Towards Inclusive Justice: Scrutinizing the Supreme Court's Verdict on Same-Sex Marriage Rights

Aditya Sharan
&
Aryan Jain
Symbiosis Law School, Noida

Abstract: *The recent landmark judgment by the Supreme Court of India in the case of Supriyo Chakraborty v. Union of India has sparked widespread discussion and debate on the issue of same-sex marriage. This paper critically examines several pivotal aspects of the court's decision, shedding light on various dimensions of the legal and societal implications involved. The paper delves into the improper application of Article 14 and 15 of the Indian Constitution, meticulously analysing whether the court adequately considered the rights of LGBTQIA+ individuals in terms of equality and discrimination. Through this analysis, the paper seeks to uncover any discrepancies or shortcomings in the court's approach to addressing these fundamental constitutional principles. The paper also explores the ambiguity inherent in the court's statements regarding the right to marry for same-sex couples. By dissecting the nuances of the court's reasoning, the paper aims to identify any inconsistencies or lack of clarity in its pronouncements on this crucial aspect of LGBTQIA+ rights. Furthermore, the paper delves into the dissenting opinion from the majority, acknowledging a brighter side in the court's recognition of adoption and civil union rights for same-sex couples. By examining the implications of this recognition, the paper offers insights into the potential avenues for progress in LGBTQIA+ rights in India. Lastly, the paper discusses potential future avenues for advancing LGBTQIA+ rights in India, including the exploration of legislative reforms and the implementation of public awareness campaigns. Drawing on insights from legal scholars, arguing counsel, and affected individuals, including prominent LGBTQIA+ rights activist Mr. Saurabh Kirpal (Senior Advocate) and family law expert Professor Ramya, the paper provides a comprehensive analysis enriched by diverse perspectives on the matter at hand.*

Keywords: LGBTQIA+ rights, Same-sex marriage, Supreme Court of India, Right to Marry, Equality, Discrimination.

The Bygone Struggle Of The Queer Community

India, with its rich history and diverse population, has a predominantly heterosexual orientation in its social norms and structures. Influenced by religious practices and teachings, the Indian culture considers heterosexual relationships as the norm for they are a means of fulfilling social responsibilities and continuing the lineage of one's family. Thus, the classification of people into 'man' and 'woman' permeates in every level of Indian society.[1] As a result of its heterosexual orientation, the act of homosexuality was looked down upon as an act against the order of nature and a criminal offence. In addition to the same, those perceived as LGBTQIA + were subjected to widespread hatred and discrimination by the Indian society and hence a stigma was created against the Queer Community.

Though such stigma has been prevalent for a long period, it is important to note the LGBTQIA+ is not alien to the Indic ethos. Homosexuality has been rooted in India ever since the 13th Century. The homo-Khajuraho Temples and various other temples across the nation have homo-erotic scriptures showcasing same sex relationships. The Kama Sutra and the writings of the Vedic period possess entire chapters on the topic of Homosexuality.[2] Furthermore, sacred writings such as Narada Smriti and Sushruta Samhita declared homosexuality to be unchangeable and natural. Moreover, the Vedas recognised the third sex or '*tritya prakriti*', as persons who do not beget offspring either due to physical impotency or their sexual orientation.[3] In addition to the same, the harems of young boys held by Hindu Aristocrats and Muslim Nawabs in addition to the male homosexuality in the Middle Ages of Muslim History provide historical examples of the presence of same-sex relations in ancient times.[4]

However, over time sympathy and sensitivity towards the Queer Community grew. As a result, the archaic section 377 was demanded to be struck down. The fight for the rights of the Queer community intensified when the UN declared the criminalisation of homosexual consensual intercourse to be violative of *Article 2* [5] and *Article 17* of the International Covenant for Civil and Political Rights [6] in *Toonen vs. Australia*.[7] India was a signatory to the ICCPR and hence was bound by its provisions, but despite the same, did not decriminalise homosexuality. A major boost was received by the LGBT community when the 172nd Law Commission in its report recommended the deletion of section 377. However, the legislature failed to act upon the same. Following the same in 2009, the Delhi High Court struck down partially struck down section 377 to decriminalize homosexuality in *Naz Foundation vs. Govt of NCT of Delhi* for being violative of Article 14, 15 ,19 and 21.[8] Explaining its position, that Article 21 of the Indian Constitution includes within its ambit the Right to Privacy and Right to Live with Dignity, both of which are denied by section 377 of the Penal Code by criminalization of his/her core identity on account of his/her sexuality.[9] In addition to the same, the court held sexual orientation to be a ground analogous to sex and hence discrimination based on the same was held to be violative of

Article 15.[10] Thus, the judgement came as a huge boost to the LGBT community of Delhi as it sought to free the queer community from the cage of fear and secrecy that they were put into by section 377. However, the decision of the Delhi High Court was soon reversed in *Suresh Koushal vs. Naz Foundation*.[11] Upholding the Constitutionality of section 377, the court reasoned the LGBT to be a minuscule fraction of the country's population to be violative of Articles 14, 15 and 21 of the Indian Constitution. Such reasoning of the court was heavily criticized as it seemed to promote an idea which was antithesis of the principle of equality propounded by the Indian Constitution. The decision of Suresh Koushal was further criticized by Supreme Court in *K.S. Puttaswamy vs. Union of India*,[12] wherein the SC declared Right to Privacy to be a Fundamental Right under Article 21. Furthermore, the court held the rights of LGBT community to be dwelling in the realm of privacy and dignity and considered sexual orientation as an essential component of one's identity.[13] Thus, the judgement provided a major boost to the position of LGBT community in society, but the community still faced the troubles of section 377.

