MARRIAGE (IN)EQUALITY: THE STATE DISCRIMINATED, THE COURT LET IT SLIDE

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ABSTRACT

This paper argues for marriage equality of queer couples under the Indian equality code. In a recent challenge laid to the exclusionary marriage laws in India, queer couples strongly argued unequal treatment meted out to them as compared to heterosexual couples, which was devoid of any intelligible differentia or legitimate State interest that could justify the exclusion. Though the marriage laws, legislated in 1950s, may not have intended to differentiate, their impact was to exclude queer couples from the institution itself and all benefits arising from it, and this was significant.

The act of discrimination sat well with all five judges of the Supreme Court, but relief was not granted. The central question became, why relief was denied under Article 32 of the Constitution and if this could be done with a positive finding of discrimination. The majority's focus on the limited power of the Court to grant relief amidst separation of powers outweighed the minority's focus on judicial review in violation of constitutional rights. This paper draws from the reasoning of the minority to make a strong case for marriage equality.

Keywords: *Same-sex Marriage – equality – fundamental rights – discrimination*

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I. INTRODUCTION

Soon after the decriminalisation of same-sex relations in Navtej,[1] the queer community petitioned the Supreme Court in Supriyo[2] seeking a recognition of their choice to marry. Upon the Court's nudge to steer clear of religious personal laws, the challenge was restricted to marriage under the Special Marriage Act, 1954 (hereinafter referred to as 'SMA'), Foreign Marriage Act, 1969, and adoption under the Juvenile Justice Act, 2015 read with Adoption Regulations.[3] A bench of five promising judges[4] was constituted to hear it, but in a 3:2 split verdict; the rights were denied.

This paper argues that once the Court entertains a challenge basis of the right to equality, it is bound to remedy it based on the right to constitutional remedies. It criticises the majority's overemphasis on the doctrine of separation of powers, which could not have frustrated judicial review. Part I examines whether denying access to marriage is discriminatory under Articles 14 and 15. It explores whether the discrimination is direct or due to disparate impact and discusses how Navtej influenced the Court's analysis of unequal treatment. Part II focuses on 'remedy' and deals with the scope of the Court's power under Article 32 to rectify discrimination. It explains the divergence in majority and minority opinions, and how the majority wrongly distinguishes past precedents to deny relief, despite a positive finding of discrimination. Part III then discusses the necessity of legislative intervention in future, regardless of whether the Court granted relief.

The paper however does not cover (i) whether a fundamental right to marry exists under Article 21 and (ii) if marriage rights can be granted under specific religious laws.

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1 *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 [5J]. [hereinafter 'Navtej'].

2 *Supriyo alias Supriyo Chakraborty v Union of India* 2023 SCC OnLine SC 1348 [hereinafter *'Supriyo']*. Justice Bhat delivered the opinion of the Court, in which Justice Kohli & Justice Narasimha concurred; Justice DY Chandrachud delivered the minority opinion of the Court, in which Justice Kaul concurred. Justice Bhat's opinion therefore constitutes the majority. Besides, Justice Kaul & Justice Narasimha also delivered separate opinions.

3 *Supriyo* (n 2) (DY Chandrachud CJ)(Concurring)[214].

4 'Promising' is based on previous 'pro-rights decisions' delivered by individual judges on the bench, which strengthened the expectation of a positive outcome in Supriyo. For instance, decriminalization of homosexuality *(Navtej* (Chandrachud J)), directions to prevent gendered sexual violence and stereotype (*XYZ vs. State of Madhya Pradesh* (2021) 16 SCC 179 (Bhat J)), striking down bail conditions under Narcotics, Drugs, and Psychotropic Substances Act (*Nikesh Tarachand Shah v. Union of India* (2018) 11 SCC 1 (Kaul J)), rejecting confessions to be used in evidence under NDPS Act (*Tofan Singh vs. State of Tamil Nadu* (2021) 4 SCC 1 (Kohli J)), stay on forced counselling of same sex couples (*Devu G Nair v. State of Kerala* 2023 SCC OnLine Ker 11382 (Narasimha J))

II. IS DENIAL OF ACCESS TO THE 'INSTITUTION OF MARRIAGE' DISCRIMINATORY?

The Indian Constitution safeguards the right to equality. Article 14 guarantees equality before the law, equal protection of laws and protects against unreasonable classification. Article 15, which also forms a part of the equality code, protects against differential treatment based on identity i.e. on the grounds of race, caste, sex, gender, religion etc. Put differently, these are characteristics of people based on which they experience disadvantage and hence discrimination and are popularly known as protected grounds. Though our Constitution recognises only some protected grounds,[5] the Court has identified additional grounds of sexual orientation,[6] gender identity[7] and disability[8] by interpreting Article 15 as inclusive and non-exhaustive. Sexual orientation formed the basis of the decriminalisation of same-sex relations in Navtej and the basis for claiming marriage equality in Supriyo.

