

UPDATE

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Confronting the Closet: An empathetic approach to Legal Recognition of Same-sex Marriages

“The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation.”

- Justice Sharon L. Kennedy

(Chief Justice of the Hon’ble Supreme Court of Ohio)

A. Background

The long-standing contentious issue of legal recognition of same-sex marriages has been re-ignited and is currently attracting the attention that it deserves. It is high time to end discrimination against individuals based on sexual orientation and gender identity.

On 25 November 2022, the Hon’ble Supreme Court of India issued notice to the Central Government and the Ld. Attorney General for India in two matters filed by gay couples seeking recognition of same-sex marriages under the Special Marriage Act, 1954, which is an integral part of Right to Life enshrined under Article 21 of the Constitution of India in the case of *Supriyo @ Supriya Chakraborty & Anr. v. Union of India*¹.

The contentions of the Petitioners were that the provisions of Special Marriage Act, 1954 are *ultra vires* the Constitution of India and emphasized that the members of the LGBT community are equally entitled to exercise the right to marry a person of one’s choice. The Order records that 1 (one) petition is pending before the Hon’ble High Court of Kerala and 8 (eight) petitions are pending before the Hon’ble High Court of Delhi on recognition of same-sex marriages under various matrimonial statutes.

In another case, as recent as on 14 December 2022, the Hon’ble Supreme Court issued notice in a petition² filed by a same-sex couple seeking registration of marriage under the Hindu Marriage Act, 1955 and the Foreign Marriage Act, 1969.

Considering the sensitivity of the subject matter at hand and the debates it has sparked, it is imperative to highlight the landmark judgement of *Navtej Singh Johar & Ors. v. Union of India*³ which gave a ray of hope to the LGBT (including all its connotations) community in respect of recognition of their social and legal rights – a community of individuals which has been resiliently fighting a battle since time immemorial towards achieving equality, acceptance, and basic dignity in and by a heteronormative society.

B. Right to sexual orientation is an intrinsic part of Right to Privacy

The case of *Navtej Singh Johar (supra)* decriminalized same-sex relations between consenting adults under S 377 of the Indian Penal Code, 1908 (“IPC”). The batch of writ petitions challenged the constitutional validity of the draconian S 377 of IPC to the extent that it criminalizes consensual intercourse between same-sex couples, and it was vehemently argued by the Petitioners that the said provision is violative of the fundamental rights guaranteed under Articles 14, 19 and 21 of the Constitution of India.

¹ WP (C) No. 1011/2022.

² WP (C) No. 1105/2022.

³ (2018) 10 SCC 1.

Among a plethora of cases which were heavily relied upon by the five-judge bench in *Navtej Singh Johar (supra)*, one such significant case of *K. S. Puttaswamy v. Union of India*⁴, a nine-judge bench decision, was cited which held that the right to privacy is a natural right.

*“Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights...”*⁵

While widening the scope of right to privacy and bringing within its ambit the right to ‘sexual privacy’ to protect the rights of sexual minorities, the Apex Court further held that the oppressive colonial legislations cannot impose the citizens of a democracy, such as ours, to have their lives pushed into obscurity. In this light, it is just and proper to throw some light on the observations of Justice Dr. Dhananjaya Y. Chandrachud articulated in *Navtej Singh Johar (supra)*:

*“60... it is imperative to ‘confront the closet’ and, as a necessary consequence, confront ‘compulsory heterosexuality.’ Confronting the closet would entail “reclaiming markers of all desires, identities and acts which challenge it.” It would also entail ensuring that individuals belonging to sexual minorities, have the freedom to fully participate in public life, breaking the invisible barrier that heterosexuality imposes upon them. The choice of sexuality is at the core of privacy. But equally, our constitutional jurisprudence must recognize that the public assertion of identity founded in sexual orientation is crucial to the exercise of freedoms.”*⁶

Complete participation in public life and that too at the same pedestal as that of the heterosexual individuals also entails legality of their marriages, adoption and parenting and eradicating the man-made barrier not just in literature but also our mindsets.

C. *Interpreting the existing statutory provisions governing marriage*

It would be untrue to say that there is no scope to incorporate same-sex marriages within the existing laws of India. The Special Marriage Act, 1954 provides for *“special form of marriage in certain cases, for the registration of such and certain other marriages and for divorce”*.

The Act is applicable to any person in India and all Indian nationals in foreign countries irrespective of the faith which either party may profess. Under various provisions of the statute, gender-neutral undertones may be identified.

For instance, S 4 of the Special Marriage Act, 1954 stipulates the conditions relating to solemnization of special marriages. It provides that a marriage between any two persons can be solemnized subject to the fulfillment of the conditions stated therein. Liberal interpretation of S 4 of the said Act, more specifically the gender-neutral terms ‘any two persons’, indicates that the legislative intent behind the provision was to include any individual irrespective of the gender or sexual orientation. However, clause (c) of S 4 of the said Act uses the term “male” and “female” resulting in ambiguity. In general parlance, provisions of such nature are not interpreted so as to include within its meaning same-sex couples.

Therefore, it is pertinent to amend the law accordingly to widen its scope. Similarly, other provisions of the Act such as Ss 5, 8 and 11 also use gender-neutral terms but do not expressly render inclusion of same-sex couples.

⁴ (2017) 10 SCC 1.

⁵ (2017) 10 SCC 1.

⁶ (2018) 10 SCC 1.

