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# Love Unchained: India's Quest for Same-Sex Marriage Equality

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## ABSTRACT

*While India's Supreme Court recently declined to legalize same-sex marriages, there are rays of hope amid the complex and somewhat disappointing decision. This ruling followed extensive hearings and the consideration of 21 petitions by same-sex couples and activists, a case that had raised expectations for a historic shift toward marriage equality. Rather than immediately granting legal recognition to same-sex unions, the court opted to accept the government's proposal to establish a committee. This committee will explore extending legal rights and benefits to same-sex couples, signaling a willingness to engage with the issue. The petitioners had passionately argued that the denial of marriage rights violated their constitutional guarantees, rendering them "second-class citizens." Their proposed solution was seemingly straightforward: amending the Special Marriage Act to make it inclusive of same-sex unions.*

**Keywords:** *Same sex, Queer couples, Supreme court, Special marriage act, Adoption rights, Civil union, Transgender rights.*

## I. INTRODUCTION

In the grand theatre of the Indian Supreme Court, a legal drama of unprecedented significance played out in 2023, leaving a lasting imprint on the nation's collective consciousness. The case of Supriyo, also known as Supriya Chakraborty, and Abhay Dang v. Union of India and its associated cases was poised to be a landmark moment for LGBTQ+ rights in the country. As the curtains rose on the pronouncement of the judgment, Chief Justice of India, DY Chandrachud, set the stage with a thought-provoking declaration: "There is a degree of agreement and a degree of disagreement on how far we have to go."

This legal saga was not just a matter of jurisprudence but a saga of human rights and societal transformation. With four distinct judgments authored by eminent jurists on the bench – CJI DY Chandrachud, Justice SK Kaul, Justice Ravindra Bhat, and Justice PS Narasimha – the courtroom became an arena for a multi-dimensional legal discourse. It illuminated not only the

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complexities of the law but also the profound shifts occurring in the landscape of LGBTQ+ rights in India.

However, this introduction alone cannot do justice to the depth of this legal epic. Let's further explore the key elements and nuances that define the significance of these cases.

## **II. BACKGROUND**

Numerous petitions have been brought forward in the Indian legal system, all seeking the vital recognition of same-sex marriages. In January 2020, a noteworthy case was initiated when Nikesh and Sonu, a gay couple, lodged a petition with the Kerala High Court. The petition was admitted by Justice Anu Sivaraman, setting in motion an important legal process. Subsequently, in September 2020, a group of four sexual and gender minority individuals, comprising Abhijit Iyer Mitra, Gopi Shankar M, Giti Thadani, and G. Oorvas, filed a similar petition with the Delhi High Court. Their case was admitted by a two-judge Bench, which included Chief Justice D.N. Patel and Justice Prateek Jalan. Even more momentous was the involvement of the Supreme Court of India. In November 2022, a gay couple named Supriya Chakraborty and Abhay Dang took their quest for legal recognition of their marriage to the Supreme Court. This high-stakes petition was admitted by a two-judge Bench presided over by Chief Justice D.Y. Chandrachud and Justice Hima Kohli. Notably, this petition was joined by another gay couple, Parth Phiroze Mehrotra and Uday Raj Anand. The Supreme Court's involvement took a unique twist, as it directed various high courts to transfer nine similar petitions from Delhi High Court and one from Kerala High Court to be considered alongside the original petitioners. In a landmark move on March 15, 2023, the Supreme Court admitted a staggering total of 20 connected petitions filed by 52 sexual and gender minority individuals, which included 17 couples. The crux of these petitions primarily revolved around the demand for recognition under secular marriage laws, notably the Special Marriage Act and the Foreign Marriage Act. An essential point of contention was the constitutionality of the notice and objection provisions within these laws, as they were perceived to unjustly interfere with the right to marry. Another compelling aspect was the argument put forth by some petitioners who practice Hinduism, contending that the exclusion of couples from sexual and gender minority communities from the Hindu Marriage Act amounted to a violation of their freedom to practice their religion. Representation in these cases was diverse, with various advocates representing the petitioners, and the respondents were represented by Attorney General R. Venkataramani and Solicitor General Tushar Mehta. Furthermore, the Supreme Court took the unusual step of appointing Advocate Arundhati Katju

and Kanu Agrawal as the Nodal Counsel for the petitioners and respondents, underscoring the complexity and significance of these cases in the Indian legal landscape.

