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**CASE COMMENTARY ON SUPRIYA CHAKRABORTY AND ANR. V.  
UNION OF INDIA**- Arunima Bali<sup>1</sup>**FACTS**

Supriyo v. Union of India<sup>2</sup> is a case lodged as a writ petition under Article 32<sup>3</sup> which is a right to constitutional remedies. Whenever the right(s) of an individual is desecrated, Article 32 ensures that the individual can move to the Supreme Court for early enforcement of that right. Article 32 being the guardian of democracy functions as a vital organ of our society. In the presented case, LBGTQAI+ and queer (both used interchangeably) community rights have been—at least they have appealed—violated. So far, they have claimed that adequate rights should be awarded to them. They aver that the existing laws regarding marriage, adoption and other such ensuing details are discriminatory in nature and thus they are unable to feel inclusive and adequately represented. Their idiosyncratic sexual orientation and gender identity have become a hurdle in their smooth, unshackled, progressive lifestyles.

Accordingly, their existence is decriminalised though they do not have any rights to mark their presence and express their existence. In most of the ancient scriptures of multiple religions, homosexuality has been considered a taboo and a pure sin. However, the rationale behind this is during our primaeval times, sexual intercourse was an activity meant only for procreation. Procreation in itself was the goal. Accordingly, contributors needed to be heterosexuals to produce babies. Therefore, any nonconformity from the process or the nature of the participants was considered unholy. Now, the times have changed. Neither sexual

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<sup>2</sup>Supriyo v. Union of India, MANU/SCOR/35040/2023

<sup>3</sup>INDIA CONST. art. 32

intercourse is treated like a mere procreational activity nor our psychological views remained that narrow in perspectives. Discrimination arising out of religious scriptures is still a Pandora's box for the well-being of our entire society.

### PROCEDURAL HISTORY

Section 377 of the Indian Penal Code, 1860 states that “*whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished*”.<sup>4</sup>

- In the case of Naz Foundation v. Government of NCTD<sup>5</sup>, the court permitted homosexual activities between two consenting adults. However, in Suresh Kumar Koushal v. Naz Foundation, the judgement was reversed
- In National Legal Services Authority v. Union of India<sup>6</sup>, it was held that even non-binary people also have all the constitutionally reserved rights.
- Justice KS Puttaswamy v. Union of India<sup>7</sup> stated that the Constitution has protected the rights of people fitting into distinct and unique sexual orientations.
- Navtej Singh Johar v. Union of India it was held that—
  - a. ” *Section 377 violated Article 14<sup>8</sup> because it discriminated between heterosexual persons and non-heterosexual persons, although both groups engage in consensual sexual activities*
  - b. *While Article 14 permits reasonable classification based on intelligible differentia, a classification based on an ‘intrinsic and core trait’ is not reasonable; Section 377 classifies individuals based on the core trait of ‘sexual orientation’*
  - c. *Article 15<sup>9</sup> prohibits discrimination based on ‘sex’ which includes within its meaning sexual orientation as well<sup>11</sup> and Section 377 indirectly discriminated*

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<sup>4</sup>Indian Penal Code, 1860 § 377

<sup>5</sup>Naz Foundation v. Government of NCTD, MANU/SC/1278/2013

<sup>6</sup>National Legal Services Authority v. Union of India, MANU/SC/0309/2014

<sup>7</sup>Justice KS Puttaswamy v. Union of India, MANU/SC/1604/2017

<sup>8</sup>INDIA CONST. art. 14

<sup>9</sup> INDIA CONST. art. 15

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*between heterosexual persons and the LGBTQ community based on their sexual orientation*

*d. Section 377 violated Article 19(1)(a) because Section 377 inhibited sexual privacy”<sup>10</sup>*

In a gist, Navtej Singh Johar’s case has a remarkable footing in the legal field and it proved to be a sigh of relief for all homosexual couples. The court was progressive and liberal enough to understand the needs and desires of homosexuals. Living in a society where one’s basic actions of bodily requirements can be termed a criminal act is gruesome. Homosexuals were not entitled to love or be loved just for the reason of their peculiar sexual identity. The arbitrary crimes perpetrated against homosexuals by criminalising their sexual orientations found solace in this particular case. Landmark cases like these kindled hope in the hearts and souls of the LGBTQIA+ community that the courts of law would address their sorrows. With such precedents at hand, the community again went in front of the court with its heartfelt appeals.

