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THE CONSTITUTIONAL CASE FOR SAME-SEX MARRIAGE IN INDIA WITH SPECIAL REFERENCE TO SUPRIYO V. UNION OF INDIA

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ABSTRACT

*In India, the question of homosexuality is one that has oft been considered by courts – from Naz Foundation¹ to Suresh Kumar Koushal² – a question that finally found its answer in Navtej Singh Johar v. Union of India³ with the decriminalisation of homosexuality. With the recent case of Supriyo v. Union of India,⁴ the matter of **same-sex marriages** has come to the forefront of consideration, where the court had to contend with the legal implications of such a seminal step. Marriage as a subject is dealt with under various religious laws, where the Hindus, Sikhs, Jains, Parsis depend on the Hindu Marriage Act, the Muslims draw from their own uncodified personal laws, the Christians look towards the Indian Christian Marriage Act, 1872 and for all other purposes, there exists the Special Marriage Act (hereinafter referred to as ‘the SMA’). This judgment challenged the validity of Section 4(c) of the SMA, which laid out the marriageable ages for a male and a female,⁵ thus solidifying the act of marriage to be solely between a man and a woman.*

SUPRIYO AND THE CONSTITUTIONAL BASIS FOR SAME-SEX MARRIAGE

The Supreme Court’s judgment in *Supriyo* reflected its attempt to strike a balance between the LGBTQ+ community and the apparent limitations of its own role as one of the three

¹ Naz Foundation v. Government of NCT of Delhi, 2009 (16) DLT 277.

² Suresh Kumar Koushal & Anr v. Naz Foundation & Ors AIR (2014) 1 SCC 1.

³ Navtej Singh Johar v. Union of India (2018) 10 SCC 1.

⁴ Supriyo @ Supriya Chakraborty & Anr. v. Union of India & Ors. 2023 INSC 920.

⁵ The Special Marriage Act, 1954, Acts of Parliament, No. 43 of 1954, §4(c).

institutional organs set up by the Indian Constitution. While the Court acknowledged the rights of queer couples to form meaningful emotional and sexual relationships – building on the previously established fundamental rights to privacy, choice, et cetera – they still refused to recognise same-sex marriages under the Special Marriage Act. The majority’s reasoning rested on the argument that including same-sex marriages within the purview of the SMA would be an act of judicial legislation, going beyond the Court’s recognised powers.

Regardless of whether the Court in this instance would have been engaging in judicial legislation, the court’s stance on holding that there is no fundamental right under the Constitution, as the last bastion of the Indian citizen’s fundamental rights, is a deeply problematic decision. Article 16(1) of the Universal Declaration of Human Rights⁶ and Article 23(2) of the International Covenant on Civil and Political Rights⁷ – *both* of which India is a party to – categorically classify the right to marry to be a fundamental human right. Furthermore, the Supreme Court’s ruling stands inconsistent with the rights enshrined in the Indian Constitution as well.

The controversy before the Court in *Supriyo* gives rise to a certain crucial constitutional questions: *firstly*, whether the exclusion of same-sex couples from the ambit of the SMA amounts to discrimination violative of the Constitution’s Article 14 and 15; and *secondly*, whether the right to marry can be read to be a fundamental right under Articles 19 and 21, keeping in mind the Apex Court’s previous rulings on privacy and autonomy. It is with respect to these issues that the Court’s reasoning must be critically analysed.

The Constitution of India guarantees the Right to Equality through Articles 14 to 18; as was beautifully worded in *Indra Sawhney*, “Equality is one of the magnificent cornerstones of the Indian Democracy”.⁸ Article 14 emphasises on the right to equality in a much broader, general manner, unlike its succeeding provisions, each of which address a specific facet of the right, or indeed, the lack thereof.⁹ Article 15 prohibits discrimination against citizens on such specific grounds as religion, race, caste, sex or place of birth.¹⁰ Article 16 guarantees to the citizens of India equality of opportunity in matters of public employment.¹¹ Article 17 abolishes

⁶ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc, A/RES/217(III) (Dec. 10, 1948), art. 16, para. 1.

⁷ International Convention on Civil and Political Rights, Mar. 23, 1973, 999 U.N.T.S. 171, art. 23, para. 2.

⁸ *Indra Sawhney v. Union of India* AIR 1993 SC 477.

⁹ INDIA CONST. art. 14.

¹⁰ INDIA CONST. art. 15.

¹¹ INDIA CONST. art. 16.

untouchability,¹² and Article 18 abolishes titles, other than a military or academic distinction.¹³ In this series of constitutional provisions, Article 14 is the most significant — it is the genus while Article 15, 16, *et cetera* are the species.¹⁴ In situations not covered by Articles 15 to 18, the general principle of equality embodied in Article 14 is attracted whenever discrimination is alleged.

The right to equality, embodied by Article 14, has been declared by the Supreme Court as a basic feature of the Constitution.¹⁵ The Constitution is inextricably linked to the concept of equality; apart from the provisions themselves, even the Preamble emphasises the principle of equality to be basic to the Constitution.¹⁶ Neither can the Parliament nor any of the State Legislatures transgress such a right,¹⁷ a notion that has been echoed in *Badappanavar*:

*“Equality is a basic feature of the Constitution of India and any treatment of equals unequally or unequals as equals will be violation of basic structure of the Constitution of India”.*¹⁸

The underlying purpose of Article 14 is to treat all persons similarly circumstanced alike, both in privileges conferred and liabilities imposed. Furthermore, classification must not be arbitrary but rational, i.e. it must not only be based on some qualities or characteristics which are found in all persons grouped together and not in others who are left out, but those qualities and characteristics must have reasonable relation to the object of legislation. As under Article 14, *“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”*. “Equal protection” does not require equal protection of all without distinction but to its application of the same laws alike and without discrimination to all persons *similarly situated*.

