THE NOVEL FACETS OF NON-HETEROSEXUAL UNION: A CASE COMMENT ON SUPRIYA CHAKRABORTY AND ANOTHER V. UNION OF INDIA

***Gouri C V**

ABSTRACT

This case comment delves into the landmark judgment of the Hon'ble Supreme Court of India in the case of Supriya Chakraborty and Another v. Union of India, which discusses the Constitutional Rights of homosexual couples to marry. Firstly, the background of the case is discussed. The comment further highlights the key submissions made by the petitioners and the respondents.

The analysis of the judgment explores various facets, including the recognition of queerness as innate and natural, the fluidity of the institution of marriage, and the challenges associated with amending existing laws like the Special Marriage Act. The judgment also discusses the implications on Fundamental Rights, such as the Right to Freedom of Expression, Association, and Privacy, as well as the Right of transgender persons to Marry and the Right of queer persons to Adopt.

In conclusion, the case comment underscores the significance of this judgment in reshaping the gender jurisprudence of the Indian judiciary. It recognizes the delicate balance between the judiciary and the legislature while reaffirming constitutional supremacy. The judgment fosters a moral framework for recognizing non-heterosexual relationships and calls for parliamentary action to address legal changes. It is seen as a pivotal step in challenging societal stereotypes and promoting equality for the queer community. The potential impact on other statutes related to gender and marriage is also highlighted, indicating the far-reaching implications of this judgment.

*3rd Year, B.A. L.LB., Kerala Law Academy Law College, Kerala

I. INTRODUCTION

After the most heated discussions and debates across socio-legal arena, the Hon'ble Supreme Court of India has recently discussed the Constitutional Right of Homosexual couples to engage in the civic institution of marriage in the case of Supriya Chakraborty and Another v. Union of India[1].The judgement is wider in scope and therefore requires and in-depth analysis.

II. BACKGROUND

In the case of Navtej Singh Johar v. Union of India[2], the Apex Court had decriminalized Section 377 of IPC and ruled that classification based on 'sexual orientation' is unreasonable since it is an 'intrinsic and core trait'. Article 15 was also found to include sexual orientation, granting LGBTQIA+ community members constitutional rights like the freedom to choose partners, sexual fulfilment, equal citizenship, and protection from discrimination.

However, from biological family to societal platforms queer community face economic, social and political oppression. Even the state provided service are sticking on to strict gender binaries and often queer people are misgendered in public. In the present petition the redressal was sought not for these invisible social oppressions but rather against the visible discrimination by state machineries by excluding queer community from the civic institution of marriage. They seek for equality in legal recognition of marital status on par with the heterosexual community.

III. SUBMISSIONS MADE BY THE PARTIES

a. SUBMISSIONS OF PETITIONERS

Statutory recognition of Marriage was argued to be simply a consequence of the court's existing jurisprudence of recognition of the right to dignity, equality and privacy of queer community.[3]

It was submitted that the provisions of Special Marriage Act, 1954 (herein referred to as SMA) violates Article 14,15,19 and 21. As of now, the provisions of SMA does not encapsulate queer couples. Therefore, the terms 'husband' and 'wife' were requested to be substituted with the term 'spouse'. Moreover, a gender specific term

[1] Supriya Chakraborthy v Union of India, WP (Civil) No. 1011 of 2022.
[2] Navtej Singh Johar v Union of India, (2018) 10 S.C.C. 1.
[3] Submission made by learned senior counsel, Adv Mukul Rohatgi.

was used nowhere in Section 4 which specifies the conditions for solemnisation of marriage. Schedule II, III and IV must also be restructured in a gender-neutral manner. Foreign Marriage Act 1969, Citizenship Act 1955, General Clauses Act 1977 and Juvenile Justice (Care and Protection of Children) Act 2015 should also be read in consonance with the updated construction. The office memorandum issued by Central Adoption Resource Authority in 2022[4] which prevents same sex couples and gender non-conforming couples from availing of joint adoption was also questioned. Violation of Article 14 was pointed out on the ground of denial of many other rights under welfare and beneficial legislations and manifest arbitrariness in the unreasonable classification on the basis of sexual orientation. Similarly, discrimination on the basis of sexual orientation and sex of the partner violates Article 15 of the constitution. It was argued that 'Freedom to Choose a Partner' cover the term 'expression' 'association or union' and 'reside and settle' in Article 19. [5] Sexuality, Gender Expression and Marriage are forms of expression. Right to Intimate Association is protected by Article 19(1)(c).[6] Article 21 is violated by way of deprivation of dignity and decisional autonomy. [7]

