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THE ARC OF JUSTICE: - ONGOING JUDICIAL ADVOCACY FOR LGBTQIA+ RIGHTS IN INDIA

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**“The meaning of liberty is – at its core – the ability to do what one wishes to do and be
who one wishes to be, in accordance with law.”**

(The SC in Suprio Case)

INTRODUCTION

The pursuit of justice for LGBTQIA+ individuals in India is an ongoing and dynamic process, reflecting broader societal shifts and the evolving understanding of human rights. For many years, the LGBTQIA+ community faced severe marginalization and discrimination, both legally and socially. However, the landscape of LGBTQIA+ rights in India has undergone significant transformation over the past few decades, marked by a series of landmark legal and judicial interventions. The journey towards equality and acceptance has been long and fraught with challenges, but persistent advocacy and a progressive judiciary have been pivotal in driving change. At the heart of this transformation is the growing recognition of the inherent dignity and equality of LGBTQIA+ persons. Legal advocacy has played a crucial role in challenging discriminatory laws and practices, fostering a more inclusive legal framework that respects the rights of all individuals, regardless of their sexual orientation or gender identity. This advocacy has encompassed a wide range of issues, from decriminalization and anti-discrimination protections to the recognition of diverse gender identities and the right to privacy. Judicial advocacy, on the other hand, has been instrumental in interpreting and expanding constitutional protections to include LGBTQIA+ rights. Courts have increasingly acknowledged the importance of protecting the fundamental rights of LGBTQIA+ individuals, contributing to a more progressive and inclusive legal landscape.

JUDICIAL INTERPRETATIONS: -

1. NAZ FOUNDATION V. GOVERNMENT OF NCT DELHI (2009)¹

The case was brought before the Delhi High Court by Naz Foundation, an NGO working on HIV/AIDS and sexual health, challenging the constitutional validity of **Section 377** of the **Indian Penal Code**. **Section 377** criminalized "carnal intercourse against the order of nature," which was interpreted to include consensual homosexual acts.

Key Issue:

- The primary issue was whether **Section 377** violated the fundamental rights guaranteed under the Constitution of India.

The Delhi High Court, in a landmark decision on July 2, 2009, held that **Section 377**, to the extent it criminalized consensual sexual acts between adults in private, violated **Articles 14, 15, and 21** of the Constitution. The Court held that **Section 377** arbitrarily targeted a specific section of society (the LGBTQ+ community), thus violating the right to equality. The Court found that sexual orientation is a ground analogous to sex and that discrimination based on sexual orientation is not permissible under **Article 15**. The Court emphasized that the right to privacy and dignity are integral to **Article 21**, and criminalizing consensual homosexual acts violated these rights. The Court distinguished between public morality, which can often be influenced by majoritarian views, and constitutional morality, which upholds the principles enshrined in the Constitution, including individual rights and freedoms. The judgment emphasized that constitutional morality should prevail over public morality.

The judgment set a significant legal precedent by recognizing the rights of LGBTQ+ individuals and decriminalizing consensual homosexual acts. It was the first major judicial acknowledgment of LGBTQ+ rights in India. The decision was a crucial step towards achieving equality and non-discrimination for the LGBTQ+ community. It provided legal recognition and protection for consensual same-sex relationships.

It was a landmark judgment in the fight for LGBTQ+ rights in India. By decriminalizing consensual homosexual acts and upholding the fundamental rights to equality, non-discrimination, privacy, and dignity, the judgment significantly advanced the legal and social recognition of LGBTQ+ individuals. Although it faced a temporary setback with the Supreme

¹ 2009 (6) SCC 712.

Court's 2013 reversal, the principles and arguments laid out in this case were instrumental in the eventual decriminalization of homosexuality in India in 2018.

2. SURESH KUMAR KOUSHAL V. NAZ FOUNDATION (2014)²

Following the 2009 decision by the Delhi High Court in **Naz Foundation v. Government of NCT of Delhi**, which decriminalized consensual homosexual acts between adults, several appeals were filed against this decision. The Supreme Court of India heard these appeals, leading to the Suresh Kumar Koushal v. Naz Foundation case.

Key Issue:

- The primary issue was whether the Delhi High Court's decision to decriminalize consensual homosexual acts under **Section 377** of the **Indian Penal Code** was constitutionally valid.