### ISSUES

- According to Articles 19<sup>11</sup> and 21<sup>12</sup> of the Indian Constitution, the right to marry a person of one’s choice is granted to all individuals irrespective of anyone being LGBTQIA+. One should not be victimized because of the reason that the sexual orientation of one does not belong to the norm or majority.
- One such issue was that the Special Marriage Act (SMA)<sup>13</sup> is violative of Article 21 because the LGBTQIA+’s bodily autonomy and right to a dignified life are hampered due to SMA’s provisions. Moreover, there is no rational nexus that can be affixed or ascribed to the object sought to be achieved using SMA.

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<sup>10</sup>INDIA CONST. art. 19, § 1, cl. a.

<sup>11</sup>INDIA CONST. art. 19

<sup>12</sup>INDIA CONST. art. 21,

<sup>13</sup>Special Marriage Act

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- Discrimination based on one's sex and sexual orientation is violative of Article 15 of the Constitution. Classification based on gender and sexual intercourse is not tolerable under the provisions of the Constitution.
- Article 14 endows equality before the law and equality protection of the law. Not recognizing LGBTQIA+ marriages is unreasonable and unfair. People from the community are not passably protected by the laws.
- There is an absence of intelligible differentia to discriminate LGBTQIA+ from the rest of society.
- There is a nonappearance of any '*legitimate state interest*' that can be endorsed or shielded by refuting the LGBTQIA+ the basic fundamental right to marry someone of their choice.
- Violation of the right to marry is an infringement of the right to privacy. By striving to preserve the heterogeneity of marriages, the comprehensive right to enjoy the fruits of citizenship is getting sullied.
- Matrimonial statutes should be read in a gender-neutral manner, however, if any statute violates the terms of the Constitution, then, it should be declared void.
- Gender-specific words, like 'husband' and 'wife', in the matrimonial provisions such as SMA, should be changed to gender neutral usage like 'spouses.'
- Section 4 (1)(a) should start refereeing partners as spouses and Section 4(1)(b) should start adopting 'parties' as the correct form of word convention.
- The Centre (defendant) advocated for the ideology that a union can only be considered when it is orchestrated between a biological male and female. Our society is not ready to consider same-sex marriages as a valid and authentic form of belonging. The allowability of same-sex marriages would send wrong and mind-boggling messages to the entire community at large.
- Transgender people should be given complete freedom to be identified as either 'man' or 'woman', contingent upon what they feel to be associated with.
- Central government, national child rights body NCPCR, and Islamic scholars' group, Jamiat-Ulama-i-Hind vehemently opposed the pleas of the queer community. They wielded the opinion that such a change would cause serious damage to the fabric of the society and thus LGBTQIA+ should not be awarded the demanded rights.