A. Direct discrimination & Disparate Impact under Article 15

Under Article 15, Supriyo threw light on two forms of discrimination: direct discrimination and indirect or disparate impact discrimination. Differential treatment could either result from State action that unjustifiably treats one group differently than the other (direct)[9] or from neutral State action that disproportionately affects a group (disparate impact).[10] The Supreme Court has recognised both direct and disparate impact discrimination as constitutionally suspect.[11] Adultery, for instance, a gender-specific

5 Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 29. "It is important that these grounds are personal, in the sense that they are characteristics that persons have…the term is understood in a technical sense to connote only certain types of characteristics that persons have, such as race, sex, religion, weight, sexual orientation, age, disability, eye-colour, physical appearance, and marital status." [hereinafter 'Fredman Discrimination Law']

6 *Navtej* (n 1) [268.7], [268.14].

7 *National Legal Services Authority v Union of India* (2014) 5 SCC 438 [66], [81]-[82] [2J] [hereinafter 'NALSA'].

8 *Jeeja Ghosh v Union of India* (2016) 7 SCC 761 [2J] [43]; *Vikash Singh v UPSC* (2021) 5 SCC 370 [2J] [41]-[42].

9 Fredman (n 5) 154; Bob Hepple, Prohibited Conduct, Equality: The Legal Framework (2nd edn, Hart Publishing 2014) 67–104, 81. Hepple states that "Direct discrimination aims to achieve formal equality of treatment; one person must not be less favourably treated than another because of a prohibited characteristic.. indirect discrimination occurs where an apparently neutral provision, criterion or practice is applied by a person (A) against another (B), and puts or would put B and persons with whom B shares a prohibited characteristic at a particular disadvantage when compared with persons who do not share that characteristic."

10 ibid; For examples of disparate impact see *Griggs v Duke Power Co.* 401 US 424 (1971) [US Supreme Court]; *Bilka-Kaufhaus GmbH v Weber von Hartz*, Case 170/84 (1986) [European Court of Justice]; *Andrews v Law Society of British Columbia* (1989) 1 SCR 143 [Canadian Supreme Court].

11 *Navtej* (n 1) [438] (DY Chandrachud J)(Concurring); *Supriyo* (n 3) [263] (DY Chandrachud CJ).

offence, ascribes gender stereotypes about the role of women and discriminates against the accused and complainant directly based on gender.[12] Similarly, a denial of Permanent Commission to women in the Armed Forces discriminated directly on the basis of sex. On the other hand, though unnatural sex was a gender-neutral offence and prohibited for all sexes,[13] it disproportionately affected same-sex couples in consensual relationships.[14] It created a disparate impact on account of sexual orientation and was equally violative of Article 15.

The question then was whether denying access to marriage under SMA, as claimed in Supriyo, was discriminatory, and if so, what type of discrimination it was. The RC Cooper test developed by eleven judges of the Supreme Court tells us that the impact of a statute or state action on individual rights is the most significant.[15] State action would be deemed unconstitutional if the classification it makes has a discriminatory impact on an individual, regardless of its intent. Hence, the purpose or object may not be to exclude, but if the result is so, the classification becomes suspect.[16] In other words, the object of the State cannot determine the extent of protection to an aggrieved individual.[17]

The petitioners in Supriyo argued that SMA, though legislated with the object of recognising inter-faith marriages, the impact was an exclusion of non-heterosexual unions from exercising their choice to marry.[18] All five judges agree[19] A complete denial of institution of marriage to queer couples meant the State did not recognise their social institution and relationship.[20] While marriage itself did not confer dignity, it did provide State legitimacy and was a precondition to avail consequential benefits arising from the marital status, which would not be available otherwise. These include protection from domestic violence,[21] maintenance,[22] benefits like pension and insurance in case of death

12 *Joseph Shine v Union of India* (2019) 3 SCC 39 [5J] [30], [66].

13 *Ministry of Defence v Babita Puniya* (2020) 7 SCC 469 [2J].

14 Supriyo (n 3).

15 *Rustom Cavasjee Cooper v Union of India* (1970) 1 SCC 248 [11J] (Banks Nationalisation Case): "49…But it is not the object of the authority making the law impairing the right of a citizen, nor the form of action taken that determines the protection he can claim: it is the effect of the law and of the action upon the right which attracts the jurisdiction of the Court to grant relief...it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights." [hereinafter 'RC Cooper']; *Supriyo* (n 2) (Bhat J) [518], [524].

16 *Navtej* (n 1) (DY Chandrachud J) (Concurring) [440].

17 *RC Cooper* (n 15) [50].

18 *Supriyo* (n 3), Submissions of Senior Advocate Mukul Rohatgi [20], Submissions of Senior Advocate Dr. Abhishek Manu Singhvi [21], Submissions of Senior Advocate Raju Ramachandran [22].

19 *Supriyo* (n 2) [528]-[530], [552] (Kaul J), [270] (Chandrachud CJ).

20 *Supriyo* (n 2) [552], [562]-[564] (Bhat J).