On December 11, 2013, the Supreme Court of India overturned the Delhi High Court's 2009 judgment, effectively reinstating **Section 377** and recriminalizing consensual homosexual acts between adults. The Supreme Court argued that it was not within the judiciary's purview to amend or strike down a law passed by the legislature unless it was clearly unconstitutional. The Court suggested that Parliament, and not the judiciary, was the appropriate forum to decide on the issue. The judgment noted that there had been relatively few prosecutions under **Section 377**, suggesting that this indicated the law was not being misused or enforced arbitrarily against LGBTQ+ individuals. The Court held that **Section 377** did not violate **Articles 14, 15, or 21** of the **Constitution**. It stated that **Section 377** applied equally to all individuals, regardless of their sexual orientation, and thus did not constitute discrimination.

The Supreme Court's decision in **Suresh Kumar Koushal v. Naz Foundation** (2013) had significant and far-reaching implications for LGBTQIA+ rights in India. Below are the key ways in which this decision affected the community. The decision reinstated **Section 377** of the Indian Penal Code, which criminalized "carnal intercourse against the order of nature." This effectively made consensual homosexual acts between adults illegal once again. The reinstatement of **Section 377** created an atmosphere of fear among LGBTQIA+ individuals. Many feared arrest, blackmail, and harassment by law enforcement officials. The judgment emboldened those who opposed LGBTQIA+ rights, leading to increased stigmatization and

² AIR (2014) SC 563.

discrimination. The decision was seen as a violation of the right to privacy, which is part of the fundamental right to life and personal liberty under **Article 21** of the Indian Constitution. By criminalizing consensual sexual acts between adults, the judgment infringed upon the private lives of LGBTQIA+ individuals. The decision contradicted the principles of equality and non-discrimination enshrined in **Articles 14 and 15** of the **Constitution**. It failed to recognize that **Section 377** disproportionately targeted LGBTQIA+ individuals, leading to their unequal treatment under the law. The decision reinforced negative stereotypes and social stigmas associated with homosexuality. It contributed to the marginalization of LGBTQIA+ individuals, affecting their mental health and well-being.

The criminalization of consensual homosexual acts exacerbated mental health issues among LGBTQIA+ individuals, including anxiety, depression, and a sense of isolation. The fear of legal repercussions and societal rejection led to significant psychological distress. The decision was a major setback for LGBTQIA+ advocacy groups and human rights organizations. It undermined years of legal battles and efforts to secure recognition and protection for LGBTQIA+ rights. The judgment hindered policy reforms aimed at protecting LGBTQIA+ rights. It discouraged progressive legislative changes and social initiatives that could have improved the lives of LGBTQIA+ individuals. Despite its negative impact, the Suresh Kumar Koushal decision also galvanized the LGBTQIA+ rights movement in India. Activists, legal experts, and human rights organizations intensified their efforts to challenge the judgment and advocate for the decriminalization of homosexuality.

3. NATIONAL LEGAL SERVICE AUTHORITY (NALSA) V. UNION OF INDIA (2014)³

The case was filed by the National Legal Services Authority (NALSA) seeking legal recognition for transgender individuals as a third gender and protection of their rights under the Constitution of India. The petition aimed to address the discrimination faced by the transgender community in various aspects of life.

Key Issues:

- Whether transgender individuals should be legally recognized as a third gender?

³ AIR (2014) SC 1863.

- Whether the fundamental rights guaranteed under the Constitution of India apply equally to transgender individuals?

Addressing the issues of discrimination, social exclusion, and lack of access to basic rights and services faced by the transgender community.

On April 15, 2014, the Supreme Court of India delivered a landmark judgment recognizing the rights of transgender individuals and affirming their legal status as a third gender. The Court recognized transgender individuals as a third gender, distinct from the binary categories of male and female. This legal recognition allows them to identify as transgender in all official documents, including passports, voter ID cards, and educational certificates. The Court held that transgender persons have the right to self-identify their gender as male, female, or third gender. This decision respects the individual's autonomy over their gender identity. The Court affirmed that transgender individuals are entitled to the full range of fundamental rights guaranteed under the **Indian Constitution**. These include: **Article 14, 15, 16, 19 & 21**. The judgment provided legal recognition and social validation to transgender individuals, acknowledging their existence and rights as equal citizens. This has paved the way for greater social acceptance and inclusion. With legal recognition, transgender individuals now have better access to various services and opportunities, including education, employment, and healthcare. The provision of reservations in educational institutions and public employment aims to address historical disadvantages faced by the community.

