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SUPREME COURT REFUSES TO LEGALIZE SAME-SEX MARRIAGE: IMPLICATIONS FOR LGBTQ+ RIGHTS AND FUNDAMENTAL FREEDOMS

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ABSTRACT

This article aims to enquire about the history of the LGBTQ community in India and their "Right to Marry" after the recent judgement of Supriyo v. Union of India. This article examines the presence of the LGBTQ community in history and the laws relating to their regulation in colonial India. It further delves into the injustice and discrimination faced by the community since long back and how the course of various Supreme Court judgements gave recognition to their fundamental rights. However, there was a complexity in that they were not granted the "Right to Marry" over the previous judgements. To analyse this comprehensively, we have done a case analysis of the recent judgement of Supriyo v. Union of India and have even challenged the constitutional validity of the judgement in the further course of the article. To resolve this complexity, we have even deliberately analysed whether the right to marry is guaranteed in the constitution. We have even compared the legal frameworks for same-sex marriage in various countries and their impact on India. Furthermore, we have discussed the future implications of the judgement, highlighting the denial of fundamental rights to the community. Lastly, this article would remove all the complexities a person has about the legalisation of same-sex marriages in India.

INTRODUCTION

Since the beginning of the LGBTQ community in India, our culture has recognised it. Still, they have always struggled to get the legal status or rights they deserve from our constitution or Legal System.[2]This article willdiscuss the history of the LGBTQ community

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[2] 'A Brief History of LGBT+ India' (*myGwork*,13 February 2019) <https://www.mygwork.com/en/my-g-news/a-brief-history-of-lgbt-india> accessed 1 November 2023.

in India. We will also analyse how the recent Supreme Court judgement regarding the right to marry for same-sex couples will change the future scenario in India.We will also discuss the constitutional validity of this judgement by equating it with the constitutional ethos provided under the Indian Constitution.

There has been a long history of the LGBTQ community in India, which can be seen through the religious texts, culture, and traditions of the country. Hinduism, the predominant religion in India, provides a wide range of literary and artistic sources that depict the existence of lesbian, gay, bisexual, and transgender (LGBTQ) individuals in ancient times. The concept of sexual minorities can be traced in the Hindu culture by the time Gautam Buddha founded his theories or philosophies, and homosexuality was viewed positively in Buddhism.[3] Hindu texts like Kama Sutra also referto" sharing", who are "independent women who frequent their kind or others" or, in other words ", the liberated woman, or sharing, is one who refuses a husband and has relations in her own home or other houses"[4]. She makes love with her kind. In the 12th century, a famous commentary on svairini[5] came out in which it was explained as a woman who does not have any limits, no sexual bars and acts as she wishes is known as svairini.

In the second part, eight chapters of the Kama Sutra, the different practices of the Lesbian community have been talked about in detail. We can also see in a lot of Hindu temples across Indiaconsisting of numerous artworksin which same-sex couples showing their genitals to each other has been depicted in their infrastructure, including Khajuraho temple sculptures built in the 700s and the Sun temple in Konark built in the 1200s.[6]

HISTORICAL OVERVIEW OF THE LGBTQ COMMUNITY IN INDIA

To know about something, we must enquire about its history as it will give us the required information. The historical overview of the laws in our legal framework is critical to gathering knowledge about the rights of the LGBTQ community in India. In 1861, when the

[3]Keown D, '4. Sexuality and Gender' [2020] Buddhist Ethics: A Very Short Introduction 48 <https://academic.oup.com/book/28469/chapter-abstract/229097470?redirectedFrom=fulltext> accessed 1 November 2023.
[4]SHARMA Y, 'Not a Crime but Mental Illness: The RSS "Progressive" Stand on LGBT Rights' (*www.thecitizen.in*, 18 March 2016) <https://www.thecitizen.in/index.php/en/NewsDetail/index/8/7172/Not-A-Crime-But-Mental-Illness:-The-RSS-Progressive-Stand-On-LGBT-Rights> accessed 2 November 2023.
[5]Suresh D, 'Transgenders Problems and Administrative Response' (2016) SSRN< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3768221> accessed 2 November 2023.
[6]Prabhash K Dutta, 'Homosexuality in Ancient India: 10 Instances' (*India Today*,10 July 2018) <https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10> accessed 2 November 2023.

British Raj was there, the criminal offences and punishments set out in the Mughal Fatawa 'Alamgiri were replaced with those of the Indian Penal Code **of 1862**.[7] They imposed Section 377,[8]which covered homosexuality. It stated that "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. It was also mentioned that Penetration is enough to constitute the carnal intercourse necessary to the offence described in the section.The law was drafted by Thomas Babington Macaulay, who took the idea from the anti-sodomy laws present in Britain.

