

Judgement Update: Transgender Marriage, a Mandate?



Wednesday Wisdom
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On 17th October 2023[1] the 5-judge constitution bench[2] of Hon'ble Supreme Court in Supriyo @ Supriya Chakraborty & Anr. v. Union of India[3] (Marriage Equality case) passed its 3:2 verdict declining to legalise same sex marriage in India.

Marriage Equality case Judgment has dealt with various aspects related to the rights of queer couple such as right to adopt, medical benefits etc. In this Article, we have attempted to understand the verdict only addressing the following issues:

- a) whether right to marry is a fundamental right guaranteed under the constitution of India and
- b) related to the right to marry available to Transgender individuals under the present legal regime.

Transgenders are recognised as third gender in India and enjoy all constitutional rights as any other citizen of India. We have dealt in detail the concept of transgender and their existence in our previous Article [here](#).

Background:

2014

The Hon'ble Supreme Court in its the landmark judgment in **National Legal Services Authority vs. Union of India**[4] (NALSA Judgment) declared Transgender for the first time as third gender and directed Center and State government to grant legal recognition of their gender identity such as male, female or as third gender.

2017

In **Justice KS Puttaswamy v. Union of India**[5] (Justice Puttaswamy case) the Hon'ble Supreme Court held that the Constitution protects the right to privacy of a person "which at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation to exercise their sexual orientation".

[1] The article reflects the general work of the authors and the views expressed are personal. No reader should act on any statement contained herein without seeking detailed professional advice.

[2] Chief Justice of India D Y Chandrachud, Justices Sanjay Kishan Kaul, Ravindra Bhat, Hima Kohli and PS Narasimha

[3] W.P.(C) No. 001011 - / 2022

[4] 1 (2014) 5 SCC 438

[5] 7 AIR 2017 SC 4161

2018

In Navtej Singh Johar v. Union of India[6] a five-judge constitution bench of India decriminalized section 377 of Indian Penal Code, 1860 and held that Section 377 of IPC was violative of:

- a) Article 14 of the Constitution of India as it discriminated between heterosexual persons and non-heterosexual persons.
- b) Article 15 of the Constitution of India prohibits discrimination based on 'sex' which includes within its meaning sexual orientation as well and Section 377 indirectly discriminated between heterosexual persons and the LGBTQ community based on their sexual orientation; and
- c) Article 19(1)(a) because Section 377 inhibited sexual privacy.

2019

Pursuant to NALSA judgment the parliament of India enacted a legislation in the year 2019 '**The Transgender Persons (Protection Of Rights) Act, 2019**' ("Transgender Protection Act") to provide protection of rights of transgender persons. The Transgender Protection Act is challenged before the Hon'ble Supreme Court for its constitutional validity and is pending for its hearing. Though the Transgender Protection Act provides system for transgender to be recognised as third gender, but it does not provide any provisions related to marriage rights of transgender.

Legislation in
2019

In 2019 the Madras High Court in the landmark case of **Arunkumar v. Inspector General of Registration**[7] affirmed the transgender right to marry of their personal choice under Article 21[8] of the constitution and interpreted that 'bride' under the Hindu Marriage Act would cover transgender persons who identify as women. The Court affirmed the second petitioner's self-identification as a woman and recognized her right to self-identify her gender and be included, along with other intersexes/transgender persons who identify as women, within the definition of "bride".

[6] 2018 1 SCC 791

[7] WP(MD) No. 4125 of 2019

[8] Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law

In the absence of legal recognition to marriage, there were still many issues faced by transgenders. Thus, another petition was filed by group of LGBTQ+ [9] community including Transgenders to recognise and legalise the same sex marriage.

2023: Supriyo @ Supriya Chakraborty & Anr. v. Union of India

This Petition was filed by group of LGBTQ+ [10] community including Transgenders to recognise and legalise the same sex marriage and their main contention was that the State through the operation of the current legal regime discriminates against the queer community by impliedly excluding the queer community from a civic institution: marriage which is violative of their constitutional rights.

There were four opinions among the five judges dealing with the issues. Justice Chandrachud in his detailed opinion has dealt with the issue related to Transgenders right to marry.

Whether Right to Marry is a fundamental right?

Petitioner's Submission: The Petitioners submitted that in **Shafin Jahan v. Asokan K.M & Ors.** [11](Shafin Jahan case) and **Shakti Vahini v. Union of India**[12] (Shakti Vahini Case) the Hon'ble Supreme Court held that the right to marry is a right guaranteed under the constitution of India. The petitioners further relied on the judgment of the US Supreme Court in **Obergefell v. Hodges** [13] (Obergefell case) in which the right to marry was recognised as a fundamental right.