The Constitutionality of Special Marriage Act to the extent that it does not provide for solemnization of marriage between a same-sex couple is under challenge before the Hon'ble Delhi High Court. A transfer petition, *Kavita Arora v. Union of India*⁷ has been filed before the Hon'ble Supreme Court, seeking transfer of the petition challenging constitutionality of the aforesaid statute, from the Hon'ble Delhi High Court to the Hon'ble Supreme Court, in which notice was issued on 14 December 2022.

Similarly, notice was also issued by the Hon'ble Supreme Court in *Nibedita Dutta v. Union of India*⁸ which prays for a writ of mandamus in relation to interpretation of the Hindu Marriage Act, 1955 in a manner that it is inclusive, and not arbitrary and discriminatory.

At this juncture, attention is brought to S 5 read with S 8 of the Hindu Marriage Act, 1955. S 5 provides for the Conditions for a Hindu Marriage and stipulates that a marriage may be solemnized between any two Hindus subject to the conditions given therein. S 8, on the other hand, provides for registration of Hindu marriages. As the legislative intent is not clear with respect to inclusion of LGBT community, a same-sex couple would often face obstructions at the time of not only getting the marriage registered but also taking the decision to marry each other in accordance with law in the first place. Such barbaric and archaic interpretation of legislations has left same-sex couples devoid of the option to register their marriages and enjoy the rights that they would be entitled to subsequently.

D. Family Building and Childrearing by Same-sex Couples

With decriminalization of S 377 of IPC, the battle still remains half-won. In India, the rights pertaining to parenthood stem from laws relating to succession, adoption, surrogacy, guardianship, etc. No statute permits same-sex couples to adopt or foster a child and such deprivation of rights is in the teeth of Article 15 and necessitates a dynamic change in sync with the evolving societal ideologies.

The Supreme Court of the United States of America (“**SCOTUS**”) delivered a judgement on 26 June 2015 in *Obergefell Et Al. v. Hodges, Director, Ohio Department of Health*⁹ observing that the Fourteenth Amendment of the Constitution guarantees the fundamental liberty revolving around right to marriage, and ban on same-sex marriages violates such fundamental rights of persons based on their sexual orientation. The SCOTUS in its judgement observed the following:

“...Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples...”

In India, the laws governing adoption and guardianship are as follows:

- a) Hindu Adoptions and Maintenance Act, 1956
- b) The Juvenile Justice (Care and Protection of Children) Act, 2015
- c) The Guardians and Wards Act, 1890
- d) The Hindu Minority and Guardianship Act, 1956.

Recently, the 118th Report on Review of Guardianship and Adoption Laws was presented to the Rajya Sabha on 08 August 2022. The Committee noted that both Hindu Adoptions and Maintenance Act, 1956 (“**HAMA**”) and the Juvenile Justice (Care and Protection of Children) Act, 2015 (“**JJ Act**”) provide for the adoption of children by married couples, single male and single female parents. The Committee expressed that the new

⁷ TP (C) No. 2842 of 2022.

⁸ TP (C) No. 2844 of 2022.

⁹ 576 U.S. 644 (2015).

legislation should also cover the LGBT community, thereby reflecting its progressive and modern stance towards legislative reforms. While pointing out the shortcomings and inconsistencies in both the statutes, the Committee expressed the need to harmonize both the laws and formulate a *'uniform and comprehensive legislation on adoption which is more transparent, accountable, verifiable, less bureaucratic and applicable to all irrespective of religion in order to make adoptions more easy and less cumbersome'*.

While the HAMA is a personal law and is applicable to any person who is a Hindu, Buddhist, Jain or Sikh by religion, the JJ Act is applicable to all citizens of the country irrespective of the religion.

At present, the Adoption Regulations, 2017 read with the JJ Act permit married couples, a single female and a single male to adopt a child subject to the eligibility criteria laid down therein. An LGBT individual can apply for adoption only as a single parent. Same-sex couples or individuals in a live-in relationship do not meet the eligibility criteria for the prospective adoptive parents and are deprived of legal rights in this sphere. Hence, with recognition of same-sex marriages, members of the LGBT community will be empowered to *inter alia* adopt a child as a couple.

E. Conclusion

Same-sex couples do not wish to be excluded from the joys as well as responsibilities which come with the civilization's oldest industry. They seek to be treated with equal dignity before the law. Such a right is conferred upon them by our Constitution. While it is true that our forefathers in drafting and ratifying laws in the Constitution could not have known what the future would hold, they entrusted the responsibilities to the future generations to protect and preserve the rights of all persons equally, to enjoy the freedom, equality and dignity granted to them. Hence, in case of any inconsistency, personal liberty must be emphasized on and addressed. Although requisite amendments in the legislations and recognition of rights of the LGBT community are the need of the hour, one must also bear in mind that the atrocities and violence inflicted on the community will not disappear overnight as discrimination is still highly prevalent and is deep rooted in our society.

Many members of the LGBT community fear coming out of the closet and fall prey to forced marriages. Governments, in imparting awareness and educating the citizens of the nation in order to sensitize them towards individuals who freely and voluntarily choose to come out of the closet, celebrate their revelations and seek acceptance in all spheres of life, play a significant role in this regard.

Taking this opportunity to reiterate what Justice Indu Malhotra, Former Judge of the Hon'ble Supreme Court of India, observed in *Navtej Singh Johar (supra)* before concluding,

"History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality. The mis-application of this provision denied them the Fundamental Right to equality guaranteed by Article 14. It infringed the Fundamental Right to non-discrimination under Article 15, and the Fundamental Right to live a life of dignity and privacy guaranteed by Article 21. The LGBT persons deserve to live a life unshackled from the shadow of being 'unapprehended felons'."

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