The British authorities labelled communities like the hijra a "criminal tribe",and this was mentioned in **the Criminal Tribes Act (1871)**.[9]These individuals were forced to register their sexual orientation compulsorily, and this data was constantly monitored by the authorities, which violated their right to privacy. They were also subjected to torture and were discriminated against because of their gender identities.British Lieutenant-Governor Edmund Drummondformulated the anti-hijra campaign as a mandatory project of "extinguishment" and "extinction."Authorities used different kinds of surveillance methodsand enacted them over these communitieswith the hopes of removing hijras permanently from the country.

The LGBTQ community never got recognition or acceptance from our society since the time they became a community, and the rights of the LGBTQ community have been talked about in numerous cases in India, which has led to the evolution and recognition of this community in our country.

The talks related to the recognition and acceptance of the LGBTQ community in India started in 2009 with the case of "***Naz Foundation v. Govt. of NCT of Delhi***",[10] in which Section 377 of the Indian Penal Code was challenged on the basis that it was violative of the Fundamental rights provided under the constitution. The High Court held that Section 377 violated Article 14[11] on the basis that it discriminated against Homosexuals, considering them as a separate class, and Article 15 of the Indian Constitution as it included the word sex, which consists of the sexual orientation of a person in addition to the biological sex of a person. The court held that Section 377 of the IPC was declared unconstitutional.After this

[7]Indian Penal Code 1862.
[8] Indian Penal Code 1862, s 377.
[9]Criminal Tribes Act 1871.
[10]Naz Foundation v. State (NCT of Delhi), 2009 SCC OnLine Del 1762.
[11]Article 14. Equality before law.—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

decision, many social, political, and religious organisations presented their views on this decision by providing the reasons that this judgement was highly immoral and illegal as it was against the nature of the social order.

In 2013, the Supreme Court, in the case of ***"Suresh Kumar Kaushal and Anr. v. Naz Foundation and Ors."***[12]reversed the decision of the Delhi Court and held that the LGBTQ community in India is a tiny community and the High Court made a mistake by applying international precedents. The court decriminalised Homosexuality as it was against the social order of our country and upheld the traditions and values of our country. This decision violated the fundamental rights of the LGBTQ community and, therefore, faced much criticism from the public.Later on, the landmark decision of **"*Navtej Singh Johar v. Union of India of 2018*"**[13]solved the issues of the LGBTQ community and gave them the recognition they wanted for a long time. In this case, the Supreme Court held that the 2013 Judgement was invalid and unconstitutional because Section 377 violated the fundamental rights of the LGBTQ community and held that people of the same sex can have consensual relationships.

The apex court, in this case,held that criminalisation of sexual acts between two adults of the same sex violates Articles 14, 15, 19[14] and 21 of the Indian Constitution.[15]This landmark judgement limited the suppression and discrimination against these communities. But do the LGBTQ community get the required recognition and acceptance in our country? The answer remains No because the people of our country still consider them immoral and their relationships a violation of their customs and traditions, which in turn leads to discrimination in every sphere of their lives. Even after so many years, these communities are searching for the fundamental rights they deserve but are restricted because of our society, legislature and Legal System.

CASE ANALYSIS: SUPRIYO V. UNION OF INDIA

In 2018, the LGBTQ community got the right to cohabit with each other, but after so many years of this judgement, they still do not have the right to marry or legal recognition of their

[12]Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.
[13]Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[14] Right to Freedom - Article 19. Protection of certain rights regarding freedom of speech, etc.
[15]Protection of Life and Personal Liberty – Article 21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

relationships.Therefore, the recent case of **"*Supriyo v. Union of India*"**[16]came to the fore the question of the "Right to marry" of queer couples before the Supreme Court of India. In this particular case, the petitioners who are members of the LGBTQIA+ community asked for the right to civil marriage and argued that the State, through its current legal regime, discriminates against the queer community by implicitly excluding them from a civil institution, such as marriage.[17]

The petitioners here seek the benefits that flow out of legal recognition of marriage available to heterosexual couples. They have invoked the principle of equality of the constitution and contend that they should be treated on par with the heterosexual community and, hence, should be granted the legal recognition of their partner in the form of marriage.

CONTENTIONS OF BOTH THE PARTIES

The main contentions of the petitioners are that they have a fundamental right to marry any individual out of their free will under Art. 14, 15, 19 and 21 of the constitution and any exclusion or alienation from the same leads to violating their fundamental rights. They further argued that Special Marriage Act (SMA) is ultra vires to the constitution as it impinges upon the fundamental rights of the queer community. Particular Marriage Act uses heteronormative language as it contemplates marriage between a man and a woman under Sec. 4(c)[18]and excludes non-heterosexual couples.

