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SAME-SEX MARRIAGES: A GRAVE ERROR IN THE LAW

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Students at the Delhi University's North Campus in New Delhi protest against the Supreme Court's verdict on same-sex marriage. File | Photo Credit: ANI

In a long-awaited judgment in *Supriyo*, on October 17, the Supreme Court held that same-sex couples do not have the right to marry under the Special Marriage Act. In doing so, the court not only laid down a fundamentally wrong interpretation of the Constitution but also overlooked its own precedents.

The petitioner's argument on the right to equality was simply this. Article 14 guarantees equality and equal protection of the law and Article 15 prohibits discrimination on grounds including sex. The Supreme Court has already held in *Navtej* (2018) while decriminalising homosexuality that 'sex' under Article 15 takes in 'sexual orientation'. When the state refuses to recognise marriages of homosexual couples, solely on this ground, it violates the constitutional guarantee of non-discrimination.

The majority judgment justifies the exclusion of the Special Marriage Act by saying that the object of the statute was not to discriminate against same-sex persons. Further, it is stated that absence of a law (to regulate same-sex marriages) does not amount to discrimination.

Both these arguments are misplaced. The doctrine of indirect discrimination, which simply means that the discriminator cannot escape the constitutional obligation by relying on the intent or object, has been now well established in Indian jurisprudence. Instead, the court must look at the impact of the law on a particular group (*Col. Nitisha v. Union of India,* 2021). Also, to say that mere absence of a law is not sufficient to claim discrimination misconceives the core of the issue raised by the petitioners. The claim is not that there is a right for the petitioners to have a law enacted by the state in the abstract. For instance, if ours was a marriageless state, no argument would arise premised on the privileges and benefits arising out of marriage. The argument is that the state has chosen to refuse to recognise one set of marriages on the ground of sexual orientation alone — and this is not pointedly met by the Bench.

The minority judgment, in fact, does not address the issue at all by holding that "this Court cannot either strike down the constitutional validity of SMA or read words into the SMA because of its institutional limitations". This simply puts the cart before the horse. It is precisely the institutional purpose of a constitutional court to examine whether the legislation in question is constitutional. Now to say that it will refuse to undertake this exercise because the exercise is

complicated runs counter to the established system of constitutional adjudication. Therefore, according to the court, even if a law were plainly unconstitutional, as long as there are difficulties in moulding the relief, that would be a sufficient reason to retain the unconstitutional law. This position of law, fortunately not accepted by the majority, is dangerous since this might simply mean the Parliament can avoid constitutional scrutiny by drafting laws in a way that requires the court to undertake a complex interpretive exercise.

This is, of course, not to say that the court must exceed its institutional role of that of an adjudicator. There are, of course, various policy matters for which the legislature is institutionally designed and possesses the necessary expertise. However, to conceive the issue of equal rights associated with marriage as entirely that of policy is problematic.

It is also curious to have this observation come from a court that has, in the past, issued guidelines and, in fact, resorted to judicial legislation. In *Visakha v. State of Rajasthan* (1997), the court, in the absence of a law for protection against sexual harassment, laid down detailed guidelines for how institutions must deal with complaints of sexual harassment. In *NALSA* (2014), the court directed recognition of the rights of 'third gender persons' and issued elaborate directions for the protection of transgender persons. Therefore, to stop short of constitutional examination, especially when a plausible interpretive exercise would have allowed the court to grant relief to the petitioners, does not fit well in our constitutional history.

Moreover, reading the Special Marriage Act so as to take in marriages of queer persons did not require the court to legislate. A creative interpretation of the law would have allowed the court to locate the right of marriage in the law, without having to take up the role of the legislature. Various interpretive techniques and solutions were suggested to the court which simply went overlooked.

Constitutional courts are significant in any democracy for they hold the executive and the legislature accountable for their actions. Their chief role is not to make suggestions to Parliament but to adjudicate instances of rights violations. In one of the directions of the judgment, the court records the submission by the Union government that a committee be chaired by the Cabinet Secretary to decide the entitlements of queer persons. This delegation is where the court simply abdicates its role. When a complaint of fundamental rights violation is brought before the judiciary, referring the question back to the alleged discriminator is simply irrational. It turns a question of rights into one of benevolence.

In *Baker v. Nelson* (1971), the United States Supreme Court, while declining to hold that same-sex marriage is protected under the Constitution, said: "This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation." Then, 44 years later, the court remedied this mistake and overturned this judgment in *Obergefell v. Hodges* (2015), where it repelled the argument on the need to approach Parliament and said: "It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry." This is precisely what our Supreme Court got categorically wrong in *Supriyo*. Now, India needs to desperately wait for its *Obergefell* moment.

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