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THE CONSTITUTIONAL CLOSET: READING BETWEEN THE LINES OF SUPRIYO V UNION OF INDIA

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Introduction

*Supriyo @ Supriya Chakraborty vs Union of India*¹ is a judgment that addresses the marital rights of queer individuals in India. Marriage is a concept deeply rooted in the fabric of Indian culture. After the *Navtej Singh Johar v Union of India*² judgment decriminalised homosexuality in 2018, Indian courts have been faced with the question of how they intend to not only affirm but protect queer rights as we move forward socially. While a landmark in nature, many felt that a mere affirmation from the Supreme Court that being homosexual is not a crime was one too small, too late. Further, the queer community did not get to exercise any protective rights, despite most of Indian society's conservative and borderline hateful nature. The Supriyo judgment seems to take two steps forward and one step back with its judgment concerning the rights of queer individuals in India by granting the LGBTQIA+ community protective rights while maintaining the separation of powers doctrine and avoiding the crux which is the right to marry anyone with consent.

Issues discussed

Writ petitions submitted by two queer couples Supriyo Chakraborty and Abhay Dang, and Parth Mehrotra and Uday Raj Anand argued the constitutional validity of Section 4(c) of the Special Marriage Act 1954 (SMA), that states that one of the conditions relating to solemnization of special marriages is that "the male has completed the age of twenty-one years and the female the age of eighteen years."³ They argued the emphasis on the genders was not only reinforcing the gender binary but further argued that it infringed upon the fundamental right of queer people to equality, non-discrimination, privacy, and dignity.⁴ The judgment deals

¹ *Supriyo @ Supriya Chakraborty & Anr. Vs. Union Of India* 2023 Insc 920 [2023] 16 S.C.R. 1209

² *Navtej Singh Johar V Union Of India* 2018 Insc 790 [2018] 7 S.C.R 379

³ The Special Marriage Act, 1954 (Ind)

⁴ Ashish Rawat, 'Navigating The Path To Equality: The Landmark Case Of Supriyo V. Union Of India And The Future Of Lgbtqia+ Rights' (*Manupatra*, 2 July 2024)

with what the constitutionally protected rights a queer person in India enjoys and is entitled to. The legal recognition of relationships, whether marriage or for couples who live together, grants them social and legal security. The decriminalisation of the LGBTQIA+ community is the most minimal protection of their rights, and thus, it must be questioned as to how they can enforce their fundamental rights like the right to life (Article 21) and protection against discrimination (Article 15).⁵

Judgment

CJI DR. DHANANJAYA Y CHANDRACHUD

Then CJI DY Chandrachud Utilises his judgment in dispelling false notions about the queer community that much of Indian society has. He addresses the misconception that being queer is something “urban” or “un-Indian” by mentioning the *Navtej Singh Johar* judgment’s clarification on the matter. He further proves his point with mention of non-binary identities dating back centuries before colonisation and how communities like “hijras, kothis, aravanis, jogappas, thiru nambis, nupi maanbas and nupi maanbis” inter alia continue to exist.⁶

Speaking for the Indian context, he talks about its rooted nature in culture but also contests its diverse perceptions as a “contract” or “sacrament.”⁷ An individual’s perception of the social institution should not inhibit their right to marry, thus the queer community should not be ostracised for the same.⁸ However, Chandrachud clarifies that the right to marry does not count as a fundamental right under the Indian Constitution but is a legal right.⁹ As for the broadening of the Special Marriage Act, 1954 to include queer couples, such an interpretation would be beyond the jurisdiction of the judiciary and thus must be referred to in Parliament for the creation of a separate provision.¹⁰ While addressing trans individuals’ right to marry as a heterosexual couple and adopt, he talks about how the Central Adoption Resource Authority’s regulations for adoption are discriminatory towards unmarried couples, being a violation of Article 14, demanding change for the following.¹¹ He concludes that while queer people can’t be legally married presently, they can enter into unions according to Articles 19 and 21 and

<https://Articles.Manupatra.Com/Article-Details/Navigating-The-Path-To-Equality-The-Landmark-Case-Of-Supriyo-V-Union-Of-India-And-The-Future-Of-Lgbtqia_Plus_-Rights> Accessed 22nd April 2025

⁵ The Constitution Of India [As On 1st May 2024] Part Iii Fundamental Rights

⁶ 2023 Insc 920 [82] (Cji Chandrachud) 81

⁷ Ibid [100] (Cji Chandrachud) 95-96

⁸ Ibid [106] (Cji Chandrachud) 99-100

⁹ Ibid [176 B] (Cji Chandrachud) 136

¹⁰ Ibid [208] (Cji Chandrachud) 154

¹¹ Ibid [294] (Cji Chandrachud) 207-208

will consider if people from such unions can be treated as family for purposes like ration cards, nominees for joint banking accounts among others.¹² He further directs the State and Union Governments to take legislative action to protect the rights of queer individuals.¹³

J. S. RAVINDRA BHAT AND J. HIMA KOHLI

Justice S. Ravindra Bhat and Justice Hima Kohli collectively highlight the crux of the Supreme Court's judgment in this case by demonstrating the nature of marriage as a socio-political phenomenon. When we keep aside perceptions of marriage as a sacred union or as a legal contract, it would be fair to say that it is often done to legally sanction procreation.¹⁴ The court highlights the intrinsic heterosexual nature of marriage in India and reinstates CJI Chandrachud's argument for the inability to read down SMA using the case of *Dharani Sugars and Chemicals Ltd v. Union of India*.¹⁵ This judgment revealed how it is essential to interpret statutes to accommodate new facts and situations, but they cannot be conceptually different, as that would infringe upon the authority of the Parliament.¹⁶ The two judges, however, contradict the former CJI by clarifying that queer individuals enjoy a 'right to relationship' as opposed to a civil union as the latter would be subject to parliamentary imposition and isn't under the judiciary's authority.¹⁷ They further counter Chandrachud's arguments about queer individual's right to adopt, reinforcing their point that a new provision must be created to accommodate for queer individuals.¹⁸ They uphold the fact that queer individuals deserve to enforce their fundamental rights to life (Article 21) and equality (Article 14) but also clarified that the judiciary can only do so much in terms of enforcing other rights.¹⁹

