

Supriyo V. Union of India 2023 Insc 920 Case Note and Comment

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ABSTRACT:

Examining the ruling of the Supreme Court in *Supriyo v. Union of India*, a case consisting of several petitions, which addressed the issue of whether same-sex couples are legally permitted to get married and start families in India. The Special Marriage Act of 1954, which limits marriage to a "man" and a "woman," was challenged by the petitioners as unconstitutional, but the intervenor's skilled counsel argued that non-heterosexual weddings should not be allowed for several grounds that this paper aims to look at. This case note indicates that although the judgment follows established precedents in concluding, there are some fallacies in the majority's reasoning that require further discussion.

“The capacity of non-heterosexual couples for love, commitment and responsibility is no less worthy of regard than heterosexual couples.”

~Justice Sanjay Kishan Kaul

BACKGROUND OF THE CASE:

In November 2022, two same-sex couples filed writ petitions in the Supreme Court seeking legal recognition of same-sex marriages in India, the first petition was filed by Supriyo Chakraborty and Abhay Dang met in Hyderabad in December 2012, when the pandemic hit, it brought the frailty of life and home to both partners and their families, the petitioners felt that they needed a little more than love, and wished for the security that marriage brought along.¹ Despite a long-committed relationship, which is also accepted by their families, friends, and people around them, they were strangers in the eyes of the law as the legal regime around recognition and solemnization of marriages excludes a marriage between a same-sex couple².

Hence, the first petition was filed on 14th November 2022. And the second petition was filed by Parth Phiroze Merhotra and Uday Raj Anand. The two-judge bench of Chief Justice of India (CJI) D.Y. Chandrachud and Justice Hima Kohli acknowledged their petition, and later the Supreme Court directed High Courts to transfer nine similar petitions to the Supreme Court to decide along with the original petitions.

ISSUES BEFORE THE COURT:

Given the facts of the case, the major issues that this paper aims to address are:

1. Do members of the LGBTQIA+ community have a right to marry?

¹ *Supriyo @ Supriyo Chakraborty & Anr. v. Union of India* W.P.(C) No. 1020/2022 (PIL-W)

² *Ibid*

2. Does the non-inclusion of LGBTQIA+ marriages under the Special Marriage Act, 1954, amount to discrimination under Article 14 and can the SMA, 1954 be declared unconstitutional?

IS THERE A RIGHT TO MARRY?

As argued by Mr Raju Ramachandran, the petitioners have a fundamental right to marry a person of one's own choice under Articles 14, 15, 19, 21 and 25 of the Constitution of India, the denial encompasses the right to happiness, it also states that the court's current law on LGBTQIA+ rights affirms that these individuals are entitled to dignity, equality, and privacy, which includes the fundamental right to marry the person of their choosing. This includes a fulfilling marriage with the person of one's choosing. The petitioners contended that marriage was a fundamental right by citing *Shafin Jahan v. Asokan K.M. (2018)*³ and *Shakti Vahini v. Union of India (2018)*⁴ in support of their position. In both situations, a biological man and a biological woman were married outside of their respective castes and religions. The decision to pick a partner, whether married or not, belongs only to the person. In a same vein, *Shakti Vahini* maintained that two adults have the right to marry each other if they so want.

The petitioners also contend that the non-recognition of 'atypical families' or 'chosen families' beyond constraints of marriage, blood or adoption violates Article 14, 15, 19 and 21⁵. While Article 21 of the Constitution of India protects the right to found a family and the right to a meaningful family life for all persons including LGBTQ persons, the law uses the word "family" and "household", the petitioners argue that these words are restricted to a "biological" man and woman and their children. Because the right to establish a union can be linked to multiple Part III provisions, the petitioners demand that the courts apply the integrated proportionality approach developed in *Akshay N Patel v. Reserve Bank of India*⁶ when determining whether the right has been violated.

