REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

Writ Petition (Civil) No. 1011 of 2022

Supriyo @ Supriya Chakraborty & Anr. ….Petitioner(s)

Versus

Union of India ….Respondent(s)

With

Writ Petition (Civil) No. 1020 of 2022

Writ Petition (Civil) No. 1105 of 2022

Writ Petition (Civil) No. 1141 of 2022

Writ Petition (Civil) No. 1142 of 2022

Writ Petition (Civil) No. 1150 of 2022

Writ Petition (Civil) No. 93 of 2023

Writ Petition (Civil) No. 159 of 2023

Writ Petition (Civil) No. 129 of 2023

Writ Petition (Civil) No. 260 of 2023

Transferred Case (Civil) No. 05 of 2023

Transferred Case (Civil) No. 06 of 2023

Writ Petition (Civil) No. 319 of 2023

Transferred Case (Civil) No. 07 of 2023

Transferred Case (Civil) No. 08 of 2023

Transferred Case (Civil) No. 10 of 2023

Transferred Case (Civil) No. 09 of 2023

Transferred Case (Civil) No. 11 of 2023

Transferred Case (Civil) No. 12 of 2023

Transferred Case (Civil) No. 13 of 2023

Writ Petition (Civil) No. 478 of 2023

J U D G M E N T

PAMIDIGHANTAM SRI NARASIMHA, J.

1. I am conscious of the ordeals that arise from a multiplicity of judicial opinions in cases involving constitutional questions. Yet, I consider it worthwhile to pen the present opinion, given the significant nature of questions involved. Polyvocality in the exercise of the adjudicatory function may not necessarily be viewed with discomfort*;* if complemented by judicial discipline, it is truly reflective of the diversity of judicial thought.

2. The constitutional questions for which we seek answers in the present set of petitions are two-fold: (a) the status of the right to marry for LGBTQ+ couples and (b) depending upon the answer to the first, the remedy that must ensue. With respect to the first, the petitioners assert that not only do they have the right to marry under the Constitution, but also that through an interpretative

process such a right must be read into the existing legislative framework governing marriages. The respondents, oppose both the foundations upon which the petitioners seek to establish their right, and at the same time they remind us of the judicial limitations on the issuance of positive directions for enforcement of such a right.

3. I had the privilege of traversing through the opinions of the learned Chief Justice, Justice Sanjay Kishan Kaul and Justice Ravindra Bhat. I am afraid I am unable to agree with the opinions of the Chief Justice and Justice Kaul. I am in complete agreement with the reasoning given and conclusions arrived at by Justice Bhat. I will supplement his findings with some of my own reasons. Since the broad arguments and submissions have been succinctly captured in the opinion of the learned Chief Justice, I find no reason to separately enlist them here.

4. At the outset, I will set out my conclusions, which are also in complete consonance with that of Justice Bhat in his opinion.

    a. The question of marriage equality of same sex/LGBTQ+ couples did not arise for consideration in any of the previous decisions of this Court, including the decision in *Navtej Singh Johar & Ors.* v. *Union of India*[1] and *NALS*A v. *Union of India*[2]. Consequently, there cannot be a binding precedent on this count. The reasons for arriving at this conclusion are articulated in the opinion of Justice Bhat.
    b. The rights of LGBTQ+ persons, that have been hitherto recognized by this Court, are the right to gender identity, sexual

[1] (2018) 10 SCC 1
[2] (2014) 5 SCC 438

orientation, the right to choose a partner, cohabit and enjoy physical & mental intimacy. In the exercise of these rights, they have full freedom from physical threat and from coercive action, and the State is bound to afford them full protection of the law in case these rights are in peril.

c. There is no unqualified right to marriage guaranteed by the Constitution, that qualifies it as a fundamental freedom. With respect to this, I agree with the opinion of Justice Bhat, but will supplement it with some additional reasons.

d. The right to marriage 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. This, in my opinion, is the real import of the decisions in *Shafin Jahan* v. *Asokan K.M.*[3] and *Shakti Vahini* v. *Union of India*[4].

e. The constitutional challenge to the Special Marriage Act, 1954 and the Foreign Marriage Act,1969 must fail, for the reasons indicated in the opinion of Justice Bhat.

f. Similarly, Justice Bhat also rightly finds the semantic impossibilities of gender-neutral constructions of the Special Marriage Act, 1954 and the Foreign Marriage Act,1969. On both (e) and (f), the opinion of Justice Bhat is exhaustive as to the reasons, and they need not be supplemented.

g. I find that a right to a civil union or an abiding cohabitational relationship conferring a legally enforceable status cannot be situated within Part III of the Constitution of India. On this count too, I agree with the conclusions of Justice Bhat, and supplement them with my own reasons.