The judgment strengthens legal protections against discrimination for transgender individuals. It ensures that they cannot be discriminated against on the basis of their gender identity in various spheres of life, including employment, healthcare, and public services. The directives to the government to implement social welfare schemes and provide healthcare services are crucial for addressing the specific needs of transgender individuals. These measures aim to improve their overall well-being and quality of life. The judgment has empowered transgender individuals to assert their rights and has contributed to raising public awareness about transgender issues. It has encouraged advocacy and activism within the community and among allies.

While the **NALSA** judgment primarily addresses the rights of transgender individuals, its principles and directives have broader implications for the LGBTQIA+ community. The judgment's recognition of the right to self-identify one's gender extends the concept of gender

identity and expression beyond the binary framework. This recognition supports the rights of all individuals within the LGBTQIA+ spectrum to express their gender identity freely. By interpreting **Article 15** to include discrimination based on gender identity, the judgment sets a precedent for challenging discrimination against other LGBTQIA+ individuals. It reinforces the idea that discrimination on the basis of sexual orientation and gender identity is unconstitutional. The judgment's emphasis on the right to live with dignity and autonomy over one's body and identity is a significant affirmation of the rights of LGBTQIA+ individuals. It supports the broader principle that every person has the right to live according to their true identity without fear of stigma or discrimination.

4. JUSTICE K.S. PUTTASWAMY V. UNION OF INDIA (2017)⁴

The case of **Justice K.S. Puttaswamy v. Union of India** arose from a challenge to the constitutional validity of the Aadhaar scheme, which involved the collection and use of biometric data by the government. The petitioners argued that the scheme violated the right to privacy, which was not explicitly mentioned in the Indian Constitution.

Key Issue:

- Whether the right to privacy is a fundamental right under the Indian Constitution?

On August 24, 2017, a nine-judge bench of the Supreme Court unanimously delivered a historic judgment affirming that the right to privacy is a fundamental right under the Indian Constitution. The judgment overruled earlier decisions that did not recognize privacy as a fundamental right. The Court held that the right to privacy is intrinsic to the right to life and personal liberty under **Article 21** and is part of the freedoms guaranteed by **Part III of the Constitution**. This encompasses **Articles 14** (right to equality) and **19** (freedoms of speech, expression, etc.). Privacy was defined broadly to include various aspects such as personal autonomy, bodily integrity, confidentiality, and the right to make personal decisions. It extends to personal data, intimate relationships, and individual choices about one's lifestyle, behavior, and identity.

The Court acknowledged that the right to privacy is not absolute and can be subject to reasonable restrictions. Any invasion of privacy by the state must meet the three-fold requirement:

⁴ AIR (2017) SC 4161.

- ❖ There must be a law in place justifying the encroachment.
- ❖ The law must seek to achieve a legitimate state aim.
- ❖ There must be a rational connection between the objective and the means adopted, ensuring the least restrictive measure is used.

The recognition of privacy as a fundamental right underpins the right of LGBTQIA+ individuals to personal autonomy and dignity. It supports their right to make decisions about their lives, including their sexual orientation and gender identity, free from unwarranted state interference.

“Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the “mainstream”. Yet in a democratic Constitution founded on the Rule of Law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. ... Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lies at the core of the fundamental rights guaranteed by **Articles 14, 15 and 21** of the **Constitution**.”

The broad interpretation of privacy includes protection against discrimination based on sexual orientation and gender identity. This provides a constitutional basis for challenging laws and practices that discriminate against LGBTQIA+ individuals. The judgment’s recognition of informational privacy is significant for LGBTQIA+ individuals, ensuring their personal information, including health and identity details, is protected from unauthorized disclosure and misuse. The privacy judgment sets a precedent for enhancing legal protections for LGBTQIA+ individuals in various aspects of life, including health, employment, and education. It mandates that any state action affecting privacy must be justified by a compelling state interest and must be proportionate.

5. SHAFIN JAHAN V. ASOKAN K. M. (2018)⁵

The case involved a woman named Hadiya (Akhila Ashokan), who converted to Islam and married Shafin Jahan, a Muslim man. Her father, Asokan K. M., challenged the marriage,

⁵ AIR (2018) SC 1136.

claiming that his daughter had been brainwashed and forcefully converted to Islam. The Kerala High Court annulled the marriage, declaring it a case of "love jihad."