Moving on to the arguments given by the Learned Counsel of the Union of India, Mr. R. Venkataramani, argues that courts cannot issue directions granting legal recognition to non-heterosexual marriages because it would require the redesigning of several enactments and rules and would lead to chaos in the community. Mr. Tushar Mehta contends that there is no legal requirement for the state to recognize any kind of relationship. He also introduces the idea of a legitimate state interest, stating that the state has no legitimate interest in recognizing such relationships in order to maintain society. He further emphasizes that the courts have no authority to determine whether or not non-heterosexual couples can be awarded legal recognition for their union. The respondents rely on certain case laws, for instance, *National Legal Services Authority v. Union of India*⁷ and *In Navtej Singh Johar v. Union of India*⁸, the court exclusively protected non-heterosexual couples' personal and immediate privacy zones, and not the right to marry. The respondents fear that by declaring such a recognition legally valid, this court would be granting legal recognition to a 'new social relationship'⁹, which could pre-empt debates.

Ms. Manisha Lavkumar argues that although marriage laws are always changing, they are still based on heterosexual relationships. She claims that the state has a general interest in keeping non-heterosexual relationships outside of the definition of marriage because it controls married behaviour, upholds social

³ *Shafin Jahan v. Asokan K.M. (2018)* 16 SCC 368, AIR 2018 SC 1933

⁴ *Shakti Vahini v. Union of India (2018)* 7 SCC 192

⁵ *Supriyo @ Supriyo Chakraborty & Anr. v. Union of India W.P.(C) No. 1011/2022*, page no. 32

⁶ *Akshay N Patel v. Reserve Bank of India* LL 2021 SC 711

⁷ *National Legal Services Authority v. Union of India (2014)* 5 SCC 438

⁸ *Navtej Singh Johar v. Union of India (2018)* INSC 790

⁹ *Supriyo @ Supriyo Chakraborty & Anr. v. Union of India W.P.(C) No. 1011/2022*, page no. 35

order, and guarantees the advancement of society in a way that is lawful¹⁰. Lastly, Ms. Manisha Narain Agarwal submitted that the petitioners are seeking social acceptance of their relationships through an Order of the Court but the Court does not have the powers of such magnitude¹¹.

IS THE SMA UNCONSTITUTIONAL?

The counsel appearing for the Petitioners lay extensive emphasis on the constitutionality of the Special Marriage Act, 1954, Mr. Mukul Rastogi argues that SMA violates the right to dignity and decisional autonomy of the LGBTQIA+ persons which in-turn violates Article 21 of the Constitution, since SMA in its wordings excludes the LGBTQIA+ persons, it clearly discriminates against them on the basis of their sexual orientation and the sex of their partner, violating the Article 15 of the Constitution.

He also substantiates reasons as how is the SMA violative of Article 14 of the Constitution; there has been an attempt to follow the Reasonable Classification Test, the learned counsel argues that there is no constitutionally valid, intelligible differentia between LGBTQIA+ and non-LGBTQIA+ persons. The classification is only based on sexual orientation and gender identity, which is constitutionally impermissible. The second step of the RCT which questions the rational nexus with the objective of the SMA, which is to provide a civil form of marriage for couples who cannot or choose not to marry under their personal law, therefore the exclusion of LGBTQIA+ couples from the SMA has no rational nexus with this object. Ms. Jayna Kothari argues that the SMA is violative of the right to transgender persons to have a family, and she cites *Oliari v. Italy*¹² for reference.

The petitioners also contend that the intent of the parliament when it enacted the SMA is not relevant, while Mr. Tushar Mehta argue that the debates during the introduction of the SMA indicate that the parliament made a conscious decision to exclude non-heterosexual unions from the ambit of the SMA, the constitutionality of the statute cannot be challenged on the ground of under-inclusion¹³. They also claim that the SMA will be rendered un-workable if it is read in a gender-neutral manner, the court also cannot issue guidelines as it did in *Vishaka & Ors. V. State of Rajasthan*¹⁴ given the history and purpose of the SMA, such power granted to the courts under article 114 must be used sparingly as the court cannot take over the functions of the other organs of the state.¹⁵

JUDGEMENT

All five judges (Chief Justice D.Y. Chandrachud, Justice Sanjay Kishan Kaul, Justice Ravindra Bhat, Justice P.S. Narasimha, and Justice Hima Kohli) with a 3:2 majority on the bench concurred that marriages between LGBTQ individuals cannot be covered by the Special Marriage Act of 1954 and that there is no basic right to marry.