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[3] (2018) 16 SCC 368
[4] (2018) 7 SCC 192

h. I agree with the reasoning and the conclusion of Justice Bhat with respect to the constitutionality of Regulation 5(3) of the CARA Regulations, 2020.

Marriage as Social Institution and the Status of the Right to Marry

5. There cannot be any quarrel, in my opinion, that marriage is a social institution, and that in our country, it is conditioned by culture, religion, customs and usages. It is a sacrament in some communities, a contract in some other. State regulation in the form of codification, has often reflected the customary and religious moorings of the institution of marriage. An exercise to identify the purpose of marriage or to find its 'true' character, is a pursuit that is as diverse and mystic as the purpose of human existence; and therefore, is not suited for judicial navigation. But that does not render the institution meaningless or abstract for those who in their own way understand and practice it.

6. In India, the multiverse of marriage as a social institution, is not legally regulated by a singular gravitational field. Until the colonial exercise of codification of regulations governing marriage and family commenced, the rules governing marriage and family, were largely customary, often rooted in religious practice. This exercise of codification, not always accurate and many a times exclusionary, was the product of the colonial desire to mould and reimagine our social institutions. However, what is undeniable is that, impelled by our own social reformers, the colonial codification exercise produced some reformatory legislative instruments, ushering in some much-needed changes to undo systemic inequalities. The constitutional project that we committed ourselves to in the year 1950, sought to recraft some of our social institutions and within the

first half decade of the adoption of the Constitution, our indigenous codification and reformation of personal laws regulating marriage and family was underway.

7. Even when our own constitutional State attempted codification and reform, it left room for customary practices to co-exist, sometimes providing legislative heft to such customary practices. Section 5(iv)[5], section 5(v)[6], section 7[7], and section 29(2)[8] of the Hindu Marriage Act, 1955 are illustrative in this regard. Similarly, the Special Marriage Act, 1954 in provisos to sections 4(d)[9] and section 15 (e)[10] saves customary practices, without which the marriage would have been otherwise null and void. Same is the case with the proviso to section

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[5] "5. **Conditions for a Hindu marriage.** – *A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:*
(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two."

[6] "5. **Conditions for a Hindu marriage.** – *A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:*
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[7] "**7. Ceremonies for a Hindu marriage**.—
(1) *A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.*
(2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken."

[8] **29. Savings.—**
(*2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.*"

[9] "**4. Conditions relating to solemnization of special marriages.—***Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:—*
(d) the parties are not within the degrees of prohibited relationship:
Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship;"

[10] **15. Registration of marriages celebrated in other forms.***—Any marriage celebrated, whether before or after the commencement of this Act, other than a marriage solemnized under the Special Marriage Act, 1872 (3 of 1872), or under this Act, may be registered under this Chapter by a Marriage Officer in the territories to which this Act extends if the following conditions are fulfilled, namely:—*
(e) the parties are not within the degrees of prohibited relationship:
Provided that in the case of a marriage celebrated before the commencement of this Act, this condition shall be subject to any law, custom or usage having the force of law governing each of them which permits of a marriage between the two"

4(d) of the Foreign Marriage Act, 1969[11]. Legislative accommodation of customary practices is also reflected in section 5 of the Anand Marriage Act, 1909[12].

8. The legal regulation of the institution of marriage, as it exists today, involves regulation of the solemnisation or ceremony of marriage, the choice of the partner, the number of partners, the qualifying age of marriage despite having attained majority, conduct within the marriage and conditions for exit from the marriage.

9. As to ceremonies and solemnisation, section 2 of the Anand Marriage Act, 1909[13], section 3(b) of the Parsi Marriage and Divorce Act, 1936[14], section 10, 11 & 25 of the Indian Christian Marriage Act, 1872[15] and section 7 of the Hindu

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[11] "**4. Conditions relating to solemnization of foreign marriages**.—*A marriage between parties one of whom at least is a citizen of India may be solemnized under this Act by or before a Marriage Officer in a foreign country, if, at the time of the marriage, the following conditions are fulfilled, namely:—*

(d) the parties are not within the degrees of prohibited relationship:

Provided that where the personal law or a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship."