Key Issue:

- Whether an adult has the right to marry a person of their choice without interference from family or the state.
- Whether the High Court was correct in annulling the marriage of Hadiya and Shafin Jahan on the grounds of "love jihad."

In **Shafin Jahan v. Asokan K. M.**, the Court observed that absolute faith of an individual to choose a life partner is not in the least affected by matters of faith. The Constitution guarantees to each individual the right freely to practice, profess and propagate religion. Choices of faith and belief as indeed choices in matters of marriage lie within an area where individual autonomy is supreme. The law prescribes conditions for a valid marriage. It provides remedies when relationships run aground. Neither the State nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters.

“The right to marry a person of one's choice is integral to **Article 21 of the Constitution**. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty. Society has no role to play in determining our choice of partners. Intimacies of marriage, including the choices which individuals make on whether or not to marry and on whom to marry, lie outside the control of the State. Courts as upholders of constitutional freedoms must safeguard these freedoms.”

The choice of a partner is indeed considered a fundamental right under **Article 21 of the Indian Constitution**, which guarantees the right to life and personal liberty. This right is integral to personal autonomy and dignity. It allows individuals to make decisions about their intimate relationships and family life without undue interference from the state or society. For LGBTQIA+ individuals, this right is crucial for ensuring equality and freedom in intimate relationships. While judicial rulings have affirmed the importance of this right, ensuring that the right to choose a partner extends to all individuals, regardless of sexual orientation or gender identity, requires ongoing legal reform and societal acceptance.

6. SHAKTI VAHINI V. UNION OF INDIA (2018)⁶

The case was brought before the Supreme Court by an NGO called Shakti Vahini, which sought to address the issue of honor-based violence and the right of individuals, particularly women, to marry of their choice. The petition aimed to address the growing incidents of violence and threats faced by individuals from their families and communities when they chose to marry against societal norms or family expectations.

Key Issue:

- The issue of honor-based violence
- The prevalence of honor killings in India and the role of Khap Panchayats or similar community groups in perpetuating such violence.

The Supreme Court emphasized the need for protecting individuals from honor-based violence and coercion. The Court directed that the police should ensure the safety and protection of individuals facing threats or violence due to their choice of marriage. The Court reaffirmed the right of individuals to choose their own partners and marry without fear of violence or coercion. It underscored that this right is protected under the Constitution as part of personal liberty and autonomy. The Court directed law enforcement agencies to take preventive measures and provide protection to individuals facing threats of violence due to their choice of marriage. This included registering complaints and take action to ensure the safety of the individuals involved. The Court emphasized the need for both preventive and remedial measures to address honor-based violence, including sensitization of law enforcement agencies and ensuring prompt action in cases of reported violence or threats.

The judgment underscored the need for legal and institutional mechanisms to protect individuals from honor-based violence. It reinforced the obligation of law enforcement agencies to ensure the safety of individuals exercising their right to marry. The Court's ruling affirmed the constitutional right of individuals to marry a partner of their choice. This decision supported the broader principle of personal autonomy and liberty, reinforcing that societal or familial norms cannot override individual rights. The judgment highlighted the need for reforms within law enforcement agencies to better handle cases of honor-based violence. It called for training and sensitization to ensure effective protection and support for victims. The ruling has contributed to the broader dialogue on individual rights and honor-based violence,

⁶ AIR (2018) SC 1601.

promoting awareness and encouraging societal changes to support the right to marry without facing violence or coercion.

The Supreme Court's decision in **Shakti Vahini v. Union of India** (2018) primarily addressed honor-based violence and the right to marry a person of one's choice, reaffirming personal autonomy and safety. While the judgment did not specifically address LGBTQIA+ rights, its principles have significant implications for the LGBTQIA+ community in the context of individual rights and protection against violence. The judgment affirmed the fundamental right to choose one's partner, free from coercion and violence. This principle inherently supports the right of LGBTQIA+ individuals to choose their partners without fear of retribution, aligning with the broader recognition of personal autonomy and liberty under the Constitution. By addressing honor-based violence, the Court underscored that familial and societal pressures cannot override individual rights. LGBTQIA+ individuals often face significant pressure and violence from their families and communities for their choices in partners and relationships. This ruling provides a legal precedent for protecting LGBTQIA+ individuals from such coercion and violence.