### **III. NO FUNDAMENTAL RIGHT TO MARRY**

The recent Supreme Court judgment has brought to light a significant legal perspective. The unanimous decision of the court resoundingly stated that there is no absolute, inherent right to marriage enshrined in the Indian Constitution. The Chief Justice of India (CJI) clarified that the judgments cited by the petitioners, which asserted the right to marry, did not conclusively guarantee such a right under the Constitution. In particular, he referred to the rulings in cases like *Justice K.S. Puttaswamy v Union of India* and *Navtej Singh Johar & Ors. v. Union of India*. However, the CJI acknowledged that while marriage itself might not be deemed a fundamental right, its importance is derived from the practical benefits it offers. In this context, the CJI highlighted that even though the Constitution does not explicitly recognize a fundamental right to marry, many fundamental constitutional values, including the right to life and personal liberty, can be realized through the practical advantages associated with marriage. Justice Kaul, while not explicitly commenting on the right to marry, expressed his general concurrence with the CJI's judgment. Justice Bhat, on the other hand, articulated his view that there is no unconditional right to marriage, except as recognized by statute. He emphasized that marriage is fundamentally a social institution that predates the State and is not a status conferred by the State. Justice Bhat argued that because the origin of marriage is external to the state, this external source sets the boundaries for marriage. He also pointed out that the regulation of marriage by the state conflicts with the notion of marriage as a fundamental right. In his opinion, Justice Bhat contended that civil marriage or the recognition of any such relationship can only exist within the framework of statutory law. Justice Narasimha aligned with Justice Bhat's viewpoint, stating that the right to marriage is essentially a statutory right rooted in legally enforceable customary practices. He further emphasized that marriage, as an institution, is deeply influenced by cultural, religious, and customary factors. Although he acknowledged the fundamental role of marriage benefits in leading to a fulfilling life, Justice Narasimha asserted that these benefits do not, by themselves, elevate marriage to the status of a fundamental right under the Constitution. This unanimous stance by the Supreme Court emphasizes the complexity and nuances surrounding the concept of the right to marriage in India.

#### **(A) On Striking Down the Special Marriage Act & Allied Laws**

The unanimous consensus of the Supreme Court bench was that the Special Marriage Act (SMA) and its affiliated laws should not be invalidated or altered. Chief Justice DY

Chandrachud, in his judgment, highlighted that Section 21A of the SMA intricately linked the Act to personal and non-personal laws of succession, creating a highly complex situation. Justice Kaul, in his own judgment, echoed this sentiment, emphasizing that the entitlements arising from marriage were intricately woven into a "proverbial 'spider's web' of legislations and regulations." Therefore, any adjustments to the scope of marriage under the SMA could potentially trigger a "cascading effect" across various laws. The Chief Justice also noted that the SMA was initially enacted to facilitate marriages between individuals of different religions and castes. He emphasized that if the SMA were to be invalidated for excluding queer couples from its purview, it would harken back to a pre-independence era where individuals of diverse faiths and castes could not legally marry. Furthermore, both the CJI and Justice Kaul emphasized that inserting words into the provisions of the SMA and related laws would entail delving into the legislative realm, which was beyond the court's jurisdiction due to its "institutional limitations." The judgment delivered by Justice Bhat and Justice Kohli concurred with this perspective. They also asserted that the SMA was not in violation of Articles 14 and 15 of the Constitution. The SMA, they argued, was solely intended to enable marriage, as understood at the time of its passage in 1954, for heterosexual couples. They stressed that as long as a clear objective was discernible, it could not be criticized solely because it did not create a more refined classification. They further noted that the original rationale behind the SMA, namely, to facilitate inter-faith marriages, remained relevant, and the passage of time did not render it irrelevant. This viewpoint was shared by Justice Narasimha as well.

### **(B) On Rights of Transgender Persons of to Marry**

The unanimous stance of all five judges held that transgender individuals engaged in heterosexual relationships possessed the legal right to marry under existing laws, including personal laws that govern their marriages. Chief Justice DY Chandrachud, in his judgment, stressed the significance of interpreting marriage laws in a harmonious manner with the Transgender Persons Act. He noted that Indian marriage laws predominantly permit marriages originating from heterosexual relationships, defined as those involving a "man" and a "woman," a "husband" and a "wife," or a "bride and a bridegroom." Any limitation on these interpretations would run counter to the Transgender Persons Act, which expressly prohibits discrimination against transgender individuals. He underscored that an individual's transgender identity is based on their gender identity, not their sexual orientation. Furthermore, he asserted that intersex individuals who identify as either male or female also possess the right to marry under existing laws, including personal laws. All four other judges on the bench concurred with this

viewpoint, reaffirming the fundamental right of transgender individuals in heterosexual relationships to marry under the prevailing legal framework.