This struggle finally ended in 2018 when the five-judge Constitutional Bench of the Apex Court decriminalized homosexuality in *Navtej Singh Johar vs. Union of India*.[14]

In 2018, the Apex Court found section 377 of IPC to be discriminating against individuals of the LGBTQIA+ community based on their sexual orientation and gender identity and violative of Articles 14,15,19 and 21. Thus, the Apex Court partially struck down section 377 and decriminalised consensual sexual relations among consenting adults. Though the judgement is an important one, its significance in terms of the scope of rights which were granted to the LGBTQIA+ community is often misinterpreted. We contend the same because the judgement only allowed the LGBTQIA+ community the right to enter into consensual sexual relations and the right to cohabit with one another and did not grant the wider rights of marriage and adoption, which are essential to the dignity of the individual. When the petitioners sought to demand the right to marry from the Apex Court, Dipak Misra CJ said, "*When we say union, we do not mean the union of marriage, though marriage is a union.*"

This definition of the law is quite vague and self-defeating because if marriage is a union, it must be protected as a right under Article 19 for all citizens, irrespective of their gender identity or sexual orientation. However, the present statement of the ex-CJI creates a distinction between the queer community and the rest of society on the question of marriage, which is against the ethos of our Constitution. Furthermore, it is a representation of the reluctance of the judiciary to go against the prevailing social morality of the country, which views marriage as a sacramental institution and grants marriage rights to the queer community as an attack on the same.[15]

Subsequently, to the present time, on October 17, 2023, in the case of *Supriyo Chakraborty vs. Union of India*,[16] the Supreme Court delivered a unanimous

verdict stating that there is no fundamental right to marry. Despite differences among the bench on various matters, they collectively agreed that the right to marry should not be regarded as a fundamental right applicable to all individuals, regardless of sexual orientation. It's worth noting that the Hon'ble Bench fails to recognise that Indian Constitution does not explicitly recognize the right to marry as a fundamental right. However, this does not rule out the possibility of it evolving into a constitutionally guaranteed right. The Constitution has been subject to broad interpretations in the past, with rights such as health and education being inferred within existing provisions. The implications of this decision extend beyond just non-heterosexual couples; they affect everyone. Since marriage is not deemed a fundamental right, it could significantly impact pending petitions challenging laws such as the Freedom to Religion or anti – conversion laws. Upholding the constitutionality of these laws would become more challenging, particularly considering the existing hurdles faced by inter-caste or interfaith couples. This challenge becomes even more daunting in cases involving queer relationships. Marriage holds significant societal importance, and legal determinations surrounding it carry normative implications.[17] Given that marriage continues to serve as a marker for social recognition, the verdict may perpetuate further discrimination against queer couples. It could create the perception that such couples are unfit for marriage, contradicting previous judgments like *Navtej Singh Johar* which conferred rights upon them. While the right to marry is not explicitly guaranteed as a fundamental right for anyone, its absence disproportionately affects queer couples, leaving their rights in a precarious state. Furthermore, in identifying discrimination against queer individuals, it can be presumed that the primary objective of the Hon'ble court was to eradicate prejudice or intolerance toward affected individuals. However, the court's failure to grant marriage recognition to the community suggests an improper application of Article 14 and 15 of the Constitution of India, which pertain to Equality before Law and Discrimination on the basis of Sex. Mere issuance of guidelines for police sensitization, non-discrimination by officials, and directions for the enactment of laws may not effectively curb discrimination against individuals. The non-discriminatory recommendations and guidelines provided by the Learned Constitutional Bench themselves fail to prevent discrimination against individuals while delivering the verdict while insisting on civil unions rather than giving equal marriage rights. Furthermore, the findings in the judgement presented juxtapose the concept of marriage, a fundamental and deeply personal institution recognized by numerous legal precedents, with relatively mundane matters such as access to roads or the freedom of expression enjoyed by a poet. Such a comparison is not only irrational but also inhumane, as it trivialies the significance and sanctity of marriage. Marriage is a sacramental relationship that holds immense importance in society, with legal, social, and emotional ramifications. It involves the union of two individuals, often with religious or

cultural significance, and is recognized as a fundamental right by various legal precedents. Comparing marriage to poetry or access to roads diminishes its profound significance and fails to acknowledge the complexities and implications involved. Furthermore, equating the State's obligation to provide roads or facilitate the freedom of expression enjoyed by a poet with the right to marry under Article 21 of the Constitution is fundamentally flawed. Article 21 guarantees the right to life and personal liberty, encompassing various aspects essential for a dignified existence, including the right to marry and form a family.[18] Marriage is not merely a matter of convenience or preference; it is a fundamental aspect of personal autonomy and identity. Therefore, to reduce the discussion of marriage to the level of poetry or infrastructure development is not only irrational but also undermines the inherent dignity and significance of marriage as a fundamental human right.[19] It overlooks the profound impact that marriage has on individuals' lives and the broader societal framework.

Unscrupulous Application Of Article 14 And Article 15

The idea of Equality pervades the Indian Constitution. It is one of the magnificent cornerstones of our democracy.[20] The Constitution of India guarantees the Right to Equality from Articles 14 to 18. Out of this series of constitutional provisions, Article 14 [21] is the most significant. It embodies the principle of non-discrimination and outlaws' discrimination in a general way.[22] It comprises two components: *Equality Before the Law and Equal Protection of Laws*. At a bare glance, there hardly seems to be any difference between the meaning of these expressions as it is difficult to imagine a violation of one principle without a violation of the other, but it is important to understand that despite the similarity in the nature and scope of these expressions, they do not convey the same meaning.[23] The difference lies in the utilisation of the word 'law' in both expressions. The first expression uses the term 'law' philosophically while the latter expression refers to its plural expression, i.e.' laws', and hence refers to the specific laws of our country.[24]

As a result, the former expression serves as a negative covenant on the State to not discriminate among the persons living within the territory of India, while the latter burdens the state with the positive obligation of ensuring that every person enjoys equal protection of the laws.[25] Article 14 requires the combined reading of these two expressions, revealing the true intent of Constitution makers to achieve 'equality for all in all respects of life'. In other words, the aim behind inclusion of article 14 was to bring about an end in the inherent inequality that exists among human beings. Hence, for the purpose of the same Article 14 does not propound uniform treatment of all, but uniform treatment of those who are similarly situated.[26] In a nutshell, it postulates equal to be treated equally and unequal to be treated differently to achieve equality in its truest form.[27] Thus, while Article 14 forbids class legislation by providing privileges to a group of persons arbitrarily selected from the others, it does not forbid such

classification for the purpose of legislation, provided such classification is reasonable and unarbitrary.[28] Furthermore, it is essential to note that there always exists a presumption in favour of the Constitutionality of the provision.[29] Thus, while measuring the violation of Article 14, the task of the court of law is not to measure whether the said law results in inequality but to check whether the inequality created by the law is unreasonable and arbitrary.[30] But when is a classification deemed to be reasonable is subjective in nature.