7. NAVTEJ SINGH JOHAR V. UNION OF INDIA (2018)⁷

The case of Navtej Singh Johar v. Union of India challenged the constitutionality of **Section 377** of the **Indian Penal Code**, a colonial-era law that criminalized "carnal intercourse against the order of nature," which was interpreted to include consensual homosexual acts. The petitioners included dancer Navtej Singh Johar, journalist Sunil Mehra, chef Ritu Dalmia, and business executive Aman Nath, among others. They argued that **Section 377** violated their fundamental rights under the Indian Constitution.

Key Issue:

- Whether **Section 377** violates the right to privacy, as established in the **Justice K.S. Puttaswamy v. Union of India** (2017) judgment?
- Whether **Section 377** violates **Article 14** of the Constitution, which guarantees equality before the law and equal protection of the laws?
- Whether **Section 377** violates **Article 19(1)(a)**, which guarantees the freedom of speech and expression?

⁷ AIR 2018 (1) SCC 791.

- Whether **Section 377** violates **Article 21**, which guarantees the right to life and personal liberty, including the right to dignity and autonomy?
- 1) The Court held that **Section 377**, insofar as it criminalizes consensual sexual conduct between adults in private, is unconstitutional. The Court clarified that **Section 377** would continue to apply to non-consensual acts, acts involving minors, and bestiality. The judgment extensively cited the **Puttaswamy case**, affirming that the right to privacy is a fundamental right. It held that sexual orientation is an essential attribute of privacy, and **Section 377**'s criminalization of consensual same-sex acts violates the right to privacy.
 - 2) There can be no doubt that an individual also has a right to a union under **Article 21** of the Constitution. When we say union, we do not mean the union of marriage, though marriage is a union. As a concept, union also means companionship in every sense of the word, be it physical, mental, sexual or emotional. The LGBT community is seeking realization of its basic right to companionship, so long as such a companionship is consensual, free from the vice of deceit, force, coercion and does not result in violation of the fundamental rights of others.
 - 3) The Court held that **Section 377** discriminates against LGBTQIA+ individuals based on their sexual orientation, violating **Article 14**. It emphasized that the law unfairly targets a segment of society, thereby failing the test of equality and non-discrimination. The Court recognized that **Section 377** impairs the freedom of expression by penalizing consensual sexual acts between same-sex adults, thus infringing on their right to express their identity and sexuality freely.
 - 4) The Court underscored that **Section 377** violates **Article 21** by infringing on the right to life and personal liberty, which includes the right to live with dignity and the right to autonomy over one's body and sexual choices.
 - 5) **Section 377 IPC**, so far as it penalizes any consensual sexual relationship between two adults, be it homosexuals (man and a man), heterosexuals (man and a woman) or lesbians (woman and a woman), cannot be regarded as constitutional. However, if anyone, by which we mean both a man and a woman, engages in any kind of sexual activity with an animal, the said aspect of **Section 377** is constitutional and it shall remain a penal offence under **Section 377 IPC**. Any act of the description covered under **Section 377 IPC** done between two individuals without the consent of any one of them would invite penal liability under **Section 377 IPC**.

The judgment acknowledged the historical injustice faced by LGBTQIA+ individuals, including discrimination, stigma, and violence. It emphasized the need for societal change and acceptance of diverse sexual orientations. The Court recognized the adverse mental health impacts of criminalizing consensual homosexual acts, including depression, anxiety, and suicidal tendencies. It highlighted the need to combat social stigma and promote mental well-being. The Court acknowledged the importance of affirming one's identity and the need for the law to respect and protect the dignity and choices of LGBTQIA+ individuals.

- ❖ The decriminalization of consensual homosexual acts is a landmark step towards legal recognition and protection of LGBTQIA+ rights in India. It removes the fear of criminal prosecution for consensual same-sex relationships.
- ❖ The judgment affirms the fundamental rights of LGBTQIA+ individuals, including privacy, equality, freedom of expression, and the right to life and personal liberty. It sets a legal precedent for future cases and advocacy efforts.
- ❖ The judgment has significantly contributed to increasing social acceptance and visibility of LGBTQIA+ individuals. It has sparked public discourse and awareness about LGBTQIA+ issues and rights.
- ❖ The principles established in the judgment provide a strong foundation for further legal reforms, including anti-discrimination laws, recognition of same-sex marriages, and other legal protections for LGBTQIA+ individuals.
- ❖ By decriminalizing consensual same-sex acts, the judgment helps reduce the social stigma and mental health challenges faced by LGBTQIA+ individuals. It promotes their right to live with dignity and self-respect.
- ❖ The judgment lays the groundwork for further legal reforms aimed at ensuring comprehensive protection and recognition of LGBTQIA+ rights. This includes areas such as marriage equality, anti-discrimination laws, and access to healthcare and social services.