They submitted that it is violative of Art. 14 of the constitution as equal protection of laws is denied by the SMA to the queer community. SMA excludes the non-heterosexual community from its ambit, creating a classification with unreasonable intelligible differentia.The classification made in this particular case is based on the sexual orientation and gender identity of the requisite parties to a marriage, which is utterly impermissible according to the constitutional principles. Moreover, there is no rational nexus with the object sought to be achieved by the SMA. The objective of the SMA is to give couples a right to marry when

[16]Supriyo v. Union of India, 2023 SCC OnLine SC 1348.
[17]Khan K, 'SC Verdict on Same Sex Marriages Explained Highlights: No Fundamental Right of Same-Sex Couples to Marry, Says Supreme Court' (*The Indian Express*, 17 October 2023) <https://indianexpress.com/article/explained/explained-law/sc-verdict-on-same-sex-marriages-explained-live-8986361/> accessed on 17 October 2023.
[18]Special Marriage Act 1954, s 4(c).

they are unable to match or choose not to marry under their laws, and hence, excluding non-heterosexual couples from it has no rational nexus. [19]

They also emphasisedthe judgement of "Navtej Singh Johar & Ors. Vs Union of India", wherein it was said that Art. 15(1) prohibits discrimination based on sex, which subsumes sexual orientation.The SMA's requirement that a couple must consist of a man and a woman is an exclusion based on an identity marker. It is based on ascriptive characteristics—attributes predefined and designated by society or other external conventions. They concluded that SMA is violative of Art. 15 as it discriminates based on sexual orientation by preventing same-sex couples from solemnising their marriages. Hence, The SMA's refusal to recognise same-sex marriages breaches Articles 14 and 15 of the Constitution because it fails the reasonable classification requirement, is blatantly arbitrary, and discriminates based on gender identity and sexual orientation.

They even stated that SMA violates Art. 19(1)(a)[20], Art. 19(1)(c)[21]and Art.21 of the constitution as the right to marry is under a socially valuable expression in the form of choice and personal dignity. They even reiterated that the right to happiness is a fundamental tenet of Art. 21 as the right to life in its true character includes the right to live happily with personal dignity, which is alienated to them by SMA. Art. 21 of the constitution even guarantees the right to family and the right to meaningful family life under its ambit to all persons, including LGBTQIA+ couples, as family and household are defined very broadly in the law, not just limiting to a "biological man" or a "biological woman" and their children.

The petitioners also submitted that SMA and other secular laws like Foreign Marriage Act (FMA)[22] should be read in gender neutral manner without the usage of any heteronormative language, and gendered terms such as "husband" and "wife" ought to be read as "spouse. They said, "The language used in the SMA facilitates a gender-neutral interpretation. Section 4 of the SMA is regarding any two persons, as Section 4(1)(a)[23] refers to a spouse and

[19]Raj TK, 'Same-Sex Marriages: A Grave Error in the Law' (*The Hindu*, 15 November 2023) <https://www.thehindu.com/opinion/op-ed/a-grave-error-in-the-law/article67535658.ece> accessed 16 November 2023.
[20]Article 19(1)(a) - right to freedom of speech and expression;
[21] Article 19(1)(c) – right to form associations or unions;
[22] Foreign Marriage Act 1969.
[23]Special Marriage Act 1954, s 4(1)(a).

Section 4(1)(b)[24] refers to a party". Twenty-one years should even be the minimum age for all individuals to meet to be eligible to marry under the SMA.

They submitted that procreation and consummating sexual relations are not the sole purpose of the marriage. Instead, it is much more than just the mating of two individuals. A happy marriage is rooted in emotional connection, companionship and commitment. The petitioners finally contended that they had approached the highest court under Art. 32(1)[25] of the constitution vests the citizens the right against their breach of fundamental rights. Hence, it would be highly incorrect to say that they should wait for the parliament to make the necessary legislation for the solemnisation of same-sex marriages, granting marriage equality.

On the other hand, the respondents contended that the court is not the correct forum to approach in this particular case, and it is up to the legislature to make laws regarding the solemnisation of same-sex marriages after deliberation and consultation with all the major stakeholders. Even the approach by the court in ***"Vishakha and others vs the State of Rajasthan"***[26]cannot be undertaken in this case as courts cannot issue guidelines to order the legal recognition of non-heterosexual marriages because doing so would necessitate amending several laws and regulations. They further put forth that this Court should refrain from encroaching upon the domain of formulating laws and policies as it's a function of the legislature and would be an anathema to the doctrine of separation of powers.