### **(C) On A 'Civil Union'**

The issue of recognizing a 'civil union' for queer couples became a focal point of spirited debate within the bench, leading to varying and intriguing perspectives. Two of the judges, Chief Justice DY Chandrachud and Justice SK Kaul, argued passionately for the recognition of civil unions. Their rationale was anchored in the principle that every individual, irrespective of sexual orientation, possessed the inalienable right to form relationships and choose life partners. They contended that this freedom was protected under the Constitution and that the failure of the State to recognize and provide the benefits associated with marriage would be a form of discrimination. They went further, suggesting that the State had an obligation to acknowledge such unions and grant them legal benefits. Their willingness to consider the formation of a committee to determine the scope of these benefits, as proposed by the Solicitor General, added an element of pragmatism and the potential for a fresh legal framework. However, a different and equally compelling perspective was put forth by Justice Bhat in his judgment, which was echoed by Justice Kohli. While recognizing the fundamental right of queer individuals to form relationships, they expressed reservations about the court's directive to create an entirely new legal framework for formalizing such relationships. Justice Bhat voiced his concerns about legislating a "civil right to a union," underscoring the immense complexities and implications associated with establishing a new social institution. He painted a vivid picture of the labyrinthine legal structure this would entail, including registration processes, eligibility criteria, age restrictions, divorce procedures, alimony, and other intricacies intimately linked to the institution of marriage. In his view, the state was not constitutionally obligated to embark on this journey. Justice Narasimha joined forces with Justice Bhat, highlighting the potential encroachment upon the principle of the separation of powers. This foundational tenet of the Indian legal system clearly defines distinct roles for the judiciary, executive, and legislative branches of government. The notion of mandating the state to recognize civil unions, in their opinion, posed the risk of overstepping these boundaries. This fascinating exchange of perspectives within the bench showcased the intricacies of the legal and societal discourse surrounding the recognition of civil unions for queer couples. It also underscored the monumental challenge of aligning legal systems with evolving societal norms and rights. The intersection of legal principles, constitutional values, and the practical complexities of implementation made this a compelling and thought-provoking aspect of the judgment.

### **(D) On Adoption Rights of Queer Couples**

The question of whether queer couples have the right to adopt children became a point of divergence within the Supreme Court bench. In a 3:2 decision, the Supreme Court denied queer couples the right to adopt children, with Chief Justice DY Chandrachud and Justice SK Kaul in the minority, and Justice Bhat, Justice Kohli, and Justice Narasimha forming the majority. Chief Justice Chandrachud, in his judgment, emphasized the need for delegated legislation to remain consistent with the parent act, adhering to its boundaries and not exceeding its authority. He pointed out that the Central Adoption Resource Authority (CARA) should exercise its power within the intended purpose defined by the Juvenile Justice (JJ) Act. He highlighted the primary objectives of the JJ Act, which are to safeguard the best interests of the child and ensure their proper development. The Chief Justice expressed concern regarding Regulation 5(3) of the Adoption Regulations, which prohibited unmarried partners from being prospective adoptive parents jointly. This effectively meant that unmarried couples, including queer couples, could only adopt as individuals. He argued that the JJ Act did not preclude unmarried couples from adopting jointly. Therefore, CARA's imposition of this additional condition, as per Regulation 5(3), was considered contrary to the spirit and letter of the JJ Act and Section 57 in particular. The Chief Justice also criticized the assumption made by CARA that only married heterosexual couples could provide a stable household for a child. He noted that there is no single definition of a stable household, and the law should not discriminate against unmarried couples, including those from the queer community, based on their sexual orientation. This perspective aligns with Article 15 of the Indian Constitution, which prohibits discrimination based on identity. To rectify the situation, Chief Justice Chandrachud held that Regulation 5(3) of the Adoption Regulations should be interpreted to exclude the word "marital." This means that the reference to a 'couple' in Regulation 5 should encompass both married and unmarried couples, including queer couples. Additionally, the principle in Regulation 5(2)(a), which mandates the consent of spouses in a marriage, should apply equally to unmarried couples seeking to jointly adopt a child. Justice Kaul concurred with this view. Justice Bhat, who penned the majority opinion, cited the lack of a framework as a reason for not allowing queer couples to adopt. He emphasized that a married couple is not inherently a "morally superior choice" when it comes to adoptions. Justice Bhat underlined that the adoption framework considers the protections and entitlements that stem from the institution of marriage. He argued that the guiding principle of the JJ Act was the "best interest of the child," rather than enabling adoption for all. According to his interpretation, Section 57(2) of the JJ Act pertained exclusively to joint adoption by married couples. This law was designed to prioritize the "best interest of the child" and protect