The Supreme Court's decision in **Navtej Singh Johar v. Union of India** (2018) is a monumental step forward in the protection and advancement of LGBTQIA+ rights in India. By decriminalizing consensual homosexual acts and affirming the fundamental rights to equality, non-discrimination, privacy, and dignity, the judgment provides a strong legal foundation for the recognition and protection of LGBTQIA+ individuals. It marks a significant shift towards greater acceptance and inclusion, while also setting the stage for continued advocacy and legal reforms to achieve full equality for the LGBTQIA+ community in India.

8. ARUNKUMAR V. INSPECTOR GENERAL OF REGISTRATION⁸(2019)

The case of Arunkumar v. Inspector General of Registration (2019) is a significant decision by the Madras High Court in India concerning the recognition of transgender rights. Arunkumar, a cisgender man, and Sreeja, a transgender woman, married according to Hindu rites and ceremonies. When they sought to register their marriage under the Hindu Marriage Act, the registrar refused, prompting them to file a writ petition.

Key Issue:

- The central issue was whether a marriage between a cisgender man and a transgender woman could be registered under the Hindu Marriage Act, 1955?

The Madras High Court held that the marriage between Arunkumar and Sreeja was valid under the Hindu Marriage Act. The court ruled that the term "bride" under **Section 5** of the Act includes transgender women. The court interpreted the term "bride" in a broader sense to include transgender women, stating that the term should be understood in the context of evolving societal norms and the rights of transgender individuals. The court relied on the Supreme Court's landmark decision in **National Legal Services Authority v. Union of India (NALSA), 2014**, which recognized transgender persons as the third gender and affirmed their rights, including the right to self-identify their gender. The court emphasized principles of equality, non-discrimination, and dignity under the Indian Constitution. It asserted that denying recognition to the marriage would violate the fundamental rights of the individuals involved.

- ❖ Recognizes the right of transgender persons to marry under the Hindu Marriage Act.
- ❖ Affirms the broader interpretation of gender in legal contexts.
- ❖ Reinforces the constitutional principles of equality and non-discrimination.

The decision in Arunkumar v. Inspector General of Registration is a progressive step towards the legal recognition and protection of transgender rights in India.

9. SUPRIO @ SUPRIA CHAKRABORTHY V. UNION OF INDIA (2023)⁹

In November 2022, the petitioners, Supriyo aka Supriya Chakraborty and Abhay Dang on behalf of 21 same-sex couples approached the Apex Court seeking the recognition of same-sex marriages under **Special Marriage Act, 1954, Foreign Marriage Act, 1969** and **Hindu**

⁸ 2019 SCC Mad 8779.

⁹ Suprio @ Suprio Chakraborty & Anr. v. Union of India WP(Crl) No: 1011of 2022.

Marriage Act, 1955. They approached the court in exercise of its power of judicial review seeking enforcement of their own fundamental rights as well as in the public interest on behalf of lakhs of crores of other LGBTQIA+ citizens of India. Earlier this year, the Supreme Court bench led by the Chief Justice debated the same-sex marriage extensively over a ten-day hearing reserving it for May 2023 and referred the case to a constitutional bench. The verdict was finally delivered on 17th October 2023. While India has made notable strides in recognizing the rights of its LGBTQIA+ citizens, the institution of same-sex marriage remains a contested frontier. The petitioners contended that non- recognition of same-sex marriage amounts to violation of their fundamental rights under **Article 14, 15, 19(1)(a) and 21** of the Constitution of India which the petitioners seek to enforce through their petition.