To reduce the degree of subjectivity, the Judiciary has relied on different tests over the years, one of them being the test of reasonable classification, which is built upon two facets namely: (1) The classification must be based on an intelligible differentia.[31] (2) The classification must have a rational nexus with the object of the legislation.[32] For a classification to be deemed as permissible under Article 14, the satisfaction of both these conditions is imperative.[33]

A perusal of the provisions of the SMA indicate that the statute explicitly refers to marriage in heterosexual relationships. As a result, two distinct classes are created by the SMA, namely heterosexual couples who are eligible to marry and non-heterosexual couples who are ineligible to marry.[34] However, Bhatt J and Kohli J beg to differ. As per them, the SMA creates a classification of heterosexual couples of different faiths i.e. it differentiates between interfaith couples and couples of the same faith.[35] But, the SMA also facilitates marriage between couples of the same faith.[36] Therefore, the claim that the SMA differentiates on the basis of the faith of the individuals is baseless. Hence, the basis of classification, if any, is on the basis of sexual orientation. Moving towards the object of the legislation, it was contended by the majority opinion of Bhatt J and Kohli J that SMA aimed at regulating marriage of heterosexual relationships exclusively. The said stance is flawed as the main object behind the enactment of the SMA was to facilitate inter-faith marriages, not to regulate the right of a citizen to marry on the basis of sexual orientation. The statement is strengthened by the Statement of Objects and Reasons to the SMA, which in clear and express terms, grants the benefit of inter-faith marriages to 'any person' and does not make any distinction on the basis of one's gender identity, sex or sexual orientation. Furthermore, though the framework of the Act is conducive to a heterosexual relationship, it does not prescribe any bar related to one's sexual orientation to raise a contention that a person of a non-heterosexual orientation is excluded from its benefit. In the words of Kaul J, 'Doing so would be missing the wood for the trees'.[37]

Therefore, the objective behind enacting the SMA was to facilitate interfaith and intercaste marriages. In other words, it aimed at providing avenues to those marriages which faced opposition or discrimination from society. As a result, a classification on basis of one's sexual orientation, a core and essential trait of an individual, is unreasonable and offensive to the dignity and self-worth of an individual.[38] The position is supported by Chandrachud J, who while referring to *Navtej Singh Johar vs. Union of India*[39] considered any classification on basis of

a core and essential trait to be violative of Article 14 [40] thereby reiterating the stance taken by the Apex Court in *Chitra Ghosh vs. Union of India*.[41] Hence, the Apex Court's application of the test of reasonable classification was incorrect.

Furthermore, it is pertinent to question the reason behind the Apex Court's reluctance to employ the test of manifest arbitrariness. For a long time, due to the subjective nature of 'what is termed as arbitrariness', the test was viewed as 'second guessing' the Parliament's policy choices. As a result, the Apex Court refused to apply the contours of this test to measure the constitutionality of legislative actions.[42] However, in *Shayara Bano vs. Union of India*,[43] the Apex Court declared that the manifest arbitrariness of a provision is a valid ground for declaring a legislation unconstitutional and, thus declared section 2 of Shariat Act,1937 to be violative of the idea of equality. Later, based on this rationale, the Apex Court declared section 377 as violative of Article 14.[44] Hence, in the recent past, the Apex Court has relied more on the test of manifest arbitrariness while measuring the validity of legislation on the touchstone of Article 14.[45] Therefore, it is pertinent to question why the Apex Court omitted to apply the test while measuring the validity of the SMA.

On measuring the SMA on the threshold of the test of manifest arbitrariness, it is clear that the SMA is violative of Article 14. The reasoning behind the same is the dynamic nature of equality which cannot be confined to the doctrinaire and traditional limits.[46] At the time when the SMA was enacted, Indian society comprised only heterosexual forms of relationships because the concept of homosexuality, in addition to being illegal, was scarce. As a result, the SMA dealt with the challenges faced only by heterosexual couples and was in line with the idea of equality prevailing at that time. But in 2018, after the Apex Court partially decriminalised section 377 and allowed consensual sexual relationships among non-heterosexual persons, another form of relationship gained legal recognition.[47] Post this decision of the Apex Court, two forms of relationships existed in the Indian society, but only one is allowed the privilege to enter into the institution of marriage. Hence, SMA, in so far as it exclusively deals with the issues faced by heterosexual couples, must be deemed as arbitrary and hence violative of Article 14.

Denying an individual the choice of a partner based on gender violates the right to equality.[48] Moreover, Article 15 comes into play as it prohibits state-sponsored sex-based discrimination. Justice Chandrachud, in the *Navtej Johar case*, asserts that the challenges faced by individuals from sexual and gender minorities, such as exclusion and discrimination, are rooted in societal heteronormativity and biases toward traditional gender relationships. This discrimination undermines substantive equality in both gender-neutral relationships and marriages.[49] Article 14 incorporates the doctrine of reasonable classification, requiring two conditions to be met: the classification must have an intelligible differentia, and this differentia must have a rational connection to the statute's[50] intended objective. The differentiation between heterosexual and

homosexual adults lacks constitutional validity, as there is no legitimate objective served by restricting marriage to only a man and a woman.[51]