MINORITY OPINION

Given by Chief Justice D.Y. Chandrachud and Justice Sanjay Kishan Kaul, both the judges agree on the argument by the petitioners that a restriction on the right to enter into a union based on sexual orientation

¹⁰ Ibid [49(b)]

¹¹ Ibid [55]

¹² *Oliari and Others v. Italy*, Applications nos. 18766/11 and 36030/11

¹³ *Supriyo @ Supriyo Chakraborty & Anr. v. Union of India* W.P.(C) No. 1011/2022, [42 (I)(iv)]

¹⁴ *Vishaka and Ors. v. State of Rajasthan* (1997) 6 SCC 241

¹⁵ *Supriyo @ Supriyo Chakraborty & Anr. v. Union of India* W.P.(C) No. 1011/2022, [50(b)]

would violate Article 15 of the Constitution as the word 'sex' in the said article includes other markers of identity which are related to sex and gender such as 'sexual orientation'. According to the Chief, the freedom of speech and expression as well as the ability to organize associations are protected by Article 19, which includes the right to enter into "civil unions."

But on the topic of the Constitutional validity of the SMA, CJI opinions deferred from that of Justice Kaul's. According to CJI Chandrachud, ruling the SMA invalid would defeat the goal of the Act's "progressive legislation" and adding, deleting or substituting words in Section 4 of the SMA could not be accepted due to "institutional limitation" while according to Justice Kaul, the SMA violates Article 14 since it discriminates against LGBTQIA+ community. He mentioned the two-pronged approach that is used to evaluate whether a law infringes on an individual's right to equality and he agrees with CJI Chandrachud that there are "multifarious interpretative difficulties" when it comes to including non-heterosexual persons under the SMA.¹⁶

MAJORITY OPINION

On this topic, Justice Bhat on behalf of him and Justice Hima Kohli writes the majority decision in concurring with the CJI that "everyone who identifies as queer has the right to a relationship and the choice of partner, cohabit and live together, as an integral part of choice." Article 21 already acknowledges this. Nevertheless, he disagreed with the logic that a new statute establishing a civil right to a union was necessary. Justice Narasimha concurred with Justice Bhat and stated that it would be against the separation of powers concept to require the state to recognize a civil union, he also adds that marriage is a fundamental freedom and not a right.

Justice Bhat also mentions that recognizing such a right would require a separate regime for registration of the civil union, laying down the conditions of a valid union etc.

He said, citing precedents, that a classification does not amount to exclusion unless the excluded category is a part of the included class. The "sole intention" of the SMA, according to Justice Bhat, is to "facilitate marriage between persons professing different faiths." Consensual sexual encounters between individuals of the same sex were still illegal at the time the law was passed. He also into his wordings tends to warn that a gender neutral interpretation of the SMA would "complicate an already existing path to justice for women and leave room for the perpetrator to victimise them".

CONCLUSION

The conflict between a person's right to autonomy and the government's desire to control marriage was at the heart of this very case. The majority ruling maintained the measures' constitutionality. Nonetheless, I find that I concur with the minority ruling. Anybody's right to object places an excessive burden on personal freedom and may violate Article 21's prohibition against marriage. Furthermore, the word "any person" is so ambiguous that it invites baseless criticism rather than well-founded worries. Their focus on the right to privacy and the freedom to make personal decisions when selecting a life partner is consistent with substantive equality principles and the changing Indian marital culture.

¹⁶ Advay Vohra and Gauri Kashyap, 'Plea for Marriage Equality: Judgement Summary' (*Supreme Court Observer*, 18 October 2023) <<https://www.scobserver.in/reports/plea-for-marriage-equality-judgement-summary>> accessed 24 March 2024