them in cases where a marriage had broken down. Adoption became a fundamental prerequisite for accessing legal safeguards related to divorce, custody, guardianship, maintenance, and succession. This framework ensures that if one parent abandons the relationship, the other can still maintain themselves and provide for the child, a remedy that couples without legal recognition of marriage are deprived of. Justice Bhat argued that the absence of legal recognition for queer couples forces them to adopt individually, leading to a lack of legal protections for both parents and the child. He asserted that the state urgently needs to grant the full range of rights to queer parents and children to ensure the maximum welfare and benefits reach children in need of safe and secure homes, promoting their fullest development. This viewpoint was concurred with by Justice Kohli and Justice Narasimha.

#### **(E) On Formation & Scope of Committee**

Regarding the formation and scope of the Committee, there were different perspectives among the Supreme Court judges. Chief Justice DY Chandrachud and Justice SK Kaul, who believed that queer couples had a right to a State-recognized union, noted the assurance of the Solicitor General that the Union Government would establish a committee chaired by the Cabinet Secretary. This Committee's purpose would be to define and clarify the scope of entitlements for queer couples in unions. Chief Justice Chandrachud specified that the Committee should consist of experts with expertise in addressing the social, psychological, and emotional needs of individuals from the queer community, as well as members of the queer community itself. He further directed that the Committee, before finalizing its decisions, should conduct extensive stakeholder consultations, including people from marginalized groups, and collaborate with the governments of States and Union Territories. On the other hand, Justice Ravindra Bhat, who did not recognize the right of civil unions, also directed the Union to establish a high-powered committee chaired by the Union Cabinet Secretary. The committee's mandate was to conduct a comprehensive examination of "all relevant factors." Justice PS Narasimha did not mention a committee in his judgment, but he broadly agreed with Justice Bhat's judgment.

#### **IV. CONCLUSION**

In a significant ruling, India's Supreme Court has recognized the rights of gay couples to engage in same-sex relationships, providing constitutional protection while stopping short of legalizing equal marriage. Despite opposition from the government and religious leaders, the court's decision demonstrates a step-by-step approach to addressing LGBTQ+ rights issues in a complex legal landscape.



While full marriage equality remains a goal for the future, this ruling marks a pivotal moment in the ongoing journey towards LGBTQ+ rights in India. The court's willingness to engage with the issue highlights the determination of activists and same-sex couples. While there may be some disappointment over the decision, the commitment to the cause remains strong, indicating that the fight for equality and recognition is far from over. This ruling opens the door for continued dialogue and progress, offering hope for the evolving landscape of LGBTQ+ rights in the country.

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**V. REFERENCES**

- Case Title: Supriyo v. Union of India | Writ Petition (Civil) No. 1011 of 2022 + connected matters
- Citation: 2023 LiveLaw (SC) 900.
- Supreme Court Supreme Court 2023 Marriage Equality Same-Sex Marriage Queer Rights Supriyo v. Union of India
- WRIT PETITION (CIVIL) NO. 494 OF 2012
- PETITION (CRIMINAL) NO. 76 OF 2016
- <https://www.bbc.com/news/world-asia-india-65525980>
- <https://www.aljazeera.com/news/2023/10/24/india-lgbtq-supreme-court-same-sex-marriage-rights>
- [https://en.wikipedia.org/wiki/Supriyo\\_v.\\_Union\\_of\\_India#CITEREFW.P.\(C\)\\_No.\\_1011/2022\\_\(25\\_Nov\\_2022\)](https://en.wikipedia.org/wiki/Supriyo_v._Union_of_India#CITEREFW.P.(C)_No._1011/2022_(25_Nov_2022))
- <https://www.livelaw.in/top-stories/right-to-civil-union-adoption-transgender-persons-right-to-marry-where-supreme-court-bench-agreed-disagreed-in-marriage-equality-case-240420>
- <https://indiankanoon.org/doc/129202312/>

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