By denying the Right to Marry they are being deprived of joint tax benefits, right of surrogacy, adoption etc. which consequently denounces them from enjoying a meaningful family life.[8] Violence from natal family, societal perception, forced conversion therapies and unscientific gender normalising surgeries can be reduced significantly by recognising queer marriages. Our country upholds supremacy of constitution and therefore the court is empowered to review the statutory provisions. Indian Parliament is merely a creature of the Constitution and hence this intervention would not amount to judicial legislation.[9] As observed by Deborah Hellman, the ultimate result of exclusion of LGBTQIA+ community from the popular social institution of marriage would be 'demeaning'.[10]

b. SUBMISSIONS OF THE RESPONDENTS

[4] CARAICA013/1/2022Administration; "CARA Circular".
[5] Union of India v Naveen Jindal, (2004) 2 S.C.C 510.
[6] Reliance was placed on Griswold v. Connecticut, 381 U.S. 479 (1965).
[7] Reliance was placed on K.S. Puttaswamy v Union of India, (2017) 10 S.C.C. 1; Navtej Singh Johar v Union of India, (2018) 10 S.C.C. 1; National Legal Services Authority v Union of India, (2014) 5 S.C.C. 438; and Deepika Singh v Central Administrative Tribunal, 2022 SCC OnLine S.C. 108.
[8] Submission made by Adv Anand Grover.
[9] Submission made by Adv Menaka Guruswamy.
[10]Deborah Hellman, *Discrimination and Social Meaning*, Social Science research Network (Oct 29, 2023 06:30 PM) Discrimination and Social Meaning by Deborah Hellman :: SSRN .

The learned Attorney General Adv Venkataramani primarily submitted that marriage is a union between heterosexuals and procreation is an essential aspect. The purpose of SMA is recognition of marriage of heterosexual couples alone. There is no legislative vacuum in the issue and it is up to the parliament to legislate on the matter after engaging the opinion of all stakeholders. Learned senior counsel Adv Kapil Sibal relied on decisions of South African Supreme Court[11] and United States Supreme Court[12] which upheld the importance of social debate and public discourse on the matter of recognising right to marry. Court's interruption in the matter would be anathema to separation of powers.

The principle of equality does not postulate uniformity.[13] Right to Marry cannot be read with the term 'expression' and 'union' under Article 19. Further Article 21 cannot be considered infringed because marriage is a public institution and falls in the outer most zone of privacy.[14] Article 21 provides Right to Choose a Partner. But legislative recognition of such a choice is not a fundamental right. Moreover, Right to Marry cannot be traced to Right to Privacy. However, law merely regulated unions which were socio-historically recognised. Giving legal sanctity to queer marriages is a polycentric issue which cannot be decided through a judicial verdict.

Children are a matter of huge concern while recognising this novel social institution.[15] Article 21 guarantees to every child right to best upbringing. A child born through any of the new conceiving techniques is finally a product of hetero sexual combination and therefore they naturally seek out a family environment which is comparable to their birth family. The scheme of laws relating to adoption and surrogacy if amended to encapsulate the new community would affect the best interest of child. [16]

A judicial sanctioned legal recognition of non-heterosexual unions was humbly criticised as an act similar to colonial top-down imposition of morality and against democratic voices.[17] Since there is no legislative vacuum Court cannot intervene on the matter.

[11] Minister of Home Affairs v Fourie, (2006) 1 S.A. 524.
[12] Obergefell v Hodges, Director, Department of Health, 576 U.S. 644 (2015).
[13] *supra* Note 1, at 60 ¶ 46 (b).
[14] K S Puttaswamy v Union of India, A.I.R. 2017 S.C. 4161.
[15] Submission made by Adv Aiswarya Bhati.
[16] *supra* Note 1, at 59 ¶ 45 (d).
[17] Submission made by Adv J Sai Deepak.