Regarding Article 15, it has been clarified that it specifically forbids discrimination based on 'sex' and should be expansively interpreted to encompass and include 'sexual orientation.'[52] So as backed by a persuasive precedent of *Bostock vs. Clayton County*,[53] the United States Supreme Court established that sexual orientation and gender identity fall under the definition of 'sex' in Title VII, marking a significant milestone and a major victory for LGBTQ rights at the federal level. Following this landmark ruling, President Biden, upon assuming office, issued an executive order directing federal agencies to adopt a similar interpretation of 'sex' when enforcing various other anti-discrimination laws, including those related to housing. While the Supreme Court's decision in favour of same-sex marriage initially appeared to signal progress in LGBTQ rights, there remains unfinished business. Under the current presidential administration, we have witnessed regressions in LGBTQ rights within the workplace and educational settings, indicating that there is still much work to be done to ensure full equality and protection for the LGBTQ community. This could imply that anti-discrimination provisions under Article 15 may not extend to include homosexual marriages. In the Navtej Johar case, Justice Chandrachud countered this argument when delivering his verdict on same-sex relationships. He argued that the *'stereotypical notions of differences between men and women'* used to justify discrimination were flawed.[54] According to him, this narrow interpretation undermined the core essence of Article 15's prohibition of discrimination, as it failed to consider the intersectional nature of sex discrimination.[55] Justice Chandrachud emphasized that individuals of diverse sexual orientations, including lesbians, gays, bisexuals, and transgender individuals, possess a constitutional right to equal citizenship in all aspects, asserting that the Constitution[56] recognizes and protects sexual orientation. This viewpoint aligns with Tarunabh Khaitan's belief that inclusiveness and pluralism form the foundation of Article 15, providing the strongest support for its anti-discrimination principle.[57]

A clear improper application of Article 14, raising questions about why the doctrine of manifest arbitrariness was not applied and why the older predominant differentia test was favoured by the Hon'ble court. This selective approach indicates a deviation from established legal principles, leading to a violation of Article 15, which prohibits discrimination based on sex and should be expansively interpreted to encompass sexual orientation. The failure to apply the doctrine of manifest arbitrariness, despite its recent acceptance by the court as a valid ground for declaring legislation unconstitutional, suggests a lack of consistency in the court's approach. This inconsistency undermines the principles of equality and fairness enshrined in the Constitution, as it allows for arbitrary classifications to go unchallenged. Furthermore, the application of the older predominant differentia test at the convenience of the court raises concerns

about the impartiality and integrity of the judicial process. By resorting to outdated legal frameworks, the court may inadvertently perpetuate discrimination and injustice, rather than upholding the principles of equality and non-discrimination. Additionally, the analysis highlights a clear violation of Article 15, which prohibits discrimination on the basis of sex. Granting marital rights exclusively to heterosexual individuals while denying the same to non-heterosexual individuals constitutes a form of sex-based discrimination, contrary to the constitutional mandate of equality before the law. The analysis underscores the need for a more consistent and principled approach to the interpretation and application of constitutional provisions, particularly in cases involving fundamental rights and equality. Failure to adhere to these principles not only undermines the rule of law but also perpetuates injustice and inequality within society.[58]

Sanctimonious Application Of Right To Marry

The well-known song '*Same Love*' by Macklemore & Ryan Lewis addresses the desire for a certain '*sameness*' sought by same-sex couples in its lyrics.[59] In the twenty-first century, global politics is significantly influenced by marriage equality campaigns that have '*mobilized*' the concepts of inclusion and sameness.[60] These movements advocate for being '*included*' within existing marriage laws and being treated with '*sameness*.' Ruth Vanita accurately captures the current situation by noting that regardless of a government's stance on same-sex marriage, it cannot regulate individuals' feelings of love or their '*understanding of marriage*.'[61]

The Indian Constitution does not explicitly acknowledge the right to marry as a fundamental or constitutional right. The recognition of the freedom of choice in marriage as an inherent aspect of Article 21[62] has been achieved through judicial interpretation. Marriage is viewed as the cornerstone of society, with its legality[63] regulated by the cultural and religious ethos of the community. The lack of acceptance for same-sex marriages is rooted in religious and social norms, and this spirit of intolerance is evident in the legal policies of various jurisdictions that criminalize homosexuality.[64]

In the case of *Shakti Vahni vs. Union of India*,[65] the Supreme Court acknowledged the right to choose a life partner as a fundamental right under Articles 19[66] and 21 of the Constitution while issuing directives to prevent honour killings. The court emphasized that when two adults consensually select each other as life partners, it constitutes a manifestation of their choice, duly recognized under the Constitution. In the case of *Shafin Jahan vs. Asokan K.M.*,[67] the Supreme Court, while overturning a Kerala High Court judgment, affirmed the right to choose a life partner and autonomy in intimate personal decisions. Stressing the autonomy guaranteed by the Constitution,[68] the court asserted that each individual possesses[69] a protected entitlement in determining the choice of a partner, whether within or outside marriage. In the case of *Lata Singh vs. State*

of UP,[71] the apex court recognises that in a free and democratic country, and once a person becomes a major, he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum, they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter- religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.[72] The landmark *Puttaswamy*[73] decision recognized the fundamental right to privacy, encompassing autonomy over personal choices. It held that sexual orientation is a crucial component of the right to privacy and of Articles 14, 15, and 21.[74] Decisions of the Supreme Court decriminalizing consensual sexual activity between homosexuals and guaranteeing same-sex couples the right to marry indicate that the right to privacy is intrinsic to the constitutional guarantees of liberty and equal protection of laws. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised.

This interpretation was further extended in Navtej Johar, which granted recognition to marriage equality. Justice Chandrachud asserted that an individual not only has the right to choose a partner but also the authority to decide on the nature of the relationship they wish to pursue.[75] On the contrary in the recent judgement of *Supriyo Chakraborty vs. Union of India* the 5-judge bench unanimously agreed to a tendentious and disputable adjudication that The Constitution does not expressly recognize a fundamental right to marry. An institution cannot be elevated to the realm of a fundamental right based on the content accorded to it by law. However, several facets of the marital relationship are reflections of constitutional values including the right to human dignity and the right to life and personal liberty. Thus, if the Constitution guarantees a fundamental right to marry then a corresponding positive obligation is placed on the State to establish the institution of marriage if the legal regime does not provide for it. This warrants us to inquire if the institution of marriage is in itself so crucial that it must be elevated to the status of a

fundamental right. As elucidated in the previous section of this judgment, marriage as an institution has attained social and legal significance because of its expressive and material benefits. This Court while determining if the Constitution guarantees the right to marry must account for these considerations as well.[76]

A clear ambiguous and hypocritical statement from the Hon'ble bench headed by CJI DY Chandrachud by not acknowledging the fundamental right to marry as he has himself stated in one the aforesaid judgement,[77] where he says partners to a marital tie. That decision rests exclusively with the individuals themselves. Neither the state nor society can intrude into that domain.[78] The statement made by the CJI particularly when considering his own acknowledgment of the fundamental right to marry in a previous judgment. In that judgment, he emphasized that the decision regarding partners in a marital tie rest solely with the individuals themselves, with neither the state nor society having the authority to intrude into that domain.