21 Protection of Women from Domestic Violence Act 2005.

22 Code of Criminal Procedure 1973, s 125; *Danial Latifi & Anr v Union of India* (2001) 7 SCC 740 [5J].

of spouse, succession[23] and adoption.[24] In Chief Justice Chandrachud's words, these were material and expressive entitlements which flow from a union.[25] The Court stated and I agree that providing these benefits showed a clear State interest in regulating the institution of marriage, which was not left to varied religious personal laws. Though the State could restrict and regulate the institution, for example by providing a minimum age, which was commensurate to the object to be achieved: it could not however prohibit access to the institution based on a protected characteristic in Article 15. As Chief Justice Chandrachud emphasised, this could also not be justified by a legitimate state interest as it was entirely unconnected to marriage or adoption.[26] For queer couples, this meant total exclusion and direct discrimination on the basis of 'sexual orientation'.

Viewed from another angle, the denial also caused a disparate impact on queer couples. Justice Bhat, speaking for the majority was convinced that a denial of earned and compensatory benefits, for which marital status is an eligibility, had an indirect discriminatory impact on queer couples.[27] In adoption for instance, though the Juvenile Justice Act & Adoption Regulations permitted single women and single men (with restrictions) to adopt, however, heterosexual married couples were only eligible to adopt as a couple.[28] Heterosexual and non-heterosexual unions were entirely excluded. Leaving aside heterosexual unions since Supriyo was not concerned with their rights, non-heterosexual unions were excluded only because of their inability and ineligibility to exercise their choice to marry and be a part of the institution. This ineligibility disproportionately impacted queer couples' right to adopt as a union and they were left with no choice but to adopt as individuals.[29] The same applied to benefits arising from succession and other laws.

B. Unreasonable classification under Article 14

Besides disparate impact under Article 15, the bench also examined the Article 14 challenge of unreasonable classification. The two minority opinions of Chief Justice Chandrachud (minority) & Justice Kaul (minority concurring) successfully upheld the challenge. The test to be applied was whether the classification was based on an intelligible differentia, and whether it had a reasonable nexus to the object sought to be achieved.

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23 Hindu Succession Act 1956; Indian Succession Act 1925.

24 Juvenile Justice (Care and Protection of Children) Act 2015; Central Adoption Resource Authority Adoption Regulations 2022 [hereinafter 'CARA Adoption Regulations'].

25 *Supriyo* (n 2) (Chandrachud CJ) [261].

26 Ibid [337].

27 *Supriyo* (n 2) (Bhat J) [563],[564(iv)].

28 ibid [546].

29 ibid.

Justice Kaul's compelling minority opinion stood apart and held that SMA failed the Article 14 muster by creating two distinct classes of heterosexual partners who are eligible to marry and non-heterosexual partners who are ineligible.[30] This distinction (causing an exclusion) had no reasonable nexus to the purpose of SMA which was to facilitate inter-faith marriages.[31] SMA was therefore violative of Article 14 for creating an unreasonable classification. Justice Kaulalso disagreed with Justice Bhat that SMA intended to enable marriage between heterosexual couples exclusively.[32] But, even if that were true, the State's decision to regulate only heterosexual marriages was itself an illegitimate objective and constituted exclusion based on sexual orientation under Article 15 (discussed above).

Justice Kauls opinion is the only one which holds SMA unconstitutional in this straightforward manner. Besides this, a nuanced aspect of Article 14 was examined by Chief Justice Chandrachud. While dealing with adoption, Chief Justice Chandrachud reasoned that Regulations 5(3) & 5(2)(a) of CARA Adoption Regulations made 'marriage' a yardstick for couples to adopt. While this created a classification between married and unmarried couples, it had no rationale to the object sought to be achieved i.e. the best interest and safety of the child.[33]It was rather based on a stereotype of ascribed gender roles in a marriage that raised false presumptions of who could be better parents or provide a stable household.[34] Further, the Regulations also suffered from excessive delegation and were ultra vires the Juvenile Justice Act which did not restrict adoption based on marital status.

C. The equality leaning of Navtej gave way

The findings of Supriyo under Articles 14 & 15 reflect that it was positively influenced by Navtej, which is the most prominent case of the queer movement in India. Decriminalising consensual sexual relations (as in Navtej) was a monumental first step for queer persons. To reach this decision, Navtej engaged in a comprehensive equality-leaning analysis and not merely a privacy approach.[35] It held that criminalising 'unnatural sex' under Section 377 of the Indian Penal Code, 1860 not only violated a queer person's dignity, privacy, and personhood (Article 21) but was manifestly

30 *Supriyo* (n 3) (Kaul J) [380].

31 ibid [382], [383].

32 ibid.

33 *Supriyo* (n 2) (Chandrachud CJ) [326]-[329].

34 ibid.

35 It is clarified that Navtej addressed both sexual autonomy and privacy under Article 21 & unequal treatment under Articles 14 & 15, and not just one of them. Under unequal treatment, all judges dealt with manifest arbitrariness under Article 14; J Chandrachud, J Nariman & J Indu Malhotra in their concurring opinions dealt with Article 15 as well.

arbitrary and fundamentally led to unequal treatment (Articles 14 & 15). If queer persons could not be treated differently in relation to sexual relations, the same logic ought to apply to marriage and sequential rights.