J. SANJAY KISHAN KAUL

Justice SK Kaul's judgment is concurrent with that of CJI Chandrachud's as proven by his agreement with the latter's stance on queer relationships being an inherent part of Indian society. He furthers Chandrachud's arguments by citing early illustrations from the *Rig Veda* that talk about children of two mothers (*dvimatri*), highlighting that these relationships are rooted in deep love as opposed to mere amorous intentions.²⁰ He further affirms his argument

¹² Ibid [340] (Cji Chandrachud) 242

¹³ Ibid

¹⁴ Ibid [5] (Bhat J And Kohli J) 227

¹⁵ Dharani Sugars And Chemicals Ltd V. Union Of India [2019] 6 S.C.R. 307

¹⁶ Ibid (N 1) [89] (Bhat J And Kohli J) 268

¹⁷ Ibid [52] (Bhat J And Kohli J) 249

¹⁸ Ibid [122] (Bhat J And Kohli J) 284

¹⁹ Ibid [27] (Bhat J And Kohli J) 238

²⁰ Ibid [5] (Kaul J) 213-214

that queer people have the right to form civil unions, even if they're not legally protected.²¹ In complete contravention to the rest of the judges, Justice Kaul delivers the dissenting opinion that SMA is violative of Article 14 due to not being accommodating of queer relationships.²² He goes on to address that statutory interpretation should be done keeping in mind the constitutional principles directed by the Supreme Court, taking the example of the *Lüth* case in the Federal Constitutional Court of Germany.²³ He concludes by stating that it is essential that the Union Government make provisions to protect the rights of the LGBTQIA+ community for them to be reinstated in the rights that they have been deprived of for centuries.²⁴

J. PAMIDIGHANTAM SRI NARASIMHA

Justice P.S. Narasimha talks about the rights conferred upon queer individuals by the Supreme Court in the *Navtej Singh Johar* and *NALSA* judgment like right to gender identity, cohabitation, privacy inter alia.²⁵ In congruence with J. Kaul, J. Bhat and J. Kohli, he upholds that marriage is not a fundamental but a statutory right. Thus, the argument that SMA is unconstitutional doesn't ring true.²⁶ Like his contemporaries, he respects the community's demand for reinforcing their rights whilst invoking the separation of powers doctrine, claiming it to be ultra vires of the Court's jurisdiction.²⁷ He affirms Justice Bhat's stance of 'right to relationship' as opposed to the right to form a civil union, due to the same rationale that it would imply legal consequences, concluding that the matter is out of the court's hands.²⁸

Conclusion

It becomes clear from the judgment that the Court wanted to put the queer community's mind at ease, which is why the judgment served as a disappointment to them. The judges had a split verdict on whether queer individual's right to enter into civil unions but mostly agreed on the following: there is no fundamental right to marry, SMA is not unconstitutional for being exclusive of the queer community and that the Supreme Court does not have the authority to provide them with the right to marry.²⁹ From a cursory reading, it appears that the Supreme

²¹ Ibid [11] (Kaul J) 215

²² Ibid [16] (Kaul J) 217

²³ Ibid [21,23] (Kaul J) 219

²⁴ Ibid [27] (Kaul J) 220-221

²⁵ Ibid [4] (Narasimha J) 308

²⁶ Ibid

²⁷ Ibid [4] (Narasimha J) 309

²⁸ Ibid [17] (Narasimha J) 315

²⁹ Gauri Kashyap And Advay Vora, 'Plea For Marriage Equality: Judgment Matrix' (*Supreme Court Observer*, 18

Court of India wanted to get credit for making a progressive judgment that would be socially revolutionary, whilst realising that doing so would face immense backlash. In talks of directing the Union Government to create laws accommodating LGBTQ individuals, they failed to address their persecution at an everyday level. A study conducted by the National Institute of Epidemiology revealed that transgender persons experience significant violence, with the police and other law enforcement agencies more than any other perpetrators.³⁰ The demand for right to marriage not only sought to legitimise queer relationships, but have them enjoy the privileges that heterosexual relationships do. Given how intrinsic marriage is to the socio-cultural fabric of our country, it is also about acceptance among one's own, as the CJI rightfully pointed out the false notion of it being a Western identity. The Queer community needs more protection than decriminalisation. They deserve to be treated as human beings, and to do so, we must make room for their presence in society so that they can contribute productively and authentically. The Legislature and the Judiciary must work together closely, whilst also issuing stronger directives to the executive to see where they falter in their process to give them the protection they require. Further, conversations about the queer community shouldn't be done behind closed doors. We must make sure that their stories are heard and their history is protected so that the future generation does not have to ponder whether a human being is worthy of human rights based on who they choose as their partner.

Oct 2023) <<https://www.scobserver.in/reports/plea-for-marriage-equality-judgement-matrix/>> Accessed 25 April 2025

³⁰ Cjp Team, 'India's Lgbtqia+ Struggle: Beyond Legal Victories, Battle For True Equality Remains' (*Citizens For Justice And Peace*, 25 June 2023) <<https://cjp.org.in/indias-lgbtqia-struggle-beyond-legal-victories-battle-for-true-equality-remains/>> Accessed 25 April 2025