Moreover, SMA does not violate Art. 14 and Art 15 of the constitution because the differentiation made between heterosexual and non-heterosexual couples is reasonable because heterosexual couples can procreate. At the same time, the non-heterosexuals can't, considering procreation is an essential aspect of marriage. Also, when the SMA was formulated, the concept of the queer community was not in existence; its objective at that time was to give secular legislation for heterosexual couples to marry regardless of caste, religion etc. Therefore, the act would not be unlawful for being too narrowly inclusive if it excluded non-heterosexual partnerships from its scope. Only when a class of heterosexuals is excluded explicitly by statute will the SMA be underinclusive.

[24]Special Marriage Act 1954, s 4(1)(b).
[25]Article 32. Remedies for enforcement of rights conferred by this Part.—(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

[26]Vishaka v. State of Rajasthan, (1997) 6 SCC 241.

Marriage is not a fundamental right, so the state is not obligated to recognise every type of relationship legally. The state only gives recognition to those relationships in which they have legitimate state interests. The respondents submitted that they have a legitimate state interest to recognise heterosexual marriages for the regulation of the societal welfare and the best interests of the child born out of such marriages because the mother and father are both equally crucial for the upbringing and overall development of the child which is not the case in non-heterosexual relationships wherein the child adopted or born out of artificial reproductive technology would feel the absence of either father or mother.[27] The state even gave specific bogus arguments with no backing of evidence that homosexuality could be an acquired trait instead of an innate or intrinsic trait, as well as it is an elite/urban phenomenon.

JUDGMENT

The ruling of the case was disheartening to the queer community as it did not declare the right to marriage as a constitutional guarantee. The judgement discussed several crucial points comprehensively to come to the decision, which went in the favour of the respondents by a ratio of 3:2.

1. There Is No Unqualified Right To Marriage

Marriage is a social institution, and the Constitution does not explicitly define the fundamental marriage right.[28] The petitioners in this particular case are demanding legal recognition to be given to same-sex marriages, which means the right to access a publicly created and administered institution.[29] This cannot be operationalised to the root of the separation of powers given in our constitution. The creation of a legal institution is a function of the state, which they are trying to seek through the agency of the court. At the same time, the minority judgement given by the chief justice stressed that marriage is an unqualified right and should be accorded as a fundamental freedom to uphold an individual's personal choice and dignity.

2. Right to "Union" or abiding relationship

[27]Jan Hare, Denise Skinner, "Whose Child Is This?": Determining Legal Status for Lesbian Parents Who Used Assisted Reproductive Technologies [2008] 57(3) JSTOR <https://www.jstor.org/stable/20456799> accessed 10 November 2023.
[28]'Supriyo and the Fundamental Right to Marry' (*Centre for Law & Policy Research,* 6 November 2023) <https://clpr.org.in/blog/supriyo-and-the-fundamental-right-to-marry/#:~:text=On%20October%2017%2C%202023%2C%20the> accessed 25 November 2023.
[29]ibid 16.

The minority judgement the Chief Justice gave emphasised that there is a right to freedom to enter into a union under Art. 19(1)(c) and Art. 21 spelt out in cases of **"*Navtej Singh Johar vs Union of India*"[30], *"Justice K.S. Puttaswamy (Retd) vs Union Of India"*[31], *"National Legal Services Authority (NALSA) vs Union of India"*[32]** etc. It is the person's choice to choose his marital partner. The essence here is that the rule of positive postulates of fundamental rights entails a positive obligation on the state to give legal recognition to such relationships in the form of marriage. This right to abiding relationship here flows out of the fundamental right to privacy, autonomy, and dignity under Art. 21. The majority ruling while discarding the positive postulates theory. This theory was widely rejected in the case of the All India Bank Employees Association vs. the National Industrial Tribunal. It was held that one right can't lead to other rights as "by a series of ever-expanding concentric circles in the shape of rights concomitant to concomitant rights and so on, lead to an almost grotesque result". Henceforth, the state is not obligated to give a right to a union or an abiding relationship under Art. 19(1)(c) and Art. 21. Also, claiming to recognise an institution of civil right to marriage through judicial diktat has intractable difficulties and should be comprehensively deliberated by the state.