IV. ANALYSIS OF THE JUDGMENT

At the outset the Hon'ble Supreme Court affirmed its authority to hear the case under Article 32 and declared that it is empowered to issue directions for the enforcement of fundamental rights even in the absence of a law which was impugned before it.[18]

a. INDIANNESS OF QUEER IDENTITY

It is already settled that queerness is innate and natural.[19] The Hon'ble Court rejected the respondent's argument that gender queerness is not native to India and enlisted the various regional terms[20] to illuminate the wide diaspora of queer community across India and thereby rejected the argument that it is urban and elitist. [21] These identities exist among adivasis, dalits, and many other marginalised communities[22] even though these persons barely identify themselves with the technical labels of queerness.[23]

Pre- colonial society used to accept queerness as a part of their ordinary day to day life similar to cisgenders. The Victorian Morality is the source of the current homophobic attitude and is not necessarily a natural successor of our past. It was through Criminal Tribes Act[24] that the British regulated transgender persons by providing harsh penalties if they dressed like a woman or danced or played music. Practices like these injected homophobia and lavender marriages to our consciousness. Thus, the idea of homosexuality and gender minorities were identified to be as Indian as their fellow cisgender citizens.

b. FACETS OF THE INSTITUTION OF MARRIAGE

The Hon'ble Supreme Court refused to provide a universal and general definition to marriage. The arguments of respondent that the very conception of marriage does not permit queer marriages were rejected since it is the prerogative of each couple to define the institution. Moreover, the inability of queer couples to procreate is not

[18] *Supra* Note 1, at 76 ¶ 72.
[19] *Supra* Note 2.
[20] Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (The University of Chicago Press, 2005).
[21] *Supra* Note 1, at 84 ¶ 86.
[22] Satyanarayan Pattnaik, *'Two Orissa girls defy norms, get married'* (Times of India, 5 November 2006), India Today 'UP: In love for 7 years, two women divorce husbands to marry each other' (India Today, 1 January 2019), Paul Boyce and Rohit K Dasgupta, '*Utopia or Elsewhere: Queer Modernities in Small Town West Bengal*' in Tereza Kuldova and Mathew A Varghese (eds.), *Urban Utopias* (Palgrave Macmillan, 2017).
[23] Maya Sharma, *Loving Women: Being Lesbian in Unprivileged India* (Yoda Press, 2006).
[24] Criminal Tribes Act, 1871.

a barrier to marriage just as it does not prevent heterosexual couples who are unable or choose not to procreate.[25]

There are three parties to a marriage-two consenting parties and an approving state.[26] The non recognition of non-heterosexual marriages denies the petitioners social and marital benefits which flow from marriage. The rights guaranteed by Constitution would remain parchment rights if the conditions for the effective exercise of them are not created.[27] The Apex Court held erroneous the argument of Learned Solicitor General stating that the state regulates relationships in the form of marriage solely because they result in procreation. Even though marriage is an intimate zone of privacy, the withdrawal of state from domestic sphere leaves the disadvantaged party unprotected since classifying certain actions as being private has different connotations for those with and without power.[28] However the court refused to recognise Right to Marry as a Fundamental Right yet many of our constitutional values including those in Article 21 may comprehend the values which a marital relationship entails.[29]

c. CHALLENGES TO THE SPECIAL MARRIAGE ACT, 1954

SMA is closely linked to other personal and non-personal laws of succession and therefore in order to include non-heterosexual couples the whole statutes need to be effectively restructured. If in the present petition the court holds the provisions of SMA unconstitutional it would take India back to the era when it was clothed in social inequality and religious intolerance and would push the courts to choose between eradicating one form of discrimination and prejudice at the cost of permitting another.[30] If the court extensively read words into numerous provisions of SMA and other allied laws, it would be a judicial legislation. The court admitted its limitations to grand a remedy since the parliament has better access to varied sources of information and represents in itself a diversity of viewpoints in the polity. Question on Foreign Marriage Act was also left to parliament to decide. However, it accordingly clarified that the Right of a citizen of India to enter into