Key issues:

- Are same-sex couples treated fairly under the law? Do they have the same rights as other couples when it comes to aspects like inheritance, owning property together, adoption, taxation, moving to another country and healthcare?
- Are LGBTQ+ people and their relationships accepted and respected by society? Especially in places where traditions or religions might not approve of same-sex relationships due to their beliefs?
- How do same-sex relationships affect, how people see gender roles, what is considered normal when it comes to love and sex, and the values people perceive of family and marriage?
- Who gets to decide if same-sex marriage must be allowed-should the state make the rules, or the individuals have the freedom to choose? And what role do the courts play in deciding if same-sex marriage should be legal?

The Court ruled that there is no fundamental right to marry a person of the same sex under the Indian Constitution and maintained that the **Special Marriage Act, 1954**, applies only to heterosexual couples. While affirming the rights of LGBTQIA+ individuals to form unions and live with dignity, the Court emphasized the need for legislative action to address the recognition of same-sex marriages and directed against discrimination towards same-sex couples.

The Union Government, State Governments, and Governments of Union Territories are directed to:

- ❖ Ensure that the queer community is not discriminated against because of their gender identity or sexual orientation;

- ❖ Ensure that there is no discrimination in access to goods and services to the queer community, which are available to the public;
- ❖ Take steps to sensitize the public about queer identity, including that it is natural and not a mental disorder;
- ❖ Establish hotline numbers that the queer community can contact when they face harassment and violence in any form;
- ❖ Establish and publicize the availability of 'safe houses' or Garima Grehs in all districts to provide shelter to members of the queer community who are facing violence or discrimination;
- ❖ Ensure that "treatments" offered by doctors or other persons, which aim to change gender identity or sexual orientation are ceased with immediate effect;
- ❖ Ensure that inter-sex children are not forced to undergo operations with regard only to their sex, especially at an age at which they are unable to fully comprehend and consent to such operations;
- ❖ Ensure that inter-sex children are not forced to undergo operations with regard only to their sex, especially at an age at which they are unable to fully comprehend and consent to such operations;
- ❖ Recognize the self-identified gender of all persons including transgender persons, hijras, and others with sociocultural identities in India, as male, female, or third gender. No person shall be forced to undergo hormonal therapy or sterilization or any other medical procedure either as a condition or prerequisite to grant legal recognition to their gender identity or otherwise;
- ❖ The appropriate Government under the Mental Healthcare Act must formulate modules covering the mental health of queer persons in their programs under **Section 29(1)**. Programs to reduce suicides and attempted suicides (envisaged by **Section 29(2)**) must include provisions which tackle queer identity;

The following directions are issued to the police machinery:

- ❖ There shall be no harassment of queer couples by summoning them to the police station or visiting their places of residence solely to interrogate them about their gender identity or sexual orientation;
- ❖ They shall not force queer persons to return to their natal families if they do not wish to return to them;

- ❖ When a police complaint is filed by queer persons alleging that their family is restraining their freedom of movement, they shall on verifying the genuineness of the complaint ensure that their freedom is not curtailed;
- ❖ When a police complaint is filed apprehending violence from the family for the reason that the complainant is queer or is in a queer relationship, they shall on verifying the genuineness of the complaint ensure due protection; and
- ❖ Before registering an FIR against a queer couple or one of the parties in a queer relationship (where the FIR is sought to be registered in relation to their relationship), they shall conduct a preliminary investigation in terms of **Lalita Kumari v. Government of U. P**¹⁰ to ensure that the complaint discloses a cognizable offence. The police must first determine if the person is an adult. If the person is an adult and is in a consensual relationship with another person of the same or different gender or has left their natal home of their own volition, the police shall close the complaint after recording a statement to that effect. The Supreme Court declined to grant legal recognition to non- heterosexual marriages under the existing law.

The court said that the right to marriage is not a fundamental right and is not guaranteed by the constitution. While the court did not approve equal marriage, it did recognize the rights of non-heterosexual couples. Additionally, it held that the matter falls outside the jurisdiction of the court and the Parliament is the appropriate forum for the same due to a large number of legislations and provisions involved. Following are the further observations:

The court held that it cannot strike down or read differently the provisions of the **Special Marriage Act**, which defines marriage as a union between a man and a woman. It said that this is a matter of policy and legislation, not of interpretation or constitutional rights

- ❖ Queerness is a natural phenomenon known to India since ancient times. It is not urban or elite;
- ❖ There is no universal conception of the institution of marriage, nor is it static. Under **Articles 245 and 246** of the **Constitution** read with **Entry 5 of List III to the Seventh Schedule**, it lies within the domain of Parliament and the state legislatures to enact laws recognizing and regulating queer marriage; The **Constitution** does not expressly recognize a fundamental right to marry. An institution cannot be elevated to the realm

¹⁰ (2014) 2 SCC 1.