South African lawyer Jonathan Berger has argued that this distinction matters because while privacy demands the State to stay completely out of individuals' affairs, equality requires the State to actively ensure equal treatment in all areas of life.[36] Therefore, once equal treatment with heterosexual people is recognized, it should be easier to claim related rights such as equal age of consent, protection from employment discrimination, and rights in marriage and adoption.[37] It was significant to acknowledge inequality in addition to a dignified living. Some international perspectives are helpful here.

In Dudgeon v. UK,[38] the European Court of Human Rights struck down Northern Ireland's buggery law under Article 8 of the European Convention on Human Rights, finding it disproportionately restricted personal and family life without any pressing social need. This privacy-focused approach did not address equal treatment under Article 14, making it harder for a gay couple in Oliari v. Italy[39] to seek marriage rights. The Court in Oliari stated that States were not required to grant marriage equality if they provided some legal recognition, influenced by the fact that many European countries only recognized civil partnerships.

In contrast, queer lawyers and activists in South Africa focused on equality in their litigation, leading to successive victories. Starting with constitutional protection of sexual orientation and judicial recognition of marriage and adoption, they emphasized equality over privacy. In National Coalition of LGBTQ,[40] Justice Ackermann opined that the equality approach offered greater protection for homosexual persons. Thus, in Fourie,[41] the Constitutional Court rejected the State's argument that the Constitution only protected private family life and not marriage. The Court deemed excluding same-sex couples from marriage as contrary to equality, asserting that treating same-sex marriages as inferior was constitutionally unacceptable.

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36 Jonathan Berger, 'Getting to the Constitutional Court on Time: A Litigation History of Same-Sex Marriage' in Melanie Judge, Anthony Manion, Shaun de Waal (eds), *To Have and To Hold: The Making of Same-Sex Marriage in South Africa* (Fanele 2008) 17.

37 Shivani Vij, 'A strong case exists for marriage equality' (The Hindu, 31 December 2022) <https://www.thehindu.com/opinion/op-ed/a-strong-case-exists-for-marriage-equality/article66321811.ece> accessed 15 August 2024.

38 *Dudgeon v UK Application* No 7525/76 (1981) [ECtHR].

39 *Oliari & Ors. v Italy* Application Nos 18766/11 and 36030/11 (2015) [ECtHR].

40 *National Coalition of LGBTQ & Ors v Minister of Home Affairs & Ors* (CCT10/99) [1999] ZACC 17 [South Africa Constitutional Court].

41 *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19 [South Africa Constitutional Court].

In the US, both decriminalization of same-sex relation[42] and granting of marriage equality[43] were based on the due process clause of the Fourteenth Amendment, focusing on personal liberty (rather than equality). Justice O' Connor's concurring opinion in Lawrence however highlighted that sodomy laws should be struck down for unequal treatment compared to heterosexual couples, emphasizing that the core issue was unequal treatment, not just liberty.

In Navtej, India belatedly adopted the South African approach. Though sexual autonomy under Puttaswamy substantially helped establish rights under Article 21, another significant part of the analysis was the inequality meted out to queer persons by treating them as a separate class from heterosexual persons and perpetuating stereotypes. When Supriyo was argued, it was this equality-leaning approach which helped the petitioners establish an Article 15 violation, despite a unanimous finding of the bench that a fundamental right to marry did not exist.[44] Sexual orientation was already a protected ground in Navtej and on that basis, the Court questioned the marriage exclusion which adversely impacted queer couples. Both the majority and minority agreed that benefits were denied on account of marital status, which were available to heterosexual couples, without any reasonable basis for this distinction. The foundation of equality laid down in Navtej was extremely crucial. Going forward, this finding of unequal treatment will remain intact and help achieve additional rights.

III. ONCE HELD DISCRIMINATORY, HOW CAN COURTS RECTIFY IT?

Never mind the different approaches, the Court was ad-idem that access to marriage was unfairly and unequally denied to queer persons. Once this was done, why was the Court not convinced of the relief? The majority held itself back from giving a positive declaration of the right to a union, let alone giving positive directions to effectuate the right. It was the 'scope and extent' of Article 32 that was differently understood by the majority and minority, or rather misunderstood by the majority, that led to the conclusion in Supriyo.

A. Scope of Article 32

Article 32 guarantees the right to move the Supreme Court for enforcement of rights conferred by Part III of the Constitution. It is itself placed in Part III, which means that the right to approach the Court is also guaranteed. The 'remedy' is therefore also a fundamental right that cannot be abrogated.[45] This is the same 'effective remedy' under

42 *Lawrence v Texas* 539 US 558 (2003) [US Supreme Court].

43 *Obergefell v Hodges* 576 US 644 (2015) [US Supreme Court].

44 *Supriyo* (n 2) (Bhat J) [365(g)].

45 *Powers, Privileges and Immunities of State Legislatures, In re* 1964 SCC OnLine SC 21: (1965) 1 SCR 413 [7J] [117]; *State of WB v Committee for Protection of Democratic Rights* (2010) 3 SCC 571 [5J] [53] [hereinafter 'Democratic Rights'].

Article 2(3) of the International Convention on Civil & Political Rights (hereinafter referred to as "ICCPR")[46] which obligates its signatories to ensure access to courts. India is one of the few jurisdictions that safeguards the remedy on an equal footing as the right.