3. Interpretation of the SMA Act

The SMA Act came way before the growing emergence of the queer community. Its objective at the time of establishment was to provide a secular law for the marriage of heterosexual communities irrespective of caste, religion, etc. It cannot be said that this act purposely excluded non-heterosexual couples because, at that time, homosexuality was criminalised under Sec. 377 of IPC. It was established to meet the exigency of regulation of marriages between interfaith couples. The petitioners, in this case, reiterated that SMA uses heteronormative language across its various provisions, thus creating an unreasonable and arbitrary classification and hence, should be interpreted in a gender-neutral manner inclusive of the queer community.

The ruling, however, stressed that under-inclusion does not amount to discrimination, as per the case of "N Venugopala Ravi Varma Rajah vs ***Union of India*."[33]** This case observed that "the mere fact that the law could have been extended to another class of persons who

[30] ibid 13.
[31] K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1.
[32] National Legal Services Authority v. Union of India, (2014) 5 SCC 438.
[33] N. Venugopala Ravi Varma Rajah v. Union of India, (1969) 1 SCC 681.

have certain characteristics similar to a section of the Hindus but have not been so included is not a ground striking down the law". The court gave the similar interpretation in the case of ***"Ajoy Kumar Banerjee& Ors. Vs. Union of India & Ors"[34].,*** where it was held that "Article 14 does not prevent the legislature from introducing a reform, i.e. by applying the legislation to some institutions or objects or areas only according to the exigency of the situation and further classification of selection can be sustained on historical reasons or reasons of administrative exigency or piecemeal method of introducing reforms. The law need not apply to all the persons in the sense of having a universal application to all persons."

These judgements have emphasised that discrimination cannot be defined as a result of exclusion or underinclusion in and of itself unless the excluded group of individuals, objects, or subjects is the focus of the law and shares the same class (the class that is included). Hence, the challenge to the unconstitutionality of the act is thrashed.

4. The court is not the forum to decide

It was stressed that the court is not the forum to decide as it is a function of the legislature to make or amend laws regulating marriage to include same-sex marriages. Entitlement to legal recognition of a social institution like marriage can only be done through an enacted law by the parliament, as it would require comprehensive deliberation and interpretation. Thecourt cannot mandate the creation of such a regulatory framework resulting in legal recognition. The majority agreed with the minority bench to make a committee by the union government to delve into the nitty-gritty regarding the requirements of the queer community. The committee shall consist of members of the queer community as well to undertake a comprehensive examination of all the relevant factors like adoption, succession, employment benefits, material benefits unconnected with matrimonial matters etc.

IS THE RIGHT TO MARRY PROVIDED IN THE CONSTITUTION?

To have a better understanding of the demands of the LGBTQ community in India to legalise same-sex marriages, we need to analyse the right to marry in the Indian Constitution. No fundamental right exists in the Constitution, which explicitly says a person can choose to match anyone. Still, there are some articles in our constitution through which we can infer that it is a person's choice to marry, and no one can stop them from doing so. The judiciary has acknowledged the freedom of choice in marriageas a fundamental feature of Article 21 of

[34]Ajoy Kumar Banerjee & Ors. v. Union of India & Ors. 1984 (3) SCR 252.

the Indian constitution, which discusses the right to life and liberty.[35]The core element of marriage is choosing a person to be together for their whole life as a unit, and this is backed by Article 19(1)(c) of the constitution, which talks about the right to form a union or association. It also includes the right to choose a person or to associate with a partner of their own choice, which means that the right to marriage can be interpreted from the Constitution.[36]

Marriage is the right of individuals to live together and can be traced from constitutional ethics and values. Article 21 says that all citizens have the right to personal liberty, and the right to choose a partner for marriage is also an intrinsic part of your liberty. Even if there is no explicit right present in our country but then also people of different communities and sexual identities, like LGBTQ, should be given the right to marry according to their own choice. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights mention the right to marry. [37]The Indian judiciary has recognised the right to marry to be an essential part of the personal liberty of a person in the case of ***Lata Singh v. State of U. P***[38], wherein the Supreme Court ruled that "a person who is not a minor has the right to marry whomever they desire". Later, in ***Shakti Vahini v. Union of India***[39], it was again stated that two adults, consensually choosing each other as their life partner, is in the exercise of their freedom of choice and expression under Article 21 and Article 19 of the constitution.

