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## CASE COMMENT: EQUALITY WITHOUT RECOGNITION? ANALYSING THE SUPREME COURT'S REASONING IN THE SUPRIYO JUDGMENT

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Sumedha Sahoo, BA LLB (Hons.), OP Jindal Global University

### ABSTRACT

In October 2023, after continuous deliberations and petitions, a five-judge bench of the Supreme Court of India gave its judgment on the much-debated case of *Supriyo v. Union of India*. *Supriyo v. Union of India* brings up reformative issues of marriage equality, adoption rights and argues for the right to marry as a fundamental right.<sup>1</sup> The court's ruling against the petitioners in this case coincides with the current societal discourse surrounding same sex marriage rights and debates surrounding the separation of powers. This case comment aims to critically analyse the various arguments and justifications given by the concurring and dissenting judges in this 3:2 judgement.<sup>2</sup> Moving further, the comment delves into analysing three major contentions, that is, the separation of powers between the judiciary and the legislature, the question of the right to marry being a fundamental right and adoption rights, and lastly, challenging the constitutional validity of section 4 (c) of the Special Marriage Act.<sup>3</sup>

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<sup>1</sup> *Supriyo v Union of India* 2023 SCC OnLine SC 1348.

<sup>2</sup> *Supriyo v Union of India* 2023 SCC OnLine SC 1348.

<sup>3</sup> *Supriyo v Union of India* 2023 SCC OnLine SC 1348.

## INTRODUCTION

### A. Background

The aforesaid petition of *Supriyo v. Union of India* was heard by a 5-judge bench of the Supreme Court of India comprising Justice SK Kaul, J. Ravindra Bhat, J. Hima Kohli & J. P.S. Narasimha and Chief Justice of India DY Chandrachud.<sup>4</sup> Before getting into the facts and proceedings of this petition, it is imperative to take a look at India's gradual progression with regard to the rights of the LGBTQIA+ community. One of the first cases filed in favour of the rights of same sex couples was the case of *Naz Foundation v. NCT of Delhi*. While the court in this case held that homosexual sex and relationships between consenting adults are legal, it later overturned this decision in the case of *Suresh Kumar Koushal v. Naz Foundation*. After the judgment in *Suresh Kumar Koushal*, there is a liberal progression that can be seen in the court's judgments.<sup>5</sup> This is reflected in the cases of *NALSA v. Union of India*, where the court recognised the right to self-identity in the form of gender.<sup>6</sup> This was followed by *Navtej Singh Johar v. Union of India*, where the Supreme Court read down section 377 and essentially decriminalised homosexuality and homosexual sex between consenting adults.<sup>7</sup> This landmark judgement given by the Supreme Court of India sparked debates about equal marriage rights of same sex couples, and as a result of which *Supriyo v. Union of India* was filed under Article 32<sup>8</sup> of the Constitution of India.

### B. Facts, Issues and Holding

As already discussed, this case came as a result of various other petitions filed before this. The primary issue under this case was the recognition of the right to marry for same sex couples. The petition contended that section 4 (c) of the Special Marriage Act is unconstitutional and violative of fundamental rights under articles 14, 15 and 21 due to its exclusion of same sex couples under this section. Section 4 (c) of the SMA has been formulated from a heteronormative perspective aiming only to include heterosexual couples and this petition

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<sup>4</sup> *Supriyo v Union of India* 2023 SCC OnLine SC 1348.

<sup>5</sup> Sucheta, 'Mapping the Progression of LGBTQ+ Rights in India- Important Laws and Judicial Pronouncements.' (2023) SCC Online Times.

<sup>6</sup> *NALSA v Union of India* (2014) 5 SCC 438.

<sup>7</sup> Sucheta, 'Mapping the Progression of LGBTQ+ Rights in India- Important Laws and Judicial Pronouncements.' (2023) SCC Online Times.