Judicial review undertaken by courts casts two obligations on it, first, to safeguard the fundamental right itself, Article 14 in this case and second, to safeguard the remedy and undo the violation of the former, if any. The remedy is therefore equally important. Once the Court finds a violation, it must issue directions under Article 32(2), provided that the type of remedy is squarely at the Court's discretion.[47]

The power to achieve this under Article 32 is very wide.[48] Article 32(2) enables the Court to pass "directions, orders or writs, in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari" for enforcement of rights. 'In the nature of' shows the power is not limited to the writs specified here but extends to any directions or orders which may be appropriate to enforce rights.[49] This reiterates that the duty of the Court is not merely to declare the law unconstitutional but to enforce fundamental rights by issuing these directions and writs.[50] These include varied positive directions, such as, enforcing speedy trial,[51] granting compensation in terms of exemplary damages, preventive, remedial and punitive measures to prevent honour killing,[52] and recognising transgenders as socially and educationally backward classes.[53]

The main difficulty faced by the majority in Supriyo was that granting marriage rights by passing a slew of directions would surpass the judiciary's domain and impinge upon separation of powers, a basic feature of the Constitution which ensures the distribution of powers between the legislature, executive and judiciary.[54] In other words, granting relief that it was asked to, would mean as if the judiciary was legislating. This is

46 International Convention on Civil & Political Rights, UNTS, 1966, Vol 999 171, art. 2(3) [hereinafter 'ICCPR'].

47 *Kanu Sanyal v Distt. Magistrate* (1973) 2 SCC 674 [5J] [7].

48 *L Chandra Kumar v Union of India* (1997) 3 SCC 261 [7J] [78].

49 *Democratic Rights* (n 45) [53].

50 *Democratic Rights* (n 45) [52] "…Whether there is a contravention of any of the rights so conferred, is to be decided only by the constitutional courts, which are empowered not only to declare a law as unconstitutional but also to enforce fundamental rights by issuing directions or orders or writs of or "in the nature of" mandamus, certiorari, habeas corpus, prohibition and quo warranto for this purpose."

51 *Hussainara Khatoon (IV) v Home Secretary, State of Bihar* (1980) 1 SCC 98 [2J] [10].

52 *Shakti Vahini v Union of India* (2018) 7 SCC 192 [3J] [55]; *Tehseen S. Poonawalla v Union of India* (2018) 9 SCC 501 [3J] [40].

53 *NALSA* (n 7) [135].

54 *Supriyo* (n 2) (Bhat J) [551], [553].

also popularly known as the democratic objection. As Jeremy Waldron puts it, giving judges the power to determine the content of human rights disrespects the democratic will of the people that has entrusted this task to the legislature.[55] The objection is particularly strong for rights entailing positive duties.[56]

This reasoning of the majority poses an old, yet significant question i.e. once the violation of a fundamental right is established, does the court's power of judicial review (to grant relief) get curtailed if an exercise of it would violate the separation of powers? A previous Constitution Bench in Democratic Reforms[57] has dealt with the same question and answered it in the negative.[58] The Court unanimously held that once a violation was established, the Court ought to grant relief under Article 32 to remedy it. The principle of separation of powers could not hold the Court back while exercising judicial review, which is also part of the basic structure. The role of the Court was not seen as anti-democratic but as an equal participant in democratic resolution of disputes.[59] The majority in Supriyo did not deal with why the reasoning in Democratic Reforms was not applicable and in fact ignored the decision entirely.

Another difficulty expounded by Justice Bhat speaking for the majority was that of moulding relief.[60] They reasoned that since the relief required applying and tailoring religious personal laws to queer couples, it is not something Courts could do. It is true that the difficulty in formulating relief qua marriage laws is unique to India. Other jurisdictions like the United States & some European States recognise marriage as a license granted by the State. However, two previous Constitution Bench decisions of MC Mehta (Oleum Gas leak) and Anita Kushwaha encountered a similar question on moulding relief. In MC Mehta, Court addressed its remedial powers in granting compensation to victims of the oleum gas leak.[61] In Anita Kushwaha,[62] the Court was asked to grant the right to transfer proceedings in Jammu & Kashmir, despite the lack of an enabling provision and an express exclusion in the Code of Civil and Criminal Procedure. In both cases, the constitutional duty cast upon Courts to frame appropriate reliefs was emphasised.[63] The Court could not say that it was powerless or helpless when

55 Jeremy Waldron, *Law and Disagreement* (OUP 1999); Sandra Fredman, *Comparative Human Rights* (OUP 2018) 80 [hereinafter "Fredman Human Rights"] 80.

56 ibid.

57 The issue before the court was whether it could direct a CBI investigation without the consent of the State under the Delhi Special Police Establishment Act.

58 *Democratic Rights* (n 45) [43]-[44].

59 Fredman Human Rights (n 55) 86.

60 *Supriyo* (n 2) (Bhat J), Part IX - Moulding Relief.

61 *MC Mehta v Union of India* (Shriram - Oleum Gas) (1987) 1 SCC 395 [5J] [hereinafter 'MC Mehta'].