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;

- ❖ The freedom of all persons including queer couples to enter into a union is protected by **Part III of the Constitution**. The failure of the state to recognize the bouquet of entitlements which flow from a union would result in a disparate impact on queer couples who cannot marry under the current legal regime. The state has an obligation to recognize such unions and grant them benefit under law; In **Article 15(1)**, the word ‘sex’ must be read to include ‘sexual orientation’ not only because of the causal relationship between homophobia and sexism but also because the word ‘sex’ is used as a marker of identity which cannot be read independent of the social and historical context;
- ❖ The right to enter into a union cannot be restricted based on sexual orientation. Such a restriction will be violative of **Article 15**. Thus, this freedom is available to all persons regardless of gender identity or sexual orientation;
- ❖ The decisions in **Navtej** and Justice **KS Puttaswamy** recognize the right of queer couples to exercise the choice to enter into a union. This relationship is protected from external threat. Discrimination on the basis of sexual orientation will violate **Article 15**;
- ❖ Intersex persons who identify as either male or female have the right to marry under existing law including personal laws which regulate marriage;
- ❖ The state must enable the LGBTQ community to exercise its rights under the Constitution. Queer persons have the right to freedom from coercion from their natal families, agencies of the state including the police, and other persons;
- ❖ Unmarried couples (including queer couples) can jointly adopt a child. Regulation 5(3) of the Adoption Regulations is ultra vires the **JJ Act, Articles 14, and 15**. Regulation 5(3) is read down to exclude the word “marital”. The reference to a ‘couple’ in Regulation 5 includes both married and unmarried couples as well as queer couples. The principle in Regulation 5(2)(a) that the consent of spouses in a marriage must be obtained if they wish to adopt a child together is equally applicable to unmarried couples who seek to jointly adopt a child. However, while framing regulations, the state may impose conditions which will sub serve the best interest and welfare of the child in terms of the exposition in the judgment;

- ❖ The **CARA** Circular disproportionately impacts the queer community and is violative of **Article 15**;
- ❖ The Union Government, State Governments, and Governments of Union Territories shall not discriminate against the freedom of queer persons to enter into union with benefits under law; and
- ❖ Record the assurance of the Solicitor General that the Union Government will constitute a committee chaired by the Cabinet Secretary for the purpose of defining and elucidating the scope of the entitlements of queer couples who are in unions.

Even though there are some limitations, the decision is a step forward in affirming the dignity and rights of LGBTQIA+ individuals, but it falls short of recognizing same-sex marriages. It protects LGBTQIA+ rights to some extent by emphasizing non-discrimination and the right to form unions, but significant legal recognition and protections, particularly for same-sex marriages, remain unaddressed. The decision underscores the need for legislative action to achieve full equality for LGBTQIA+ individuals in India.

4.4 Conclusion

The struggle for LGBTQIA+ rights in India has seen remarkable progress over the past few decades, signifying a transformative shift in the legal and social landscape. The decriminalization of consensual same-sex relationships through the landmark judgment in **Navtej Singh Johar v. Union of India** (2018) marked a significant victory for the community, affirming their fundamental rights to equality, privacy, and dignity. This judgment set a crucial precedent, paving the way for further legal recognition and protection of LGBTQIA+ individuals.

However, the path towards full equality remains a challenging one. The **Suprio @ Suprichakraborty v. Union of India** (2023) judgment, while affirming the rights of LGBTQIA+ individuals to form unions and live with dignity, highlighted the limitations of judicial intervention in the absence of legislative action. The Supreme Court's decision to leave the recognition of same-sex marriages to the legislature underscores the need for continued advocacy and political engagement to achieve comprehensive legal reforms.

The ongoing advocacy for LGBTQIA+ rights in India is not just about achieving legal

milestones but also about changing societal attitudes and combating deep-seated prejudices. The emphasis on constitutional morality in recent judgments reflects a broader understanding of justice that transcends traditional norms and embraces inclusivity and equality. This principle is crucial in addressing discrimination and ensuring that LGBTQIA+ individuals can lead lives free from fear, stigma, and exclusion.