[25] *Supra* Note 1, at 100 ¶ 107.
[26] Goodridge v Department of Public Health, 798 N.E.2d 941 (Mass. 20003).
[27] *Supra* Note 1, at 126 ¶ 160.
[28] *Supra* Note 1, at 131 ¶ 169.
[29] *Supra* Note 1, at 140 ¶ 185.
[30] *Supra* Note 1, at 153 ¶ 207.

abiding union with a foreign citizen of same sex is preserved.[31] The natal family as well as the family created with one's life partner form the fundamental groups of society. [32] For the enjoyment of such relationships state recognition of such relations is necessary. The court recognised the 'Right to enter into a Union' as inclusive of 'Right to Associate with a Partner of one's Choice', according recognition to the association and no denial of access to basic goods and services for self-development.

d. IMPLICATIONS ON FUNDAMENTAL RIGHTS

The hon'ble Supreme Court, relying upon NALSA[33] judgement recognised the manifestation of complex identities of persons through the expression of their sexual identity, choice of partner and the expression of sexual desire to a consenting party as a form of expression protected under Article 19(1)(a).[34] It was further stated that Article 19(1)(c) protects the freedom to engage in all forms of association to realize the forms of expression protected under clause (a). Relying upon Robert v United States Jaycees[35] and Kenneth L Karst[36] Freedom of Intimate Association was recognised. State could directly infringe upon this freedom when it fails to create sufficient space to exercise that freedom. Further, the 'Right to enter into a Union' is also grounded in Article 19(1)(e) because the term reside signifies ability to build a life in a place of their choosing which is uniquely significant to prosecuted queer groups who are forced to migrate from their hometowns. Secondly, the term 'settle down' includes building a life by entering into a lasting relationship with the life partner.

Queer chosen families fulfil innate human needs and decisional autonomy, rooted in Article 21. Depriving partner choice infringes on dignity and privacy rights. Mental healthcare access for queer individuals is also protected under Section 18 of Mental Healthcare Act and Article 21, ensuring non-discrimination.

The term conscience in Article 25 was read in a wider perspective as the right to judge the moral quality of the actions of their lives which includes decision on who their life partner will be and the manner in which they will build their life together.

[31] *Supra* Note 1, at 157 ¶ 212.
[32] The Preamble of the United Nations Convention on the Rights of the Child.
[33] NALSA v Union of India, (2014) 5 S.C.C. 438.
[34] *Supra* Note 1, at 161 ¶ 219.
[35] Robert v United States Jaycees, 468 U.S 609 (1984).
[36] Kenneth L Karst, *The Freedom of Intimate Association*, (1980) The Yale Law Journal, Vol. 89 (4) 624-692.

Among the exceptions given to Article 25 the court reiterated that it speaks of constitutional morality not societal morality. [37]

Submission of the Solicitor General that Article 15 does not include sexual orientation because it is not an ascriptive characteristic was rejected. Further it was held that although right to enter into a union is not absolute like other fundamental rights, state restriction based on identities mentioned in Article 15 would be unconstitutional.

e. RIGHT OF TRANSGENDER PERSONS TO MARRY

The Parliament enacted Transgender Persons (Protection of Rights) Act, 2019 to prohibit discrimination against Transgender Persons. However, the court clarified that the legislation applies only to persons with a genderqueer or transgender identity and not to persons whose sexual orientation is not heterosexual. Section 2(k) of the Act does not refer to sexual orientation but to gender identity. Therefore, the argument of Union of India that the above-mentioned act extends to all the petitioners was rejected. It was held that since a Transgender person can be in a heterosexual relationship like a cis male or cis female, a union between a transwoman and a transman, or transwoman and a cisman, or a transman and a ciswoman can be registered under marriage laws. It is not only applicable to biological men and women.