Subsequently, in the current judgment where the bench headed by him held that there is no clear fundamental right to marriage at all, it creates significant ambiguity and hypothetical scenarios. This ambiguity could potentially give rise to new sorts of problems not only for homosexual or queer couples but also for heterosexual couples. The lack of clarity on the fundamental right to marry could lead to legal uncertainties and challenges in various aspects of personal relationships, impacting individuals' autonomy and rights.

The ramifications of this ambiguity are profound. Without a definitive understanding of the fundamental right to marry, individuals across all spectrums of sexual orientation may face uncertainty and difficulty in navigating their personal relationships within the legal framework. This uncertainty extends beyond mere legality, permeating into various aspects of personal autonomy and rights. As in the said judgement of *Supriyo Chakraborty vs. Union of India*, the court discusses that;

> *"Yet it cannot be gainsaid that many of our constitutional values, including the right to life and personal liberty may comprehend the values which a marital relationship entail. They may at the very least entail respect for the choice of a person whether and when to enter upon marriage and the right to choose a marital partner."* [79]

The Hon'ble Chief Justice of India acknowledges that the Right to Marriage is not explicitly recognized as a fundamental right. However, the Chief Justice also asserts that various aspects of marriage are encompassed within the broader ambit of Article 21 of the Constitution, which guarantees the Right to Life and Personal Liberty. This juxtaposition raises the inference that if several facets of married life are integral to Article 21, then the Right to Marriage itself should logically be considered a fundamental right.[80] This argument underscores the significance of marriage in the context of individual rights and liberties protected by the Constitution. Moreover, the Chief Justice points out that in the

absence of legislative regulation of marriage, there exists a void that needs to be addressed.[81]

> *"This Court's observations with respect to the learned Chief Justice's reasoning cantered around the enunciation of the bouquet of rights emanating from various provisions other than Article 21 [Article 19 and 25], and locating an obligation, has to be seen in the backdrop of the unanimous view of this Court, that the fundamental right to marry is not found within the Constitution. Therefore, it is our considered opinion that to create an overarching obligation upon the State to facilitate through policies the fuller enjoyment of rights under Article 19 and 25, is not rooted in any past decision, or jurisprudence. That queer couples have the right to exercise their choice, cohabit and live without disturbance – is incontestable. In the same vein, that they are owed protection against any threat or coercion to their life, is a positive obligation that binds the State– this is a natural corollary of their right under Article 21."* [82]

For instance, without a clear fundamental right to marriage, questions regarding property rights, inheritance, and spousal benefits may become contentious issues. Additionally, issues related to custody, adoption, and healthcare decision-making could become increasingly complex without a solid legal foundation to define marital rights and responsibilities. Moreover, the lack of clarity on this fundamental aspect of personal relationships may lead to disparities in how different jurisdictions interpret and apply marriage laws, further exacerbating legal uncertainties and challenges for individuals seeking to formalize their relationships. Overall, the absence of a clear recognition of the fundamental right to marry in the recent judgment[83] raises significant concerns about the potential impact on individuals' autonomy and rights, highlighting the need for further clarification and legal reform to address these complexities in the realm of personal relationships. The absence of legislative recognition of the fundamental right to marry poses challenges not only for queer couples but also for heterosexual couples, particularly those seeking inter-caste or inter-religious marriages. Without clear legal protection, couples facing societal or familial pressure against their union may encounter resistance, discrimination, or even threats of violence. This lack of legal recognition can deprive them of important rights and benefits associated with marriage, such as inheritance rights, joint ownership of property, health insurance coverage, and tax benefits. Additionally, they may experience social stigma, ostracism, or marginalization within their communities, leading to social and economic disadvantages for themselves and their children.

Dissenting Opinion With Luminous Side

The minority view presented by CJI Chandrachud regarding the issue of marriage rights for non-heterosexual couples is a mere summary of the judgement in *Navtej*.[84] Similar to the dubious and vague reasoning of the court in ignoring the issue of marriage in *Navtej*,[85] Chandrachud J carefully dodges

the urge to allow non-heterosexual couples to enter into the institution of marriage. Instead, he proceeds to recognise the inherent discrimination of the current matrimonial laws of our country vis-à-vis non-heterosexual couples.

Prior to discussing the need for civil unions, Chandrachud focuses on the concept of marriage as a socio-legal institution. In his opinion, one of the primary motives behind regulating the societal institution of marriage is to remodel the existing society in consonance with the principles of Equality enshrined in the Indian Constitution, as a constitutional order premised on equality, dignity, and autonomy would be unworkable if the personal relationships, the building blocks of our society, are grounded on values antithetical to the Constitution.[86] In other words, the objective of a just society cannot be achieved if individuals are prohibited from entering into the institution of marriage on basis of their caste, religion, etc.

Keeping this principle in mind, the institution of marriage should have been opened to the benefit of non-heterosexual couples. The reasoning behind the same is that if discrimination on the basis of one's religion, caste, race or sex is violative of the Constitutional principles, then so is discrimination on the basis of one's sexual orientation.[87] If the State's purpose, as propounded by Chandrachud J is really to ensure that the essential and core traits of religion, caste or sex do not prevent a person from spending eternity with one's loved one, then it is difficult to understand why marriage rights were not extended to the non-heterosexual couples.[88] An explanation of such hypocritical conduct of the Judiciary may lie in its reluctance to act in contravention of the prevailing heteronormative attitude of society towards the concept of marriage. The support towards the grant of civil unions by the minority view to the non-heterosexual persons strengthens this argument.