[12] **5. Non-validation of marriages within prohibited degrees.**—*Nothing in this Act shall be deemed to validate any marriage between persons who are related to each other in any degree of consanguinity or affinity which would, according to the customary law of the Sikhs, render a marriage between them illegal.*"

[13] **2. Validity of Anand marriages.—***All marriages which may be or may have been duly solemnized according to the Sikh marriage ceremony called Anand commonly known as Anand Karaj shall be, and shall be deemed to have been with effect from the date Of the solemnization or each respectively, good and valid in law.*"

[14] **3. Requisites to validity of Parsi marriages.**— *(1) No marriage shall be valid if—*

(b) such marriage is not solemnized according to the Parsi form of ceremony called "Ashirvad" by a priest in the presence of two Parsi witnesses other than such priest;"

[15] Section 10 of the Act reads:

"**10. Time for solemnizing marriage**.—*Every marriage under this Act shall be solemnized between the hours of six in the morning and seven in the evening:*"

Section 11 reads:

"11. Place for solemnizing marriage.—*No Clergyman of the Church of England shall solemnize a marriage in any place other than a church where worship is generally held according to the forms of the Church of England, unless there is no such church within five miles distance by the shortest road from such place, or unless he has received a special license authorizing him to do so under the hand and seal of the Anglican Bishop of the Diocese or his Commissary.*"

Section 25 reads:

"25. Solemnization of marriage.—*After the issue of the certificate by the Minister, marriage may be solemnized between the persons therein described according to such form or ceremony as the Minister thinks fit to adopt:*

Provided that the marriage be solemnized in the presence of at least two witnesses besides the Minister."

Marriage Act, 1955 explicitly recognize the central role that religious ceremonies play in solemnisation of marriages. The Muslim Personal Law (Shariat) Application Act, 1937[16] clearly saves the application of personal law to marriages, including the nature of the ceremony. Viewed in this perspective, the diverse religious practices involved in solemnizing marriages are undeniable.

10. The choice of the partner is not absolute and is subject to two-dimensional regulations: (i) minimum age of partners and (ii) the exclusions as to prohibited degrees. There is a differential minimum age prescription for male and female partners in most legislations. Thus males, who have otherwise attained the age of majority, cannot marry under these enactments, even though they exercise many other statutory and constitutional rights when they attain the age of eighteen.

11. The concept of prohibited degrees of relationship, is statutorily engraved in section 5 of the Anand Marriage Act, 1909, section 3(a) of the Parsi Marriage and Divorce Act, 1936[17], section 5(iv) and (v) of the Hindu Marriage Act, 1955 and sections 4(d) & section 15(e) of the Special Marriage Act, 1954. Persons who have attained the requisite age of marriage under these enactments, have their choice and consenting capacities restricted, to this extent.

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[16] Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 reads:
"**2. Application of Personal Law to Muslims**.—*Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal properly inherited or obtained under contract or gift or any other provision of Personal Law. marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).*"

[17] **3. Requisites to validity of Parsi marriages**.- *[(1)] No marriage shall be valid if-*
(*a) the contracting parties are related to each other in any of the degrees of consanguinity or affinity set forth in Schedule I; or*

12. In my considered opinion, the institutional space of marriage is conditioned and occupied synchronously by legislative interventions, customary practises, and religious beliefs. The extant legislative accommodation of customary and religious practices is not gratuitous and is to some extent conditioned by the right to religion and the right to culture, constitutionally sanctified in Articles 25 and Article 29 of the Constitution of India. This synchronously occupied institutional space of marriage, is a product of our social and constitutional realities, and therefore, in my opinion, comparative judicial perspectives offer little assistance. Given this nature of marriage as an institution, the right to choose a spouse and the right of a consenting couple to be recognized within the institution of marriage, cannot but be said to be restricted.

13. The learned Chief Justice has opined that marriage may not attain the social and legal significance it currently has if the State had not recognised and regulated it through law. It is further opined that marriage has attained significance because of the benefits which are realised through it. In this context, it is necessary to recount that until the post constitutional codification of laws relating to marriage and divorce, there was no significant State intervention on customary laws relating to marriage. Even today, much of the Mohammedan law of marriage is governed by religious texts and customs and there is hardly any State intervention. The Sixth Schedule areas under the Constitution are largely governed by customary laws of marriage. That the State has chosen to regulate the institutional space of marriage and even if such regulation occupies the space in toto, by itself does not imply that marriage attained significance due to State recognition.

14. I must hasten to add that the aforesaid recollection of legislative illustrations was with a view to demonstrate the cultural relativism involved in the idea of marriage. No singular right can inform unimpeded entry to and unregulated exit from the institution of marriage; for that would disassociate the institution of marriage from its social context. The claim of the right to marry, de-hors the existing statutory framework, is nothing but a claim to *create* a legally and socially enforceable status. It is not a claim against criminalisation of sexual conduct, which was the issue in *Navtej* (supra). It is nothing but a prayer of mandamus to create the necessary legislative and policy space for recognition of relationships as marriages in the eyes of law. The prayer to recognize such a right is not one that expects the State to desist from pursuing an act, but one which will place positive obligations upon the State to erect new laws, or at least amend existing laws. I say laws, because marriage laws do not stand in isolation, they interact in multifarious ways with succession, inheritance and adoption laws, to name a few. The content of the right claimed by the Petitioners is such that it clearly places positive legislative obligations on the State, and therefore, cannot be acceded to. That there cannot be a mandamus to amend or enact laws, is such a deeply entrenched constitutional aphorism, which need not be burdened by quotational jurisprudence. We are afraid, that the *creation* of social institutions and consequent re-ordering of societal relationships are '*polycentric decisions*', which have *"multiplicity of variable and interlocking factors, decisions on each one of which presupposes a decision on all others"*[18]*,* decisions that cannot be rendered by one stroke of the judicial gavel.

