to the C.J.I., marriage is an evolving institution that is gaining new meaning with the passage of time, and the state definitely has an interest in regulating this institution. It requires not only statutory recognition but also constitutional protection. The author believes that if this social institution needs to be extended to people who are a part of society, then there is no wrong in doing so. If non-intervention of the state is this much necessary in the 'social' institution of

[6] Constitution of India 1950, art 38

marriage, then how is a denial of making it a fundamental right by the state not intervention in itself?

Justice Narasimha added to this controversial stance by stating that marriage is a fundamental freedom, not a right. He opined that the queer community finds a place neither in the right to a marriage recognised by statutes nor in that which flows from customs, restricting the right to marry. This united opinion of the justices on this issue is very disappointing.

SUPREME COURT'S OPINION ON MARRIAGE RIGHTS

Despite several decisions of the apex court having a positive approach to evolving the institution of marriage, the bench could not view the issue from a liberal and permissive viewpoint. The apex court is K.S. Puttaswamy's judgement[7] recognising the right to make personal choices like marriage to come under the ambit of the right to privacy was out rightly denied by the bench. The court was ignorant to understand a logical fact that if a person has the right to form intimate relations with people of any sexual orientation, it is pretty predictable for them to want their relationship to get social recognition and equal respect in society through tying the knot of marriage similar to any other heterosexual couple who have an 'inherent' right to come under the umbrella of this social institution. They would also want the benefits other couples usually get, like succession, adoption, etc.

C.J.I. and Justice Bhat further added to the questionability of their rationale by distinguishing earlier judgements like Lata Singh v State of UP[8] related to 'freedom in choosing life partners' in the cases of inter-caste marriages from the present one. Justice Bhat here gave the impression of proclaiming the necessity of an 'external threat' for the state to interfere in this 'sacred' institution to enable free choice.[9] This added fuel to the fire of controversy since it seemed that the state could now ignore the violation of the right to make free choices unless there was a threat of

[7] *K.S. Puttaswamy (Privacy-9J.) v Union of India* (2017) 10 SCC 1
[8] *Lata Singh v State of UP* (2006) 5 SCC 475
[9] *Supriyo v Union of India* (2023) SCC OnLine SC 1348

physical harm, undermining the tenet of proactive prevention of the rights and other constitutionally granted provisions.

IRONICAL YET THE BRIGHT SIDE OF THE JUDGEMENT

The encouraging angle of this judgment is that the court has identified the marriage between transgender people to be legal, distinguishing gender identity and sexual orientation. It tried to interpret the existing marriage laws and the laws for the protection of transgender people[10] congruously. According to the court, the Special Marriages Act[11] permits marriages between transgender and, if restricted, would violate their fundamental rights guaranteed by the NALSA judgement[12] and will create unwanted discrimination against them, which the statutes are trying to prevent.

This 'progressive' stance of the court is paradoxical since, on one side, the court is willingly making a jump from 'biological sex' to 'gender identity' but, on the flip side, is wary of taking positive steps towards 'sexuality or sexual orientation'. The Hon'ble Court is zealous to protect the fundamental rights of transgender people but is also brushing aside the violation of these essential rights supposedly guaranteed to every Indian citizen of non-heterosexual people. The inadvertent outcome of this perspective of the zenith court of the country would be the prolongation of the idea that the couples of the queer community are incompatible to enter into a matrimonial relationship in society.

CLASH OF CONSTITUTIONAL & SOCIETAL MORALITY IN JUDICIAL DECISIONS

Whilst the C.J.I., who is widely admired by the youth of the country, said in Navtej Singh Johar's judgement[13] that the court, when deciding over an issue, should only follow the light shown by the 'constitutional morality' and should not be concerned about the 'societal morality' and the queer community should be treated with equal respect and not as second-class citizens because the constitution desires so, the bench in the present case seems to have surrendered in front of

[10] The Transgender Persons (Protection of Rights) Act 2019
[11] Special Marriage Act 1954
[12] *NALSA v Union of India* (2014) 5 SCC 438
[13] *Navtej Singh Johar v Union of India* (2018) 10 SCC 1

the ethics of the majority of the society. This quintessential demonstration of judicial restraint does not consider 'constitutional morality'.

The court appeared reluctant to make any innovative and broad interpretation of the statutes and continued to recognize the institution of marriage as sacred and something they could not interfere with. Although the court was passively ready to identify the right to make civil union as a fundamental right, cynically, the court could not locate making matrimonial union as a fundamental right.

POSITION IN FOREIGN JURISDICTIONS

Albeit the fact that the apex court has referred to international laws and foreign jurisprudence, mainly American, to interpret the rights and decide on issues in many married cases, the court in this judgement did not take into account the position of marital rights and same-sex marriage in international treaties and other foreign jurisdiction.

Despite being a signatory of the Universal Declaration of Human Rights (U.D.H.R.), 1949, India was reluctant to follow Article 16[14], where the right to get married has been recognised as a human right. The Indian Constitutional Court ignored this stance completely and was reluctant to engage with it despite U.D.H.R. highly inspiring the Indian constitution. If U.D.H.R. can recognise it as a human right, it would not be wrong if this right to get married is recognised as a fundamental right.

CONCLUSION

One of the reasons for this backward step of the court was that they believed that if they recognised the right to marry as a fundamental right, they would move away from the intention of the law drafters had while drafting the S.M.A. However, this reasoning is flawed since the court does not understand the fact that until the interpretation is at par with the underlying idea of the law, the judiciary is competent enough to broaden the perspective of the law. After all,

[14] Universal Declaration of Human Rights 1949, art 16

the constitution is the supreme law, and it changes to match the desires of the electoral majorities.

The people now need to understand that this judgement is not just a case affecting the rights of non-heterosexuals. Instead, it has wide-ranging consequences. It brings into question the institution of marriage itself, sapping the strength of the constitutional values. It affects the marital rights of even heterosexual couples now, who will be granted protection in their matrimonial union where there are 'external' conditions. Moreover, it increases the power of the government to intervene in the individual's autonomy in choosing their partner. This judgment may now even affect the anti-conversion laws, which also seem to quash the individual liberties of the individuals, political motives being the core reason behind it.

This heartbreaking verdict has resulted in an uproar of public discontent since there is no actual application of it, and it does not give out any rights for the benefit of same-sex couples. Nevertheless, the positive side is that the judgment has ordered the government to constitute a committee to give benefits and rules for the queer couples. Queer couples may now have to utilise different weapons and change their strategy to win this war to earn their matrimonial rights. Once the committee's recommendations arrive, a new surge of cases is speculated. A judicial review of this verdict can also be filed, and the latest retirement of Justice R.S. Bhat gives a ray of hope since a new judge will review the verdict on the possible review.