Given the precarious, helpless position the judiciary found itself in, the idea of civil union does not come across as a surprise.[89] The idea though similar to the concept of marriage, is not a substitute for the same. It merely extends the legal incidence of marriage without transferring the title. In other words, it allows the non-heterosexual couple access to the tangible benefits associated with marriage, but this is where the similarity ends.[90] Unlike civil unions, the institution of marriage has a cultural, historical and social significance within the Indian community. It confers upon the couple a wider range of social and material benefits, the most important of which is societal recognition of the union between the two individuals.[91] Thus, it is incorrect to contend that marriage without its legal incidence is just a name and hence, civil union is an adequate substitute, as marriage encompasses the traits essential for individual autonomy, self-development and pursuit of happiness.[92]

Accepting the model of civil unions would give rise to two forms of marriage, one a full marriage and the other a skim-milk marriage.[93] The act of grant of civil union acts to the detriment of non-heterosexual couples for it affixes a label of inferiority upon them.[94] It has the effect of bringing about the draconian *American*

'*Separate but Equal Doctrine*'[95] within the aspect of marriage, as similar to the racially segregated schools for the African American Community, a separate and independent institution is proposed to be created and access to the desired counterpart is denied.[96] Thus, an extension of civil unions to non-heterosexual couples crystallizes the existing discrimination based on sexual orientation instead of curbing it.[97]

The Chief Justice of India also advocated for allowing queer individuals to adopt in accordance with CARA guidelines based on the interpretation of *Section 57(2) of the Juvenile Justice Act.* This section does not explicitly require adoption to be limited to married couples but instead mandates consent from both parties in a couple, without specifying marital status. Therefore, the use of the term "spouse" in Section 57(2) does not exclude unmarried couples from adoption eligibility. However, CARA has operated under the assumption that only married couples can offer a stable household for a child, despite the lack of a rational connection between marital status and the objective of safeguarding the child's best interests. Household stability depends on various factors unrelated to marital status, such as the partners' commitment, creating a nurturing environment, and avoiding violence.

There is no evidence to support the notion that only heterosexual married couples can provide stability to a child either. Recognizing the pluralistic values of the Constitution, the court believes that different forms of family association should be acknowledged. The court asserts that any challenges faced by children of queer individuals are due to societal biases and lack of recognition of same-sex unions, rather than the fitness of queer individuals to parent. To combat stigma and prejudice, the state should educate society about queer relationships. Laws should not assume that good parenting is exclusive to heterosexual individuals, as this perpetuates stereotypes and violates Article 15 of the Constitution, which prohibits discrimination based on sexuality. Such assumptions are akin to prejudices based on class, caste, or religion. Therefore, the Adoption Regulation's discrimination against the queer community violates Article 15, and efforts should be made to sensitize society and eliminate biases against queer relationships.[98]

However, the other judges held the position except the Hon'ble CJI and Justice Sanjay Kaul that interpreting Section 57(2) to allow both married and unmarried couples to adopt, while imposing the requirement of "consent" solely on married couples, lacks a solid basis in established principles of interpretation. They emphasize the legislative intent behind requiring spousal consent, rooted in the child's best interest, welfare, and security. Since there's a disagreement regarding the fundamental premise – whether Section 57(2) of the JJ Act permits joint adoption by both married and unmarried couples (as asserted by the Chief Justice) – the judges conclude that it's not a case of delegated legislation exceeding the authority granted by the parent Act. They argue that adopting the Chief Justice's interpretation would have adverse consequences because the

current legal framework wouldn't ensure protection for the child in the event of a breakdown of an unmarried couple who had jointly adopted. This wouldn't align with the child's best interest.[99] Furthermore, Parliament's decision to restrict joint adoption to "married" couples stems from the broader legal landscape where marriage grants various protections and entitlements. Altering the definition of "marital" status, as suggested, could have unintended negative effects that only the legislative and executive branches could address – a task beyond the judiciary's scope. However, they acknowledge the discriminatory impact on queer couples, particularly evident in adoption regulations, necessitating urgent state intervention. Therefore, while some aspects of the petitioners' arguments hold merit, modifying the provision as requested could lead to unintended consequences, such as allowing cohabiting heterosexual couples who opt not to marry to adopt jointly without the legal safeguards offered by other statutes, rendering it unfeasible.[100]

While the argument is made that allowing unmarried couples to adopt jointly, as proposed by the Chief Justice, could result in potential risks for the child's welfare in case of a relationship breakdown, it's essential to consider that the current system, which restricts adoption to only married couples, also poses risks. Firstly, it's important to recognize that marital status alone does not guarantee stability in a relationship. There are many instances of marriages breaking down, leading to disruptions in the child's life. Therefore, the argument that restricting adoption to married couples ensures stability is flawed. Additionally, the argument assumes that unmarried couples lack the ability to provide a stable and nurturing environment for a child. However, many unmarried couples are committed, stable, and capable of providing a loving and supportive home for a child.[101] By excluding them from adoption, the current system overlooks the potential benefits that these couples could offer to a child in need of a loving family. Furthermore, denying unmarried couples the opportunity to adopt based solely on their marital status perpetuates discrimination and inequality. It sends a message that only couples who conform to traditional societal norms are deemed worthy of adopting a child, disregarding the rights and capabilities of unmarried couples. While there may be concerns about the potential risks of allowing unmarried couples to adopt jointly, it's important to recognize that the current system also has its drawbacks. By excluding unmarried couples from adoption based solely on their marital status, we perpetuate discrimination and deny children the opportunity to find loving and stable homes with capable caregivers, regardless of their relationship status. There several inconsistencies and shortcomings in the approach of the court towards the issue of marriage rights for non-heterosexual couples and adoption regulations for unmarried couples. Firstly, the reluctance of the court to extend marriage rights to non-heterosexual couples, despite recognizing the inherent discrimination in current matrimonial laws, raises questions about the judiciary's commitment to upholding principles of equality and non-

discrimination. The suggestion of civil unions as an alternative fails to address the underlying discrimination faced by non-heterosexual couples and perpetuates inequality by creating a separate and inferior category of union. Furthermore, the conflicting views within the bench regarding adoption regulations for unmarried couples further underscore the lack of clarity and consistency in the judiciary's approach. While the Chief Justice advocates against using sexual orientation as a basis for reasonable classification under Article 14 but conflicts himself for not- granting the rights for marriage. While discussing these issues may offer some hope to affected individuals, the failure of the judiciary to provide clear and consistent guidance on these matters is deeply concerning. Granting civil unions or adopting conflicting interpretations of laws only serves to perpetuate discrimination and inequality, rather than address the underlying issues at hand. Therefore, it is imperative for the judiciary to uphold the principles of equality and non-discrimination in a more robust and consistent manner to ensure justice for all individuals, regardless of sexual orientation or marital status.[102]