Here, denying queer persons the right to marry while granting it to heterosexual couples is clear discrimination on the grounds of sexual orientation — which has been interpreted to be included within the ambit of ‘sex’ under Article 15.¹⁹ Such categorical refusal to recognise or facilitate queer marriages places the LGBTQ+ community at a disadvantage; the choice of a

¹² INDIA CONST. art. 17.

¹³ INDIA CONST. art. 18.

¹⁴ *Supra* note 1.

¹⁵ *M. Nagaraj v. Union of India*, AIR 2007 SC 1.

¹⁶ INDIA CONST. pmbi.

¹⁷ *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

¹⁸ *MG Badappanavar v. State of Karnataka*, AIR 2001 SC 260.

¹⁹ *Supra* note 3.

partner is a part of personal liberty,²⁰ and denying the same to certain populations reduces them to second-class citizens. The State cannot condition the exercise of such *prima facie* discrimination based on sex/sexuality.

Article 19(1)(a) ensures that all citizens shall have the right to freedom of speech and expression.²¹ Similarly, Article 21 emphasises that, “*no person shall be deprived of his life or personal liberty except according to procedure established by law*”.²² Post *Maneka Gandhi*, it was held that any such law that deprives someone of their liberty must also be, “*fair, just and reasonable*”²³ under Articles 14 and 19. Together these three provisions of the Constitution form the ‘Golden Triangle’. Denial of recognition to LGBTQ+ marriages violates Articles 14, 19 and 21: *firstly*, it violates their right to equality, seeing as how heterosexual couples are free to marry; *secondly*, such an impediment only when it comes to the recognition of queer marriages obstructs and violates their right to freedom of expression as under Article 19(1)(a); *thirdly*, such non-recognition is further violative of the community’s right to privacy, as has been interpreted to be a fundamental right by the Apex Court under Article 21 in *K.S. Puttuswamy*.²⁴ The Hon’ble Supreme Court in *Navtej Singh Johar* and *NALSA v. Union of India*²⁵ has emphasised substantive equality for those belonging to the LGBTQIA+ community. Refusal by the State to recognise such relationships renders queer relationships secondary to their heterosexual counterparts, which is discriminatory.

The argument that allowing only heterosexual couples has a rational link with the broader purpose of marriage laws – which is to ensure familial stability, recognition of relationships, inheritance, et cetera – becomes redundant upon the consideration that a family made of two women or men married to each other with a child of their own can be just as safe, stable and supportive of a family structure as if it were made up of a heterosexual couple and their child. Such classification is arbitrary and if the focus was merely on child welfare when it comes to the adoption of children by queer couples, then the law wouldn’t be determined to deny them any adoption right at all, seeing as how most of such couples who would children would opt for adoption, ensuring more willing, prepared households to take in these children.

²⁰ *Shafin Jahan v. Asokan K.M.* AIR ONLINE 2018 SC 1136.

²¹ INDIA CONST. art. 19(1)(a)

²² INDIA CONST. art. 21.

²³ *Maneka Gandhi v. Union of India* (1978) AIR 597.

²⁴ *Justice K.S. Puttuswamy v. Union of India* (2017) 10 SCC 1.

²⁵ *National Legal Services Authority (NALSA) v. Union of India* (2014) 5 SCC 438.

The only other possible defence for such abject refusal with regards to public policy, would be the enforcement of public morality. Such enforcement was, however, determined by the High Court of Delhi in *Naz Foundation* as not amounting to compelling state interest.²⁶ Furthermore, “popular morality or public disapproval of certain acts” was held as an invalid justification to restrict an individual’s privacy rights. The only kind of “morality” that *can* pass the muster of compelling state interest is constitutional morality, a morality that is “derived from constitutional values”.²⁷ Despite its reversal, the decision to do so was overturned in *Johar*,²⁸ the logic of *Naz* – that if the constitutionality of a law is justified on “morality”, then that “morality” must be grounded on “constitutional values”, not on prevailing (or otherwise) social mores – was vindicated. As Chief Justice Misra put it, the various organs of the State must embody constitutional virtues for the ultimate “betterment of each and every individual citizen of the State”²⁹

CONCLUSION

The decision in *Supriyo v. Union of India* is ultimately a moment of mere judicial hesitation — while it did emphasise on the autonomy and relational rights of queer individuals, its refusal to extend any legal recognition to same sex marriages in incongruent with its previous holdings when you consider the precedents in *Navtej Singh Johar*, *Puttuswamy*, *Shafin Jahan* and so on. Such an exclusion of queer marriages from the institution of marriage not only furthers the symbolic discrimination that they have been facing but also has practical implications in their lack of legal entitlements such as spousal benefits (in insurance, tax, inheritance), adoption, and employment policies (partner benefits, leaves, transfers, etc.). The Court’s adherence to the doctrine of separation cannot be an escape from the organ’s constitutional requirement to uphold fundamental rights. Considering this, the judgment highlights the need for urgent legislative intervention to bridge the existing gap, while also underlining the requirement for a more progressive, consistent judicial approach in the future. Such constitutional values can only be meaningfully realised if, beyond their recognition in theory, there is full application in practice as well.

²⁶ *Supra* note 1.

²⁷ *Supra* note 1.

²⁸ *Supra* note 1.

²⁹ *Supra* note 3.