Court Observations:

A. Hon'ble Chief Justice Chandrachud considering the submission in respect of Shafin Jahan Case and Shakti Vahini case observed that:

- 1.the Hon'ble Supreme Court in the Shafin Jahan case and Shakti Vahini case dealt with situations where State or non- State actors prevented a couple which was otherwise entitled to marry, from marrying.
- 2.In the case of **Shafin Jahan case**, the restriction was sought to be imposed because the partners belonged to different religions and the Hon'ble Supreme Court held that religion and caste cannot be impediments in the exercise of a person's right to choose whom to marry and that no State or non-State entity can interfere with their right to marry a person of their choice.
- 3.In **Shakti Vahini case**, the Hon'ble Supreme Court took note of the violence against couples in inter-caste and interfaith marriages. It directed the state machinery to take preventive as well as remedial measures to protect such couples who wished to marry or who were recently married.

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[11] 2018 (4) SCR 955

[12] 2018 (3) SCR 770

[13] 576 US 644 (2015)

B. Justice Chandrachud made following observations related to Obergefell case:

1. The issue before the US Supreme Court in Obergefell case was not whether the Constitution recognises the right to marry but whether the Fourteenth Amendment requires a State to license a marriage between two people of the same-sex. Justice Kennedy (writing for the majority) observed that the right to marry consists of the following four components: (i) the right of choice; (ii) the protection of intimate association by supporting the union of two persons; (iii) safeguards for children and families, and (iv) cornerstone of social order because marriage is the basis for governmental rights, benefits, and responsibilities. The opinion of the majority held that the components of marriage are not exclusive to heterosexual couples. Thus, the State by not recognising a same-sex union (which is legal) and by not granting benefits which accrue from a marriage was held to be treating same-sex couples unequally, violating the equal protection clause.
2. The jurisprudence which has emanated from the US Courts earlier judgments which held that marriage is a civic right indicates that the right to marry is recognised as a fundamental right because of the benefits (both expressive and material) attached to it.
3. In India Entry 5 of the Concurrent List of the Seventh Schedule to the Constitution of India grants both the State legislature and Parliament the power to enact laws with respect to marriage. In pursuance of the power conferred by Articles 245 and 246 read with Entry 5 of the Concurrent List, Parliament has enacted laws creating and regulating the socio-legal institution of marriage. The State legislatures have made amendments to such laws with the assent of the President, since the subject of marriage is in the Concurrent list.
4. State through the instrument of law characterises marriage with two constituent elements: the expressive component and the material component. Marriage may not have attained the social and legal significance in India it currently has if the State had not regulated it through law. Thus, while marriage is not fundamental in itself, it may have attained significance because of the benefits which are realised through regulation.

C. Justice Ravindra Bhat in his judgment observed that in many cases including Obergefell case the rationale provided by US Court for declaring the right to marry a fundamental right is that it is essential to the orderly pursuit of Happiness (as it appears in their Declaration of Independence) by free persons which in his opinion is not sound - at least as applied to state licensing of marriage (as in the US), which is what civil marriage is. The fundamental importance of marriage remains that it is based on personal preference and confers social status. Importance of something to an individual does not per se justify considering it a fundamental right, even if that preference enjoys popular acceptance or support.

Held: Chief Justice Chandrachud in his conclusion which is in consonance with Justice Bhat's opinion held that the Constitution does not expressly recognize a fundamental right to marry.

Justice Narsimha in his judgment in consonance with the conclusion of Justice Bhat's opinion further opined that in Shafin Jahan and Shakti Vahini case the right to marriage granted by the Hon'ble Supreme Court is a statutory right, and to the extent it is demonstrable, a right flowing from a legally enforceable customary practice. In the exercise of such a right, statutory or customary, the State is bound to extend the protection of law to individuals, so that they can exercise their choices without fear and coercion.

Transgender Right to Marry

Petitioners Submission: The Petitioner under this petition had sought for declaration that the right to marry a person of their choice applies to transgender persons under the present legal and that Transgender are discriminated on basis of their sexual orientation.