62 *Anita Kushwaha v Pushap Sudan* (2016) 8 SCC 509 [5J] [hereinafter 'Anita Kushwaha'].

63 ibid [42], [45].

a violation occurred.[64] It ought to salvage the threatened right somehow and search for new remedies and strategies if required.[65] Being powerless would mean that the remedy under Article 32 was frustrated, and violation of Article 14 rendered otiose as if it had no consequence. Thus, power ought to be exercised in a manner that would prevent a violation and not further it. The majority in Supriyo seems to unsettle this position, by holding - Yes, there is discrimination against queer couples, but moulding the relief seems difficult and nuanced and therefore cannot be granted.[66] It also fails to deal with the argument raised by Sr. Adv. Raju Ramachandran, that once a violation was established, the onus for curating relief was not on the Petitioner.[67] It was rather on the Court.

This understanding of fundamental rights was main point of divergence between the majority and minority opinions. Chief Justice Chandrachud, speaking for the minority, disagreed with Justice Bhat's conclusion that though the effect of SMA in granting gender-specific marriage rights is discriminatory on queer couples, Courts were incapacitated to remedy it. Chief Justice Chandrachud found that the logical corollary of a finding of discrimination is to grant a remedy, and without it, rights could not be fully realised.[68] A combined reading of the three Constitution Bench decisions cited above has same tenor.

B. Vacuum filling in the absence of law

The relief under Article 32 becomes nuanced and peculiar where the Court looks at inaction of the legislature. Absence of law resulting in a violation of fundamental right(s) magnifies the role of the Court in protecting and restoring it. Here, the burden on

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64 *MC Mehta* (n 61) "7.…If the court were powerless to issue any direction, order or writ in cases where a fundamental right has already been violated, Article 32 would be robbed of all its efficacy, because then the situation would be that if a fundamental right is threatened to be violated, the court can inject such violation but if the violator is quick enough to take action infringing the fundamental right, he would escape from the net of Article 32."

65 *Khatri (IV) v State of Bihar* (1981) 2 SCC 493 [2J] [7]; *Nilabati Behera v State of Orissa* (1993) 2 SCC 746 [3J] [19], [20] - "20. We respectfully concur with the view that the court is not helpless and the wide powers given to this Court by Article 32, which itself is a fundamental right, imposes a constitutional obligation on this Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution…".

66 *Supriyo* (n 2) (Bhat J) (Majority) [532], [560], [569].

67 *Supriyo* (n 2), Rejoinder Submissions on behalf of Senior Advocate Raju Ramchandran [17].

68 *Supriyo* (n 2), (DY Chandrachud CJ) (minority) [358] "358. My learned brother contradicts himself when he holds that the SMA is not discriminatory by relying on its object, on the one hand, and that the state has indirectly discriminated against the queer community because it is the effect and not the object which is relevant, on the other…I cannot bring myself to agree with this approach. The realization of a right is effectuated when there is a remedy available to enforce it. The principle of ubi jus ibi remedium (that is, an infringement of a right has a remedy) which has been applied in the context of civil law for centuries cannot be ignored in the constitutional context. Absent the grant of remedies, the formulation of doctrines is no more than judicial platitude."

the Court is heavier since no framework exists in the first place. While the Courts avoid taking over legislative powers, they must act when the legislature fails to do so.[69] Courts therefore engage in filling the vacuum in law till the legislature steps in.

The most prominent example here is Vishakha.[70] A frequently cited judgment redefining the Court's role under Article 32 emerged from the urgent need to protect working women from workplace sexual harassment and safeguard their rights under Articles 14, 19, and 21. There was a complete absence of law or any civil framework to redress workplace harassment. The Court acknowledged this was a difficult task,[71] particularly for the Courts, but they embraced the challenge and established clear guidelines defining sexual harassment. They also outlined specific steps that employers must take to address it. These guidelines were binding and enforceable[72] and had the effect of law under Article 141. The Court was cognizant that legislating was not in its domain, but if the absence of a framework meant that equality and a dignified living were endangered, it ought to act and enforce fundamental rights through the executive.[73] NALSA[74] relied on Vishakha to formulate guidelines to enforce transgender rights and Common Cause,[75] a Constitution Bench decision, reiterated its scope under Article 32 to formulate living will directives to enforce a dignified death as a part of dignified living.

Vishakha, NALSA & Common Cause were strongly urged by the petitioners in Supriyo but were distinguished by the majority, rather oddly. For the majority, the immediate need to obviate workplace harassment or to safeguard the personhood of transgender persons seemed more pressing and justified for granting relief, than the discrimination faced by queer couples.[76] Moreover, the Solicitor General's agreement with the Court in Vishakha[77] influenced the Court's departure from it in Supriyo, where the State vehemently contested marriage rights: a distinction that seems alien to the Court's interpretation of constitutional rights. However, the minority correctly determined that the inadequacies faced by queer couples were neither mild nor tolerable and required immediate action.[78] Queer couples were treated unequally compared to

69 *Anoop Baranwal v Union of India* [Election Commission Appointments] (2023) 1 SCC 161 [5J] [291] [hereinafter 'Anoop Baranwal'].