Therefore, the freedom of choice in matters relating to the pursuit of happiness is intrinsic to an individual's liberty, and the right to choose a partner is also a part of your liberty.The right to marry is universal and should be available to everyone, regardless of gender. As we have seen, various courts across the country have interpreted the right to marry as an integral part of the right to life under Article 21; therefore, it is high time marriage should not be considered a union of a Male, and a Female and same-sex marriages in India should also beprovided legal recognition. This need of society can be fulfilled in two ways, i.e., we can amend the laws which govern the intricacies of marriage to make them gender-

[35] 'Right to Privacy a Fundamental Right, Says Supreme Court in Unanimous Verdict' (*The Wire*24 August 2017) <https://thewire.in/law/supreme-court-aadhaar-right-to-privacy> accessed 25 November 2023.
[36]Livemint, 'Same-Sex Marriage Verdict: SC Refuses to Give Marriage Equality to LGBTQIA+' (*mint*17 October 2023) <https://www.livemint.com/news/samesex-marriage-verdict-live-updates-supreme-court-verdict-lgbtqia-special-marriage-act-cji-chandrachud-11697505822651.html> accessed 1 December 2023.
[37]CCLA, 'Summary: International Covenant on Civil and Political Rights (Iccpr)' (*CCLA*27 October 2015) <https://ccla.org/privacy/surveillance-and-privacy/summary-international-covenant-on-civil-and-political-rights-iccpr/> accessed 1 December 2023.
[38] Lata Singh v. State of U.P., (2006) 5 SCC 475.
[39]Shakti Vahini v. Union of India, (2018) 7 SCC 192.

neutral, and the Legislature can also develop a new law which recognises and regulates same-sex marriages in our country.

The intricacies related to article 21 were majorly discussed in the landmark case of ***"Justice KS Puttaswamy (retd) and another v. Union of India and others",***[40]which solved the issues related to the Right to Privacy. In this case, the constitution bench of 9 judges of the Supreme Court discussed the question of a person's choice. It stated that "the Right to Privacy mainly covers three aspects, which are (i) privacy that involves the person, (ii) informational privacy and (iii) privacy of choice, which protects an individual's autonomy over fundamental personal choices." [41]The court also stated that Privacy is an integral part of a person's life, and his ability to make choices and take decisions in matters related to his personal life is protected by Article 21 of the Indian constitution. It was also stated that Privacy includes the purity of family life, marriage, having a child or procreation and sexual orientation. If the government is not giving these rights, which are an integral part of a person in our country, then it is an indirect oppression that is taking place in the LGBTQ community.

As has already been settled in the case of **"Navtej Singh Johar"**[42], Article 15, which states that discrimination based on sex is unconstitutional,also includes sexual orientation or sexual identity of a person. This means that the state discriminates against the LGBTQ community based on sexual identity, which is invalid and unconstitutional according to Article 15 of the Indian Constitution. Even after so many years since the 2018 judgement, our government is not ready to provide the right to marry to same-sex couples. The judiciary's stance is that they don't have the power to make laws, as seen in the recent case of Supriyo v. Union of India. They keep on shifting the burden on the Legislature, which leads to a waste of time and keeps the LGBTQ community in a disrupted state.The Supreme Court also upheld the Right to Marry in the landmark case of "***Shafin Jahan v. Asokan K.M[43]",***also known as the Hadiya Case 2018. In this case, the validity of Hadiya's marriage was challenged, and the court held that a person has the complete right to choose his/her partner as it is a part of her liberty. No person should challenge this right to marry as it is protected by Article 21 of the Indian constitution.

The population of the LGBTQ community has increased in India, and now they form a considerable amount of population in our country. The LGBTQ community is as much a

[40]ibid 33.
[41]ibid 33.
[42] ibid 13.
[43] Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368.

part of this country as the heterosexual population is and deserves the same rights as granted to a citizen. They have waited long enough to get the recognition or acceptance that they deserve from society. They also desire the legal system of our countryto give them the identity and existence that a human deserves. It is essential to note that Legal Reforms in themselves are not sufficient to solve the issues of the LGBTQ community. Still, we as a society should give them the space and recognition that they need, which includes same-sex relationships.

To conclude the argument, I must say that the Constitution provides a fundamental right to marry, not explicitly. Still, it can be interpreted through the help of many landmark judicial pronouncements.But this right is restricted to the marriage of a man and a woman, and we cannot say that same-sex marriages are also protected under the Indian constitution. The laws formulated by the parliament and the rights inserted in the constitution show the government's intent for that period. Then, marriage was considered to be a sacrament union of a man and a woman and the laws were made to regulate the marriages of heterosexual couplesand not non-heterosexual couples. With the recent changes in society,we can see that homosexuality was decriminalised in 2018, and now, non-heterosexual couples also deserve the right to marry. For that, we don't have any specific law made by the parliament. So, to legalisesame-sex marriages in India, the parliament has to develop a new law, and it is not the judiciary's authority to bring a law which will legalise same-sex marriages; still, the judiciary should facilitate the making of the law.[44]