[18] *Indian Ex-Service Movement* v. *Union of India*, (2022) 7 SCC 323, 68.

Re: The impermissibility of the creation of a right to a union or an abiding cohabitational relationship

15. Having concluded that there exists no unqualified right to marry, in the ordinary course, no occasion would have arisen for any further deliberation. However, as the learned Chief Justice, in his opinion, has arrived at a conclusion that there exists a constitutional right to a *union* or *an abiding cohabitational relationship*, it is necessary for me to express my opinion on this new construction.

16. The learned Chief Justice locates components of this right to *union* or *an abiding cohabitational relationship* under Article 19(1)(a), Article 19(1)(c), Article 19(1)(e), Article 21 and Article 25 of the Constitution. In my opinion, it would not be constitutionally permissible to identify a right to a *union* or *an abiding cohabitational relationship* mirroring the institution of marriage. The learned Chief Justice identifies '*tangible*' and '*intangible*' benefits (bouquet of entitlements) that arise from state recognition and regulation of marriages. The Chief Justice further opines that the right to marriage is not fundamental. However, it is these very tangible and intangible benefits, the denial of which, according to the learned Chief Justice must inform the reading of a constitutional right to an abiding cohabitational union. In other words, the benefits of marriage, however fundamental to a fulfilling life do not make marriage itself a fundamental right, but they render the right to an abiding cohabitational union fundamental. I find it difficult to reconcile these.

17. The learned Chief Justice opines that "*it is insufficient if persons have the ability and freedom to form relationships unregulated by the State. For the full*

enjoyment of such relationships, it is necessary that the State accord ***recognition*** *to such relationships. Thus, the right to enter into a union includes the right to associate with a partner of one's choice, according recognition to the association, and ensuring that there is no denial of access to basic goods and services is crucial to achieve the goal of self-development."* The opinion of the Chief Justice, thereafter, classifies that status of two persons in relationship: (a) 'relationships' which do not have legal consequences, (b) 'unions' which have legal consequences and marriages. In my considered opinion, it is in positively mandating the State to grant recognition or legal status to 'unions' from which benefits will flow, that the doctrine of separation of powers is violated. The framing of a positive right and the positive entitlements which flow therefrom, essentially require the State to regulate such unions and benefits. In my opinion, the direction in effect, is to amend existing statutory frameworks, if not to legislate afresh.

18. Additionally, the opinion of the learned Chief Justice, situates the right to choice of a partner and right to legal recognition of an abiding cohabitational relationship within Article 25 of the Constitution of India. Emphasis is placed on the term "*freedom of conscience*" which is placed alongside the right to freely profess, practice and propagate religion. The opinion situates in this freedom of conscience, the right not only to judge the moral quality of one's own action but also to act upon it. If that were permissible under Article 25, then the textual enumeration of freedoms in Article 19 become redundant, since these freedoms can be claimed to be actions on the basis of one's own moral judgment. I find it difficult to agree with such a reading of Article 25.

19. I am not oblivious to the concerns of the LGBTQ+ partners with respect to denial of access to certain benefits and privileges that are otherwise available only to married couples. The general statutory scheme for the flow of benefits gratuitous or earned; property or compensation; leave or compassionate appointment, proceed on a certain definitional understanding of partner, dependant, caregiver, and family. In that definitional understanding, it is no doubt true, that certain classes of individuals, same-sex partners, live-in relationships and non-intimate care givers including siblings are left out. The impact of some of these definitions is iniquitous and in some cases discriminatory. The policy considerations and legislative frameworks underlying these definitional contexts are too diverse to be captured and evaluated within a singular judicial proceeding. I am of the firm belief that a review of the impact of legislative framework on the flow of such benefits requires a deliberative and consultative exercise, which exercise the legislature and executive are constitutionally suited, and tasked, to undertake.

20. For the reasons stated above, and in view of the preceding paragraph, the writ petitions are disposed of.

.....J.
[PAMIDIGHANTAM SRI NARASIMHA]

October 17, 2023
New Delhi.