70 *Vishaka v State of Rajasthan* (1997) 6 SCC 241 [3J] [16] - "16…the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality…, we lay down the guidelines…until a legislation is enacted for the purpose." [hereinafter 'Vishakha'].

71 ibid [8].

72 ibid [18].

73 ibid [7]-[8].

74 *NALSA* (n 7) [7].

75 *Common Cause v Union of India* (2018) 5 SCC 1 [5J] [203] [hereinafter 'Common Cause'].

76 *Supriyo* (n 2) (Bhat J) [557], [558]

77 *Vishakha* (n 70) [9].

78 *Supriyo* (n 3) (Chandrachud CJ) [361].

heterosexual couples, without needing to prove a threshold of intolerance.[79] There was no need to compare the violations or indignity, and even if there was, it would be impossible to objectively consider one more tolerable than the other. Moreover, Vishakha & NALSA arose from Article 14 violations, in addition to Article 21, and both created obligations for private citizens along with the State. They had more commonality than distinction with Supriyo, which ought to have driven the majority to act similarly.

Vineet Narain[80] & Anoop Baranwal[81] (and several others)[82] though not discussed in detail in Supriyo also shows what the Court can and cannot do when the legislature fails to act. In Vineet Narain,[83] the Court was concerned with rampant corruption by public officials, high dignitaries in particular, who controlled the functioning of the Central Bureau of Investigation. The infamous Jain Diaries exposed the lack of a transparent and independent mechanism to prosecute these public officials in a fair and unbiased manner. Inaction by the legislature and executive meant that equality and the rule of law were threatened, and a need was felt to restore them.[84] The Court decided to address these gaps by directing the establishment of the Central Vigilance Commission and the Enforcement Directorate, giving them statutory status, and overseeing the Central Bureau of Investigation's functioning.[85] Again, this was not seen as legislating, but only a measure until Parliament enacted a law.

Similarly, Anoop Baranwal dealt with the inaction of the Parliament under Article 324(2) to create an independent procedure for appointment of the Chief Election Commissioner, a constitutional body. The absence of a law created a void or a vacuum and threatened the right to free and fair elections and therefore democracy.[86] The Court's inability to mandate the legislature to create a law, which it was not asked to do and could not do, did not prevent it from issuing directions to provide a fair appointment procedure.[87]

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79 ibid.

80 *Vineet Narain v Union of India* (1998) 1 SCC 226 [3J] [hereinafter 'Vineet Narain'].

81 Anoop Baranwal (n 69).

82 *Common Cause* (n 75) [2], [14]; *Dayaram v Sudhir Batham* (2012) 1 SCC 333 [3J] [10]-[11], [17], [22].

83 *Vineet Narain* (n 80) [4]-[5].

84 *Vineet Narain* (n 80) [49], [51], [52] - "52. As pointed out in Vishaka…it is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field."

85 *Vineet Narain* (n 80) [58].

86 *Anoop Baranwal* (n 69) [301], [309].

87 *Anoop Baranwal* (n 69) [308].

While undertaking gap-filling to uphold rights, Indian Courts have distinguished themselves as compared to other jurisdictions. In Canada, unwritten principles like the rule of law, democracy, and judicial independence have been used to fill constitutional gaps.[88] Chief Justice Lamer of the Canadian Supreme Court explained that these gaps had to be filled by principles not explicitly included in the Constitution.[89] In the Privy Council decision of Hinds v. Queen,[90] Lord Diplock read the principle of separation of powers to determine the constitutional validity of the Jamaican Gun Court Act 1974 which transferred jurisdiction of crimes previously exercised by the Supreme Court. South Africa also used constitutional interpretation and values as a means of gap-filling.[91] However, Indian Constitutional Courts addressed these gaps, attentively and actively, by framing concrete measures until law was made by the Parliament. For them, this not only involved constitutional interpretation but creating "law" under the protective umbrella of Article 32. If this was the only way to enforce fundamental rights, it could be done by Courts.

Therefore, the majority in Supriyo claiming that the Court's power was limited in the absence of a legal regime (and would require judicial legislation) contradicted past precedents and did not sit well with the minority.[92] Chief Justice Chandrachud (minority), after disagreeing with Justice Bhat (discussed above), passed the following categorical directions under Article 32:

- Positive Declaration: All persons including queer couples have a fundamental right to enter into a union. The State is obligated to recognise the entitlements that flow from a union.[93]

- Adoption: All unmarried couples, including queer couples, have a right to jointly adopt. The provisions of CARA Adoption Regulations were read broadly to make them marriage-neutral.[94]

- Directions to Executive: First,[95] the Union and State Governments were directed to take steps to prevent violence and discrimination against the queer

88 Andrew Heard, 'Constitutional Conventions: The Heart of the Living Constitution' (2012) 6 Journal of Parliamentary and Political Law 319-338; Han Rou Zhou, 'Legal Principles, Constitutional Principles, and Judicial Review' (2020) 67 American Journal of Comparative Law 899.

89 *Reference Re Remuneration of Judges of the Provincial Court* (P.E.I.) [1997] 3 SCR 3 [Supreme Court of Canada].