FUTURE IMPLICATIONS OF THE RECENT JUDGEMENT

This judgement came as a disappointment to the queer community wherein the judiciary denied to recognise same-sex relationships. The ruling upheld that equality and non-discrimination are fundamental foundational rights of the LGBTQ community. They should not be subjected to any violence or threat. They should have an unequivocal right to cohabit, the right to choose their partner and enjoy physical intimacy however denied to give legal status or recognition to queer couples in the form of marriage. They gave the reasoning behind their refusal that the court is not the appropriate forum to recognise an institution like marriage as it would require to make a statute. This reasoning by the court is flawed and

[44]melissaann.evans, 'The Need for Independent Judges and a Free Press in a Democracy' (*www.unodc.org*2021) <https://www.unodc.org/dohadeclaration/en/news/2021/05/the-need-for-independent-judges-and-a-free-press-in-a-democracy.html> accessed 2 November 2023.

violates the fundamental rights of the queer community, as highlighted by the minority judgement.

In many previous instances, the court has given guidelines to the requisite government bodies to protect and uphold the constitutional provisions and fundamental rights of the people. We need to analyse cases like "Vishaka and others vs State of Rajasthan "and "NALSA vs Union of India",[45] where the court gave directions without statutory stipulations.The root or the source of the guidelines in all these judgements was, in essence, to protect Article 21 of the constitution, as we have demonstrated constructively above that the right to marry is an integral part of Article 21. Henceforth, the current judgement failed to uphold theconstitutional ethos of our country and further alienated the LGBTQ community from the spectrum of society.LGBTQ community want legal recognition in the form of marriage because many benefits flowing out of marriage from the state are provided to married couples, and they are bereft of that.

Keeping them alienated from these benefits discriminates against them based on sexual orientation. For example – Adoption can only be done by a married couple and not by a queer couple. Queer couples can adopt a child as a single parent and not as a couple together, and after the death of the parent, that child goes to a relative. Now, imagine the couple raising the child with their whole heart and compassion. Still, after the death of the official adoptive parent,it would go to a relative instead of the other unofficial parent. This is so discriminatory against them and calls for urgent attention.

Similarly, there are other employment benefits like gratuity, provident funds, etc., and matters like succession, matrimonial benefits, etc., which only benefit the partner in a heterosexual marriage.

The minority judgement given by the Chief Justice rightly points to the violation of the core fundamental rights of the bereft community and asks for the recognition of same-sex marriages; however, the majority judgement discarding the court as the correct forum to recognise such marriages pains our hearts. Judicial review is an essential function of the court, and it is always the court that can correct the injustice because its primary function is to protect the people's fundamental rights. Notably, the majority bench concurred with the minority bench to make a high-powered committee to look into the requirements of the

[45]ibid 34.

LGBTQ community. However, the alienation of the LGBTQ community by not granting them the right to marriage and the benefits flowing out of it continues and asks for a prompt resolution. It is rightly pointed out.

COMPARATIVE ANALYSIS OF LEGAL FRAMEWORKS FOR SAME-SEX MARRIAGE IN VARIOUS COUNTRIES AND IMPACT ON INDIA.

Around 35 countries in the world recognise same-sex marriages, and the acceptance is increasing day by day as the awareness related to LGBTQ rights is reaching every corner of the world. These global trends can influence a country like India if the government can analyse the reasoning used by the Legal systems of other countries.

If we take the example of the United States, same-sex marriage was legalised on June 26, 2015, in the case of "Obergefell v. Hodges",[46]where the US Supreme Court pronounced the right of same-sex couples to marry. This became a landmark judgement worldwide as a country like the US, a global power, gave this decision a trend to be followed by other countries. The US also has the "Respect for Marriage Act", which offers the justification for same-sex marriages. Even if we take a look at Europe, many countries have accepted same-sex marriages, like Finland, Switzerland, Spain, Norway, etc, and other countries in Europe are also in the line to legalise same-sex marriages and recognise the rights of the LGBTQ community.

Let's take Russia as an example and the situation present. This is different from the US and Europe because, in Russia, the Government is opposed to the idea of same-sex relationships and has also banned these types of relationships. The authorities have also tortured and detained many of these people who are suspected of being from the LGBTQ community.[47] Russian Government do not recognise the concept of same-sex relationships, and legalising marriages is close to impossible in the current scenario. The laws and legal systems regarding same-sex relationships vary significantly in different countries, with societies becoming more accepting of same-sex relationships and offering different levels of recognition, such as partnerships, civil unions, and full-fledged marriages.

[46] Obergefell v. Hodges, 2015 SCC OnLine US SC 6.