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## HOLDING

- ⇒ Getting rid of the provisions of SMA would have a slippery slope effect. It is in stark contravention of the separation of powers phenomenon. Legislature has its roles. If the judiciary starts forming new laws, then it would be termed as breaching the powers of the legislature.
- ⇒ Same-sex couples do not have a right to marry the person of their choice, however, transgender people do enjoy the right to marry the person they want.
- ⇒ For same-sex couples, there is a right to choose a partner and cohabit with that partner.
- ⇒ Queer couples are not awarded the right to adopt children.
- ⇒ There is no such right given so that the couples may enjoy a right to civil unions. Accordingly, such a union and the consequential rights flowing would not find much purchase.
- ⇒ Article 245<sup>14</sup> and 246<sup>15</sup> gives the power to the states to enact such gender-neutral laws like SMA or they may make all marriage-related unions legitimate without any specific classification.
- ⇒ The judgment has a bit of a silver lining for transgender couples as for them a right to marry, is available under the present provisions of law. Transgender people have a right to self-determination which was earlier subjected to the ‘certification provided by the state’<sup>16</sup>.
- ⇒ Majority of the judges in the bench invalidated the opinion of striking down the provisions of the Central Adoption Resource Authority (CARA)<sup>17</sup> restricting LGBTQIA+ couples from adopting children.
- ⇒ The bench directed that a high-powered committee should be formed by the government to decide the various entitlements, rights and liabilities of the queer community.

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<sup>14</sup> INDIA CONST. art. 245

<sup>15</sup> INDIA CONST. art. 246

<sup>16</sup> The Indian Express, <https://indianexpress.com/article/explained/explained-law/sc-verdict-on-same-sex-marriages-explained-live-8986361/> (last visited Oct 20, 2023).

<sup>17</sup> Central Adoption Resource Authority

- ⇒ The bench accepted that sheer ferocity and coercion are forced against queer communities. Family members and the police force become the two contributors to such atrocities and pains. Therefore, such natal family violence should be prevented and the police forces should work to uphold the integrity and dignity of the queer community.
- ⇒ The court maintained that homosexuality is not an urbanite phenomenon. Moreover, it is neither restricted to the hearts of the privileged people.
- ⇒ Queer couple marriages are not included in the provisions of our current matrimonial laws and such absence of inclusion cannot be supposed to be unconstitutional by its very nature.
- ⇒ The judgment ensures the applicability of the status quo without any immediate actionable legal benefits for the queer community.

### ANALYSIS

- Absence of any strict measures

The honourable Supreme Court asked the Central government to form a panel discussing the rights and legalities of same-sex couples. The court favouring the equality clause for homosexual couples, however, gave zero stern verdict on legalising their marriages or union. Emphasis was made on individual liberty and dignity without any substantial texts in black and white to fortify the mere words. The bench could have asked the central government to first frame laws and then pronounce the judgement of the case in hand. In certain cases, the courts have enacted laws and regulations through their decisions. For instance, the Vishakha guidelines in the case of Vishaka v. State of Rajasthan<sup>18</sup>, in which the Supreme Court imposed sexual harassment norms.<sup>19</sup>

This is quite worrisome that the court got much more lenient while discussing the gravities of homosexual couples. In the recent case of Suraz India Trust v. Union of

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<sup>18</sup>Vishaka v. State of Rajasthan, MANU/SC/0786/19977

<sup>19</sup>Byjus, <https://byjus.com/free-ias-prep/separation-power-indian-constitution/> (last visited Oct 21, 2023).

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India<sup>20</sup>, a petition was filed requesting the court to revisit its own decisions on the procedure of appointing and transferring judges. It has been argued that the Supreme Court, through its decisions in 1994 and 1998 (*Advocate on Record Association v. Union of India*<sup>21</sup>), effectively modified constitutional provisions, even though constitutional revisions may only be made by Parliament. The two Supreme Court decisions, on the other hand, accorded the judiciary the major power of nomination and transfer of judges.<sup>22</sup> However, in the very case pertaining to same-sex marriages, the judiciary, by giving a pretext of separation of powers did not even try to add a little definition to the gender-specific laws. The court could have struck down the arbitrary provisions discriminating on the basis of gender but it was not the modus operandi.

- Lack of empathy

In the case of *Ravindra Kumar Dhariwal v. Union of India*, the Court emphasized the importance of 'dignity' and 'equality' under Section 3 of the RPwD Act. The court underscored the State's affirmative commitment to guarantee the realization of the rights of people with disabilities, as stated directly in Section 3.<sup>23</sup> Time and again, the Supreme Court has upheld its duty by empathetically guaranteeing the required rights to the people of vulnerable classes. In the majority of the cases, the court makes sure that the starvation of the deprived classes is quenched using felicitous application and interpretation of laws. In our present case, however, the court is seemingly lacking the expected warmth and sentiments. Bare words are meaningless without the life of judicial interpretation and the blood of active legal competence.