90 *Hinds v The Queen* [1977] AC 195 (PC) 211 (appeal taken from Jam.) [Privy Council].

91 Francois Venter, 'Filling Lacunae by Judicial Engagement with Constitutional Values & Comparative Methods' (2014) 29 Tulane European & Civil Law Forum 79-100.

92 *Supriyo* (n 2) [352].

93 ibid [365(i)].

94 ibid [365(p)].

95 ibid [364].

community, ensure access to goods & services, mental healthcare etc, prevent forced treatments and operations concerning gender identity and sexual orientation, and the police were directed to ensure prevention and redressal of violence and effective enforcement of rights. Second,[96] on the assurance of the Solicitor General, the Union Government was directed to constitute a committee chaired by the Cabinet Secretary to define the scope of entitlements to queer couples in a union.

While these directions may not be everything the petitioners desired, they certainly constitute a well-defined starting point to establish the rights of queer couples in a union. Had they been accepted by the majority; they would remain operative till the legislature stepped in.

IV. LEGISLATIVE INTERVENTION WOULD BE NECESSARY IN DUE COURSE

Despite the Court's guidelines, the legislature eventually stepped in after Vishakha (POSH Act),[97] Vineet Narain (CVC Act),[98] NALSA (Transgender Persons Act)[99] and Anoop Baranwal (CEC Act).[100] The POSH Act & CVC Act incorporated all directions, Transgender Persons Act incorporated most and CEC took a contrary approach. Legislative dialogue was therefore needed and, in most cases, gave its acceptance and legitimacy to the Court's decision.

Therefore, even if today's minority becomes tomorrow's majority and the Supreme Court blesses queer couples, the need for future legislative intervention may not be obviated. The bench in Supriyo agreed that Courts were not able to grant the wide bouquet of rights to queer couples by foreseeing all nuances of religious and secular laws.[101] This was an elaborate and extensive task and involved polycentric issues.[102] This was evident from the minority opinion as well, which did not go as far as laying down a regime to provide all benefits arising from marital status. It granted only adoption rights[103] and declined to read into SMA.

The reason this could not be done by a simple mandamus is obvious. The successive rights of having and protecting a family are presently recognized only in heterosexual marriages and in a legal framework tailored to such marriages. Over the years the legislature has taken the positive burden to undo the consequences of the gendered role

96 *Supriyo* (n 2) (Chandrachud CJ) [365(s)].

97 The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

98 The Central Vigilance Commission Act 2003.

99 Transgender Persons (Protection of Rights) Act 2019.

100 The Chief Election Commissioner & Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act 2023.

101 *Supriyo* (n 3) (Bhat J) [564(iv)]; *Supriyo* (n 2) (Chandrachud CJ) [365(h)].

102 *Supriyo* (n 3) (Bhat J) [569].

103 *Supriyo* (n 2) (Chandrachud CJ) [325], [329], [333].

of women in heterosexual marriages. This meant protecting women from subjugation, violence, or its threat in a marriage, and ensuring their livelihood by enabling positive rights to property, succession, and maintenance. Hence, both religious personal laws affecting succession, different degrees of prohibited relations for each spouse, and beneficial secular laws dealing with domestic violence, maintenance, and adoption were moulded towards this objective. This included protection to only women against domestic violence, right of only a woman to claim maintenance etc.

In queer marriages with male partners, these laws would either become entirely inapplicable or fail to recognise the disadvantages faced by them, necessitating a new legal framework. Besides, to acknowledge queer marriages with female partners, the laws would require amends to provide equal protection to both spouses, since either or both may have been disadvantaged for their gender and/or sexual orientation. Domestic violence, for instance, would remain common to all queer partners and require a suitable law.

Therefore, whenever the Court recognises queer unions and marriages in future litigation, a need would still be felt to overhaul the existing framework of marriage. The legislature would have a duty to act and ensure a fuller realization of the rights of queer persons. This would help respond to the democratic objection to a judicial determination of rights, that often takes refuge under separation of powers.

V. CONCLUSION

Queer couples are still fighting for the right to marry and have a family. At the heart of this battle is differential treatment by the State. Each time a challenge is brought before the Court, it is this inequality with heterosexual persons that drives the Court to uphold a challenge. This paper initially has addressed two different facets of discrimination faced by queer couples, direct and disparate impact. Denying access to the institution of marriage meant direct discrimination based on sexual orientation. However, since marital status was also the eligibility for claiming sequential rights, the denial caused a disparate impact on queer couples who were unable to exercise the choice to marry. Supriyo acknowledged this and held it to be an article 15 violation. After doing so, however, it did not grant relief. In the next section, the paper discussed the two obstacles of separation of powers and the difficulty in moulding relief that acted as a deterrence for the Court. Both objections had been considered by the Court in past precedents and rejected as obstructions to judicial review but were distinguished by the majority. The forward-looking bench, as it were in Supriyo, refused to venture as far as Vishakha, and pass directions for registration of marriage and guidelines for adoption. Finally, the last section of the paper discussed the need for legislative intervention eventually, to develop a comprehensive legal framework for rights of queer couples.