Conclusion

In the labyrinth of legal deliberations and constitutional interpretations, the pursuit of equality and justice often faces formidable challenges. The journey towards realizing fundamental rights, particularly for queer communities, is fraught with hardships entrenched in societal norms, historical biases, and legislative gaps. Against this backdrop of entrenched discrimination and societal resistance, the Indian judiciary plays a pivotal role in safeguarding constitutional principles and ensuring equal rights for all citizens. The recent case of *Supriyo Chakraborty vs. Union of India* [103] underscores the complexities inherent in the quest for equality, particularly concerning LGBTQIA+ rights. In this landmark case, the Supreme Court grappled with the question of whether the right to marry is a fundamental right under the Indian Constitution. The court's decision not to recognize marriage as a fundamental right for all individuals, irrespective of sexual orientation, highlights the ongoing struggle for LGBTQIA+ rights in India. Despite significant strides in recent years, including the decriminalization of homosexuality and recognition of transgender rights, challenges persist in securing full legal recognition and protection for LGBTQIA+ individuals. Central to the discourse surrounding the *Supriyo Chakraborty* case is the improper application of Articles 14 and 15 of the Constitution, which guarantee the right to equality and prohibit discrimination on various grounds, including sex. The court's failure[104] to extend marriage rights to non-heterosexual couples represents a missed opportunity to uphold these constitutional principles and address systemic discrimination. Moreover, the ambiguity surrounding the interpretation of the right to marry and its potential drawbacks further complicates the issue, leaving LGBTQ+ individuals vulnerable to continued discrimination and marginalization. Amidst these

challenges, dissenting voices within the judiciary offer a glimmer of hope for progress. While the majority opinion in the Supriyo Chakraborty case may have fallen short of recognizing marriage rights for non-heterosexual couples, dissenting justices have advocated for alternative avenues, such as civil unions and adoption rights. These dissenting opinions reflect a commitment to equality and justice, even in the face of prevailing societal norms and legal constraints.

Looking ahead, the future of LGBTQIA+ rights in India is both promising and uncertain. While significant legal and social progress has been made in recent years, much work remains to be done to achieve full equality and inclusion. Looking ahead, the future of LGBTQIA+ rights in India is characterized by both promise and uncertainty. While significant strides have been made in recent years, both legally and socially, there remains much ground to cover in the pursuit of full equality and inclusion for LGBTQIA+ individuals. One critical aspect that demands immediate attention is the recognition of the right to marry for LGBTQIA+ individuals. The denial of this fundamental right not only hinders the aspirations of queer people but also impacts heterosexual individuals. As seen in the case of *Fourie*[105] in South Africa, where the Constitutional Court ruled that excluding same-sex couples from the definition of "husband or wife" was unconstitutional, similar legal interpretations could pave the way for marriage equality in India. Moreover, precedents like *Ghaidan vs. Godin-Mendoza*[106] highlight how discriminatory distinctions between homosexual partners and spouses have been struck down by courts, underscoring the need for equal treatment under the law regardless of sexual orientation. In the future, granting marital status to LGBTQ+ individuals are essential to ensure that there is no discrimination based on sexual orientation. Every citizen of India deserves equal rights and protections, irrespective of their sexual identity. Therefore, it is imperative that the legal framework evolves to reflect the principles of equality and non-discrimination enshrined in the Indian Constitution. As we navigate the road ahead, it is crucial to remain vigilant and proactive in advocating for LGBTQIA+ rights. Legal reforms, judicial interpretations, and societal attitudes must align to create a more inclusive and equitable environment for all individuals. By continuing to push for progress and challenging discriminatory norms, we can work towards a future where LGBTQIA+ individuals are fully recognized, respected, and embraced as equal members of society.

The struggle for LGBTQIA+ rights in India is an ongoing journey marked by progress, setbacks, and resilience. The *Supriyo Chakraborty*[107] case serves as a poignant reminder of the complexities and challenges inherent in the pursuit of equality and justice. As we navigate the path forward, it is imperative that we remain steadfast in our commitment to upholding constitutional principles, challenging discriminatory norms, and advocating for the rights and dignity of all individuals, regardless of sexual orientation or gender identity.

Exclusive Thoughts From Scholars, Arguing Counsel And Affected Individuals

Mr. Saurabh Kirpal[108] ***:*** *"The Court, upon identifying discrimination in some form, bore the responsibility to rectify it. The application of Article 14 was flawed and erroneous, as elucidated by Kaul, who pointed out Narsimah's misinterpretation. The intention of the judgment was to enable marriage in its entirety, not to restrict it to a particular form. Hence, the classification lacked a reasonable nexus. Furthermore, despite the availability of the manifestly arbitrary test post Shayara Bano and EP Royappa case, its omission in favor of the old predominant differentia test raises concerns. It is manifestly unreasonable to exclude non-heterosexual couples while allowing heterosexual ones, given the presence of discrimination. A significant issue from an equality perspective is the inadequate examination of Article 15, despite precedents like Navtej Johar and Anuj Garg. Discrimination on the grounds of Article 15, inherent in nature, should have undergone greater scrutiny, which was not observed. Most notably, the failure to recognize the fundamental right to marry is a regressive stance, impacting heterosexual couples as well. This finding sets a precedent that could potentially enable the government to abolish laws like the Special Marriage Act, leading to the elimination of inter-caste and inter-religious marriages. Suggesting civil unions as an alternative fall short, as they do not equate to marriage. Granting civil unions would still constitute discrimination, albeit to a lesser degree. Accepting discrimination to any extent is not justifiable, as it undermines the principles of equality. We cannot settle for anything less than full equality under the law."*