[47]Meyer C, 'Russian Supreme Court Declares LGBT Movement an Extremist Organization' (*www.asisonline.org*4 December 2023) <https://www.asisonline.org/security-management-magazine/latest-news/today-in-security/2023/december/russia-lgbtq-extremist/> accessed 5 December 2023.

The situation in Western nations is quite good when we talk about the recognition of same-sex marriages because they consider every type of love as the same, and countries in Europe have also accepted same-sex relationships by providing them with the rights that an individual deserves. The situation in South Asia is terrible in terms of legalising same-sex marriages, and there are countries where these communities are not even recognised[48].

The recent global trends that have been seen worldwide are promoting LGBTQ rights and the recognition of same-sex marriages in the agreements of international organisations and international conventions like the "Convention on Human Rights by the United Nations". International Organisations support these communities and extend their hand to protect their rights.

Every country has a legal framework according to its society and the traditions and values the people of that country have. As we know, India has a very different set of culture and values from the other nations, so the laws that would be made will be according to the country's majority's will, values and traditions. If we talk about marriage, we know that it is considered a sacrament union between a man and a woman, and it is regarded as the base or foundation of society, so legalising same-sex marriages will require much discussion by the government bodies to make a new law.[49] With the recent judgement of "Supriyo v. Union of India", we can say that for same-sex marriages to be legalised in India, it needs an ample amount of consideration from the Legislature as the government has to keep in mind the consequences of legalising these types of marriages as the people of India think differently concerning these marriages and authorities should keep in mind that we cannot break or oppose our culture or tradition by making a new law for legalising these marriages. At the same time, the community's fundamental rights cannot be ignored and should be deliberated constructively by the high-powered committee formed by the court's judgement.

Legalising Same-sex marriages will not be an easy deal for the Government, and according to the present situation, our country is well aware of these communities. We have already legalised homosexuality way back in 2018, so the government needs to bring the new

[48] Gubbala S and Miner W, 'Across Asia, Views of Same-Sex Marriage Vary Widely' (*Pew Research Center*27 November 2023) <https://www.pewresearch.org/short-reads/2023/11/27/across-asia-views-of-same-sex-marriage-vary-widely/>accessed 5 December 2023.

[49]Mondal I, 'Hindu Marriage Is a Contract or a Religious Sacrament?' (*legalserviceindia.com*) <https://www.legalserviceindia.com/legal/article-5879-hindu-marriage-is-a-contract-or-a-religious-sacrament-.html> accessed 5 December 2023.

law as quickly as they can. The things that the Legislature of our country should keep in mind is that in legalising these marriages, we cannot just oppose the views of the majority and cannot harm our prestigious culture and traditions. We cannot just do what other countries are doing; we need to analyse our country's situation to formulate new laws. Recognising same-sex marriages in India would be a massive move for the country, too, and will have a significant impact across the world.

CONCLUSION

This article enquired about the history of the LGBTQ community in India and their "Right to Marry" after the recent judgement of Supriyo v. Union of India. This article was an in-depth analysis of the situation of same-sex marriages in India and how the currentverdict is violative of their fundamental rights. The recent judgement failed to fulfil the expectations of the LGBTQ community by not giving them the "Right to Marry", which is an integral part of Art 19 and Art. 21 of the constitution, even though there is no fundamental right as such given explicitly in the constitution.

The future course should be to give further deliberation to the minority judgement given in this case by the honourable Chief Justice and Justice Sanjay Kishan Kaul, which rightly recognised the "Right to marry" of same-sex couples as their essential right. It should be rightly noted that the court could have passed guidelines to protect the fundamental rights of the LGBTQ community here, which it has done in previous instances. Giving the right to marry to same-sex couples would require many changes to several laws and regulations. Still, the legislature should deliberate upon that constructively to include same-sex couples into its ambit so that they are included in the spectrum of society entirely. The examples of recognition of same-sex marriages by different countries should be analysed, and see how they have included them in their arena and made it a reality. The judgement, although rightly, recommended the creation of a high-powered committee to look into the community's requirements. However, it has to constructively look at how the community's fundamental rights can be protected while accommodating them in our cultural setup.

Legalising same-sex marriages in a country like India would be challenging work as we know that the culture, traditions and values of our country will be a problem as we know they are inculcated in the minds of the people so heavily that they are not prone to changes. But the lawmaker needs to understand that if they do not give the right to marry to the LGBTQ

community, then it will oppose their past judgement and will violate their Fundamental Rights provided under the constitution. The government should not go in contravention of our Constitution as it is the only guiding authority in our country. The future of the LGBTQ community is in the hands of the legislature, and they should take care of it as the judiciary failed on its part.