- Orthodoxically stimulated

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<sup>20</sup>*Suraz India Trust v. Union of India*, MANU/SC/0707/2017

<sup>21</sup>*Advocate on Record Association v. Union of India*, MANU/SC/1183/2015

<sup>22</sup> PRS India, <https://prsindia.org/theprsblog/does-the-judiciary-%E2%80%9Cmake-laws%E2%80%9D> (last visited Oct 23, 2023).

<sup>23</sup>SC Observer <https://www.scobserver.in/journal/towards-de-medicalisation-of-public-law-equality-part-i/> (last visited 23 Oct 2023).

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The Supreme Court of India has given various historical judgements liberating the suffocating practices of the past. The rusted minds, customs and laws were vivified by the progressive and bold judgements of the court. In the case of State of Jharkhand vs. Shailendra Kumar Rai<sup>24</sup>, the age-old exercise of the two-finger test was banned stating that it traumatizes and victimizes females. In one such case, the Supreme Court, in response to a petition, ruled that abortion rights should be applicable and available to every single woman even those who were not married and those who were not cis-gender, had equal access to abortion. Such judgements have been quite futuristic, to say the least. However, while not granting homosexuals their rights to marriage and adoption, the court has scummed to the obsolete image of societal structure. Families are not subject to any hierarchy of sexual orientation. Who gave the title of 'less than the best' to homosexuality? The true foundations of marriage are love, trust, honesty, care, respect, and magnanimity to name a few.

○ Politically motivated

Politics form the implicit part and parcel of our society. No single law can be passed without reflecting the wishes and whims of the majority party in the Parliament. In our present case, political parties are not favouring the homosexual ideology and thus they are lax in causing any significant positive change in the laws. The fact that it has been demonstrated that winners from the ruling party are 17 per cent more likely to have their pending charges dismissed without conviction while in power.<sup>25</sup> Our judiciary is neither unaffected nor completely tainted by political clout. One political party may endorse an idea and another may have zero predisposition for the same idea. However, one decision of the Supreme Court is binding and everlasting till any further vicissitudes regarding the judgment. The indelible impact of such judgments can easily denude one's reasons for legit identification and ensuing credibility of oneself. The court's judgments are responsible for creating either sorrowful or gainful waves. In the present case, all the homosexual couples are returning home empty-handedly. Their hearts are filled with mourning and their self is vacated by meaning.

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<sup>24</sup>Advocate on Record Association v. Union of India, MANU/SC/1411/2022

<sup>25</sup>iPeaders, <https://blog.ipleaders.in/study-political-influences-judiciary/> (last visited 23 Oct 2023)

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- Skewed towards popular opinion

The judgement was disadvantageously beneficial for society. The old aphorism “*majority wins*” has yet again proved to be functional till today. Why is it always about the majority? The only option for the minorities is to either convert to majority opinion or simply leave the discussion. In a country like India, we have laws for all possible minorities but when it comes down to legalising homosexual marriages and unions, then the fancies and desires of the majoritarian prevail. Is not it called hypocrisy or an irony to say the least? The Members of Parliament and Members of Legislative Assemblies are said to be the representatives of the democracy of India. However, should we not talk about the base rates? Moreover, do the majority’s impulses should be considered while framing laws for minorities? When laws are framed for say, women then the committee is generally comprised of a majority of women activists, social workers, scholars and other eminent women. However, is there any guarantee that the anticipated panel/committee that is going to be formed by the central government will consist of homosexuals? Are homosexuals satisfactorily represented in the present government for the government to make laws for them? We need definite and theoretical answers to our questions before the Parliament can enact LGBTQIA+-friendly laws in practice.

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