Ms. Kritika Ramya[109] ***:*** *"The Court was fully authorized and well within its power to address the discrimination since the issue raised by the parties involved interpreting a gender-neutral term, namely "spouses" in the Special Marriage Act (SMA), which falls squarely within the jurisdiction of the court. This falls well within the scope of the Hon'ble Court as seen in previous decisions where the court has addressed similar issues affecting queer individuals. Therefore, there were precedents for the court to intervene in this matter. The judgment specifically pertains to the right of non-heterosexual couples to marry and should not be construed to extend to heterosexual couples. If it were interpreted otherwise, it could potentially grant the state unrestricted authority to regulate the institution of marriage. For example, A state enacts laws prohibiting inter-caste marriage, while another state could implement anti-conversion laws to restrict inter-religious or inter-caste marriages."*

Anonymous 1[110] ***:*** *"A civil union is a legal relationship that provides many of the same legal rights and responsibilities as marriage, but without the religious or cultural connotations associated with marriage. Civil unions are typically recognized by the government and grant couples' legal recognition and protection. I believe there are subtle undercurrents of discrimination in the granting of civil unions to the community. It was not granted but civil unions are a lessor form of marriage, and considering the right to equality, no one should be discriminated against on the basis of their sexual orientation."*

Anonymous 2[111] ***:*** *"Awareness about the community at large to shape the public*

opinion in order to persuade the lawmakers to pass legislation in the parliament to uphold equal liberties."

Anonymous 3[112] ***:*** *"There is a friend of mine who do face challenges even while renting apartments, so Marriage Equality, as said earlier will eventually bring in bouquet of rights for the Queer Individuals present in the country and we will not lose talented Queer Individuals via Brain Drain due to the persistent Queerphobia, since they all can help develop the country as a whole."*

Anonymous 4[113] ***:***

1. "Organizing civil society in collaboration with state actors, as we did with the Naz judgment, is essential. Change must originate from the grassroots level. Advocating for revisions in medical literature to affirm that homosexuality is entirely normal is crucial due to the significant influence doctors hold in society."

2. "I work at Naz India so we have cases for discrimination on a regular basis, it's a never-ending list, to be specific one of our community members was denied to meet his boyfriend in hospital as he was not considered to be a part of his family."

Anonymous 5[114] ***:***

1. "Outreach with queer organisations like Naz India, Nazariya etc on understanding what the community wants, would really help. The decision is always taken on the basis of what the majority needs and as per my experience with the queer community, I've gotten to know that all of us want basic human rights, marriage might not count as one but when individuals from the opposite spectrum are given that right then why not to us? I clearly am not able to think about specific steps/measures but constant interaction with the community will really help you in understanding the need of legalisation of same-sex marriage. In the recent judgement, CJI talked about anti-discriminatory policy but he contradicted his own statement by saying that we can't legalise same-sex marriage. Isn't that an act of discrimination?"

2. "Absolutely, yes! I was in a 2-year long relationship and as that guy was 6 years elder than me, his parents forced him to get married to a woman. If equal marriage rights existed, he could've argued with his parents saying that it's his legal right to marry his same sex partner. We both were given death threats by his family and the only thing they told me on call was "Islam mai yeh sab haraam hai, agr nhi chhora ek dusre ko toh dono ko maar dalenge". Lastly, I just hope things get better with time, we aren't second class citizens!"

Author/s Opinions:

"The judgment presents a perplexing scenario, characterized by the judiciary's acknowledgment of the inherent discrimination faced by non-heterosexual couples, yet a failure to provide a remedy for this injustice. This reluctance to extend a bouquet of rights to such couples mirrors the prevailing social morality, further complicating the matter. What compounds this oddness is the contradictory nature of the explanations put forth by different justices, each presenting reasons why the rights should not be granted, only to be refuted by others. The response of Chief Justice Chandrachud to Justice Bhatt's views , as well as the criticism directed towards the Chief Justice's stance

by Justices Bhatt and Narsimha, highlights the confused state of the judiciary. It appears as though the justices are trapped in a dilemma, attempting to justify why they cannot grant the rights based on constitutional arguments but finding themselves unable to do so. Moreover, given its rich history of judicial overreach in matters of Constitutional importance, it seems rich that the Judiciary refuses to decide on the aspect of marriage for non-heterosexual couples on grounds of Separation of Power.

Furthermore, as long as the precedent set by Navtej Singh Johar[116] *remains valid, there appears to be no strong constitutional argument to justify denying equal marriage rights to affected individuals. The courts cannot simply grant them a relationship status without affording them the full range of rights and privileges associated with marriage. Restricting them to living together as friends or live-in partners, or even denying them the right to procreate, is unjust and untenable in a society that upholds principles of equality and non-discrimination."*

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108. Mr. Saurabh Kirpal (son of BN Kirpal; former CJI) is an Indian lawyer, author and a senior advocate at the Delhi High Court. He is also an LGBTQ rights activist. He served as one of the prominent arguing counsels in the case of Supriyo Chakraborty vs. Union of India case and was a core member of the petition drafting committee
109. Ms. Ramya is a Scholar and an Assistant Professor of Family law, International Law, Humanitarian Laws, Environment Law at Symbiosis Law School, Noida and pursing her Ph. D from National Law University, Jodhpur
110. A law student studying at Symbiosis Law School, Noida, who identifies as heterosexual
111. A law student studying at Symbiosis Law School, Noida, who identifies as homosexual (lesbian)
112. A college student studying at Delhi University, who identifies as homosexual (gay). He has also survival of a gay gang rape incident
113. A legal professional at Naz Foundation (India) Trust, who identifies as homosexual (gay)
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