A. Marriage rights available to transgender in homosexual relationship.

Chief Justice Chandrachud made the following observations:

1. Before considering the issue, it is important to understand the difference between sex, gender and sexual orientation which is important to understand the term 'transgender'. The term 'sex' refers to the reproductive organs and structures that people are born with. Intersex persons are those whose sex characteristics do not fit the typical notions of 'male' and 'female.' The gender of a person may not correspond to the sex they were assigned at birth and therefore Sex and gender are not the same. The Yogyakarta Principles describe sexual orientation as: "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."
2. Section 2(k) of the Transgender Protection Act defines Transgender, and it applies to persons whose gender does not match with that assigned to them at birth, which includes: Transgender men and women; Intersex persons; Other genderqueer persons; and Persons with socio-cultural identities such as hijras and further clarified that word 'genderqueer' in Section 2(k). However, it does not refer to sexual orientation.
3. Further, Section 3 of the Transgender Protection Act prohibits the state from discriminating against transgender persons.

Considering the above two provisions of the Transgender Protection Act, Chief Justice Chandrachud is of the opinion that though Transgender has been given right to identify their gender as male, female or transgender but the Transgender Protection Act has not given them freedom to choose their sexual orientation. Since the legislation does not apply to homosexual persons or persons of other sexual orientations there is no question of such transgender person being free from discrimination or violence as a result of its enactment.

B. Marriage rights available to transgender in heterosexual relationship.

Chief Justice Chandrachud while dealing the issue of Transgender's right to marry of their choice in heterosexual relationship observed the following:

1. Under existing law examined Section 20 of the Transgender Protection Act which indicates that the statute is in addition to, and not in derogation from any other law for the time being in force and observed that Parliament was no doubt cognizant of the statutes governing marriage when it enacted the Transgender Protection Act and Section 3(e) in particular. "Section 3 (e) the denial or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public;"
2. The laws which govern marriage in the country i.e., both Hindu Marriage Act, 1955 (HMA) and Special Marriage Act, 1954 (SMA) specify conditions which the bride and the bridegroom must satisfy for their marriage to be recognized. The SMA and other enactments regulating marriage use the words "bride" and "bridegroom," "wife" and "husband," "male" and "female," or "man" and "woman." These legislations regulate heterosexual marriages in India.

Held: Chief Justice Chandrachud in his conclusion which is in consonance with Justice Bhat's opinion held that the gender of a person is not the same as their sexuality. A person is a transgender person by virtue of their gender identity. A transgender person may be heterosexual or homosexual or of any other sexuality. If a transgender person is in a heterosexual relationship and wishes to marry their partner (and if each of them meets the other requirements set out in the applicable law), such a marriage would be recognized by the laws governing marriage. This is because one party would be the bride or the wife in the marriage and the other party would be the bridegroom or the husband. The laws governing marriage are framed in the context of a heterosexual relationship. Since a transgender person can be in a heterosexual relationship like a cis-male or cis-female, a union between a transwoman and a transman, or a transwoman and a cisman, or a transman and a ciswoman can be registered under Marriage laws. The transgender community consists of inter alia transgender men and transgender women. A transgender man has the right to marry a cisgender woman under the laws governing marriage in the country, including personal laws. Similarly, a transgender woman has the right to marry a cisgender man. A transgender man and a transgender woman can also marry. Any other interpretation of the laws governing marriage would be contrary to Section 3 of the Transgender Protection Act and Article 15 of the Constitution. The Court in this light upheld Madras HC judgment passed in **Arun Kumar v. Inspector General of Registration**[14]

[14] (2019) Online SCC Madras 8779

Conclusion:

The five Judge constitution bench of Supreme Court has denied the right to marry to the LGBTQ community i.e., including transgender couple in homosexual relationship under existing laws. However, the Hon'ble Supreme Court has affirmed the right of transgender in heterosexual relationship to marry a person of their choice under the existing statutory laws or personal laws which is a welcome judgment for the Transgender individuals.

This recognition of marriage right will now allow the transgenders in heterosexual relationship to adopt and also enjoy other rights which arises from marriage recognised under the law. Transgenders have fought a long social and legal battle to be recognised as a citizen of India and to enjoy the same fundamental and civil rights which are extended to any other citizens of India. The fact that Transgenders had to approach Supreme Court for their marriage recognition even after being recognised as third gender in the country depicts that Transgenders are still struggling to enjoy all rights enjoyed by other section of the society. Justice Bhat in his majority judgment has observed that equality and non-discrimination are basic foundational rights. Non-recognition of queer couples' marriage has indirect discriminatory impacts in relation to earned or compensatory benefits, or social welfare entitlements for which marital status is a relevant eligibility factor and therefore has directed state to redress and remove this existing discrimination. We hope that after this Supreme Court judgment the Centre and State will take more practical steps to recognise and enforce all legal and fundamental rights available to LGBTQ community.

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