<sup>8</sup> The Constitution of India, Art. 32.

sought its amendment.<sup>9</sup> The petitioners also contended that non-recognition of same sex marriage is a violation of fundamental rights enshrined under article 14, 15, 19(1) (a) and article 21 of the Constitution of India.<sup>10</sup> While all the five judges agreed on the point of marriage being a statutory right and not a fundamental right, the Court came to a conclusion upon a 3:2 ratio, where Justice DY Chandrachud and Justice SK Kaul gave the minority dissenting opinion and the majority opinion was given by Justice Ravindra Bhat, Justice Hima Kohli, and Justice PS Narsimha.<sup>11</sup> While the court acknowledged the discrimination faced by same sex couples, the verdict was against the petitioners. The court held that there is no unanimous fundamental right to marry, and the court refused to recognise same sex marriage under the Special Marriage Act and upheld its constitutionality.<sup>12</sup> The court's rationale is based on the following reasoning discussed under the analysis of this case comment.

## ANALYSIS

### C. Separation of Powers-

India has three organs of the government, namely the legislature, executive and the judiciary. The underlying principle of the doctrine of separation of powers is that the three organs of the government do not interfere with or overlap with each other.<sup>13</sup> This not only ensures a smooth functioning of a democracy but also ensures the independence of each of the organs of the government. More importantly, the separation of powers prevents encroachment and arbitrary use of power. One of the key arguments used by the court was that legalising same sex marriage would be stepping into the territories of the functioning of the legislature and a violation of the doctrine of separation of powers.<sup>14</sup> The majority opinion led by Justice Ravindra Bhat, contended that the concept of judicial review is not the same as correcting the legislature. The petitioners argued against this point by citing several cases where the Supreme Court's very own past precedents show the contrary and how to uphold fundamental and constitutional rights. The petitioners relied on the judgments given in the cases of Vishaka v. State of Rajasthan and NALSA v. UOI, where the court, during the time of need, came out with legislations to safeguard people's fundamental rights.<sup>15</sup> In the Vishaka case, the court for the

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<sup>9</sup> The Special Marriage Act, 1891.

<sup>10</sup> Supriyo v Union of India 2023 SCC OnLine SC 1348.

<sup>11</sup> Supriyo v Union of India 2023 SCC OnLine SC 1348.

<sup>12</sup> Supriyo v Union of India 2023 SCC OnLine SC 1348.

<sup>13</sup> Devanshi Sharma, 'Separation of Powers in India' [2023] SSRN.

<sup>14</sup> Supriyo v Union of India 2023 SCC OnLine SC 1348.

<sup>15</sup> Supriyo v Union of India 2023 SCC OnLine SC 1348.

first time gave guidelines against sexual harassment to fill the legal lacunae surrounding it.<sup>16</sup> Going along these lines, it can be argued that the judiciary and especially the apex court can and have previously used its powers of judicial review to uphold fundamental rights. and the apex court. This becomes more significant as India is a common law country, and as Justice Kaul points out, the advantage of being a common law jurisdiction is that the law has the potential to change and evolve with time and society.<sup>17</sup>

#### **D. Constitutionality of section 4 (c) of the Special Marriage Act**

Petitioner's key argument about which legislation should be the one to include same sex couples was the Special Marriage Act. They contended that section 4(c) of the SMA is heteronormative and violates the fundamental rights enshrined under article 14, 15 and 21 by not allowing homosexual couples the freedom to choose their partner for marriage thereby violating the right to equality, freedom of choice and right to life and liberty. The court unanimously agreed in this case and stated that the SMA cannot be deemed to be unconstitutional as it only addresses heterosexual couples, and an entirely different legislation is required for the recognition of same sex marriages, which comes outside the purview of the judiciary.<sup>18</sup> In justifying this argument, it is stated that the right to marry is not a fundamental right but a statutory right. To counter this, the Supreme Court previously in the case of *Lata Singh v. State of UP*, had held the right to choose a partner to come under Article 21.<sup>19</sup> Justice DY Chandrachud, as well as in his minority opinion, states that same-sex couples do not have the fundamental right to marry but have the right to civil unions.<sup>20</sup> Here is where a certain dichotomy comes in, as while Justice Chandrachud and Justice Kaul are providing a progressive and liberal outlook on the issue, they are not giving a clear-cut solution to making these civil unions possible. While in his argument, Justice Chandrachud emphasises the fact that the Indian Constitution is a living and dynamic doctrine capable of interpretation and change, he does not give us a method to implement such change.<sup>21</sup> The minority in their dissent also held the CARA rules are a violation of a queer person's rights and that unmarried queer

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<sup>16</sup> *Vishaka and ors. v State of Rajasthan and ors.* [1997] Supp. (3) S.C.R. 404.