f. RIGHT OF QUEER PERSONS TO ADOPT

The Central Adoption Resource Authority (herein referred to as CARA) has issued an office memorandum prescribing eligibility criteria for prospective adoptive parents. Regulations 5(2) and 5(3) elucidates that only married couples can be adoptive parents and such couples must be in at least two years of stable marital relationship. That is while a person can in their individual capacity be a prospective parent, they cannot adopt a child together with their partner if they are not married. The court observed that the new regulations are ultra vires the provisions of Juvenile Justice Act. Section 57(2) of Juvenile Justice Act was read down as the term ‘in case of a couple’ and ‘spouse’ indicates that adoption by a married couple is not a statutory requirement. Further the usage of the phrase ‘stable’ in Regulation 5(3) was held vague and unclear since it creates a legal fiction that all married relationships which have lasted two years automatically qualify a stable

[37] Indian Young Lawyers Assn. v State of Kerala, (2019) 11 S.C.C. 1.

relationship. Thus, Regulation 5(3) was read down to exclude the word 'marital' and the word 'couple' includes both married and unmarried couples.

The Hon'ble Court found CARA regulation's marriage-based classification irrational under Article 14, as unmarried relationships are not inherently unstable. The regulation's aim is child welfare, and denying unmarried couples adoption opportunities contradict this purpose, making it violate Article 14. To allow adoption for queer couples, the court emphasized that assuming good or bad parenting based on sexuality perpetuates Article 15-prohibited stereotypes. The court noted that children in queer families suffer due to the lack of legal recognition, urging the state to sensitize society about queer relationships. The CARA circular's restrictions were found to exceed the Adoption Guidelines and Juvenile Justice Act, violating Article 15, and ultimately allowed unmarried, including queer couples, to jointly adopt.

V. CONCLUSION

The recent judgement has opened a new landscape to the gender jurisprudence of Indian judiciary. By refusing to proceed with a judicial legislation, the court once again reinforced the delicate balancing of power structure and upheld the Constitutional Supremacy. This standing clearly indicates the dominance of democracy over state. Even though an immediate judicial move was not taken to give legal sanction to queer marriages, the court has consciously framed a necessary moral mould where the relationship status of non-heterosexuals is recognised with due respect. The Apex Court clearly stated its reliance on Parliamentary Standing Committee which was promised to be constituted by the Attorney General during hearing to settle the matter within Parliament. The Right of Queer persons was read in terms of Fundamental Rights to ensure their decisional autonomy and dignity. Further their Right to enjoy a Meaningful Life was reinstated by ensuring the opportunity to adopt. The suspension of CARA regulations blowed out conventional ethos on marital stability. Transgender Persons (Protection of Rights) Act, 2019 was also read in a new context to include all heterosexual trans-marriages. The reading that colonial precedents are not a natural successor of our past is an observation of greater gravity.

Hon'ble Justice Sanjay Kishan Kaul broadly agreed to CJI Justice D Y Chandrachud's view and further added a few more aspects related to the historical prevalence of non-heterosexual unions, necessity of recognising civil unions, equal rights to equal love

etc.[38] Hon'ble Justices S Ravindra Bhat[39] and Pamidighantam Sri Narasimha[40] penned a dissenting judgment on the matter.

The implication of the judgment is far beyond mere legal settlement of the matter concerned. The Apex Court through its wide analysis of multiple social perspectives were trying to deduct a scheme of values where gender binaries no longer dominate. Even after decriminalising Section 377 and consequent recognition of homosexual identity the stigmatised exclusion is still prevalent against queer community. To counter these stereotypical thought processes a multi-faceted verdict like this is more suitable as against a mere legal approval of the Rights sought.

However, in my humble opinion, the possibility of reading down the non-heterosexual and trans-heterosexual unions in the context of Dowry Prohibition Act, 1961 and Protection of Women from Domestic Violence Act, 2005 should also have got attention of the bench. Even if an enormous change is required among various statutes to recognise queer marriages it is not an impossible task. The Hon'ble Court could have suggested a framework of amendment or strategy of legislation to bring the matter into reality. To conclude, the amplitude of the current judgement will definitely set a new benchmark for upcoming gender legislations and judicial readings.

[38] *Supra* note 1, at 248.
[39] *Supra* note 1, at 266.
[40] *Supra* note 1, at 354.