<sup>17</sup> *Supriyo v Union of India* 2023 SCC OnLine SC 1348.

<sup>18</sup> *Supriyo v Union of India* 2023 SCC OnLine SC 1348.

<sup>19</sup> *Lata Singh v State of UP* [2006] Supp. (3) S.C.R. 350.

<sup>20</sup> *Supriyo v Union of India* 2023 SCC OnLine SC 1348.

<sup>21</sup> Dr. Justice Dhananjaya Y Chandrachud, "Reformation Beyond Representation: The Social Life of the Constitution in Remediating Historical Wrongs" (March 2024) The Brandeis Lecture.

couples should be allowed to adopt under the Juvenile Justice Act.<sup>22</sup>

### **E. Right to Marry as a Fundamental Right**

To understand why the right to marry is or should be a fundamental right, it is imperative to look at marriage as an institution. The institution of marriage is multi-faceted as it includes social, political, religious and economic criteria. In India, marriage does not only constitute a legal relationship, it has various other social and religious connotations attached to it. More importantly, marriage in an Indian society is viewed as to be holding intrinsic value to a person. Along with marriage come various other economic and legal rights like the right to joint property, a joint bank account, etc.<sup>23</sup> Therefore, the petitioners, Supriya Chakraborty and Abhay Dang, who had a 'marriage' ceremony, make the ceremony only emotionally valid. Despite them doing the same things as any heterosexual married couple, they are still to this day not held on the same footing as their marriage is not legal in the eyes of the law.<sup>24</sup> Even after precedents like *Lata Singh v. State of UP*, where the court has declared that every adult has the right to marry a person of their choice, it really begs the question as to why the court is so hesitant in applying the same principle to same sex couples? While all five judges acknowledge the discrimination faced by same-sex couples, they fail to bring about any real change in the law. While the court points out various reasons which become complexities to bring out change, it is, at the end of the day, an excuse. If one cannot rely on the judiciary for the upliftment of their rights, where is a citizen of this country to go? In a country that has seen monumental progress where cases like *NALSA v. UOI*, *Navtej Singh Johar v. UOI*, and *Vishakha v. State of Rajasthan* have time and again overcome complexities in the law and society to uphold what is paramount, and that is the fundamental rights under the Indian Constitution.

### **F. Conclusion**

Concluding my argument, it is important to point out that while the minority's dissent is a sign of hope for future petitions and growth, it is not a complete step into progression. In fact, it is a lackadaisical approach where there is an intent for a solution, but no actual or real solution is provided. It is imperative to question that while CJI Chandrachud advocated for the right of civil unions for queer couples, that is all he does. He does not follow it up with steps to create

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<sup>22</sup> *Supriyo v Union of India* 2023 SCC OnLine SC 1348.

<sup>23</sup> Soumya Madireddy, 'Patriarchy in Indian Marriages' (2020) *Armchair Journal*.

<sup>24</sup> *Supriyo v Union of India* 2023 SCC OnLine SC 1348.

relevant legislation or provide the petitioners with any such resolutions. The minority's words are liberal and progressive, but they do shy away from creating real change and impact in society. It is important to notice that only the minority in this judgement acknowledge the right to adoption for queer couples while the majority decide against it.<sup>25</sup> This also depicts the priority given to societal complexities and the lack of effort to overcome them, instead of prioritising children in need who would monumentally benefit from being adopted and having a place they can call home. In a country which has recognised same sex relationships and decriminalized section 377 of the IPC, it should not take much deliberation or time to legalise their marriage too. And in the case of India, which puts the institution of marriage on a pedestal which comes with immense societal and familial pressure, it becomes especially important to legalise marriage between same sex couples.

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<sup>25</sup> *Supriyo v Union of India* 2023 SCC OnLine SC 1348.