



# SAME-SEX MARRIAGE IN INDIA: SUPRIYO & ORS. V. UNION OF INDIA & ORS. **FAQ** ON THE JUDGMENT ORALLY DELIVERED ON 17TH OCTOBER 2023

*This FAQ is based on the live oral delivery of the judgement on 17th October 2023. The information shared here may change after we read the full text of the judgment. We have prepared this document because you will have many questions about the outcome of this case, and want to help clarify some of your doubts based on early information we have after hearing the court.*

## 1. What were the cases about?

The batch of petitions filed before the Supreme Court of India challenged the Special Marriage Act, 1954, the Foreign Marriage Act, 1969, the Citizenship Act, 1955, and the Central Adoption Resource Authority (CARA) Regulations. The petitioners sought legal recognition for LGBTQIA+ persons' right to marriage, adoption and other connected protections that flow from legal recognition of their relationship. Hearings were held in April and May 2023 before a 5 Judge Bench of the Supreme Court.

## 2. Who were the judges?

The petitions were brought before a 5 judge bench of the Supreme Court. This is called a Constitution Bench (minimum of 5 judges hearing a serious constitutional matter). The judges involved were:

1. **Justice D.Y. Chandrachud (Chief Justice of India)**
2. **Justice Sanjay Kishan Kaul**
3. **Justice S. Ravindra Bhat**
4. **Justice Hima Kohli**
5. **Justice P.S. Narasimha**

## 3. How did the Court arrive at its final decision?

In order to understand this, we must first understand that all 5 judges did not completely agree on all issues. Therefore, there are 4 separate opinions that deal with a range of issues:

1. Justice Bhat and Justice Kohli
2. Justice Narasimha
3. Chief Justice Chandrachud
4. Justice Kaul

Among these 4 opinions, 3 judges have agreed to similar answers but have different reasons (Justices Bhat & Kohli, and Justice Narasimha). This forms the majority opinion and is binding. 2 judges agree to similar answers with different reasoning (Chief Justice Chandrachud and Justice Kaul), but disagree with the majority on some major points. The minority opinion is not legally binding, but can be used in future research and advocacy. On some matters, all 5 judges are in agreement, which is legally binding.

#### 4. What does the court say about the right of LGBTQIA+ persons to marriage?

The majority opinion is that LGBTQIA+ persons do not have a fundamental right to marriage because the Constitution does not recognise a fundamental right to marry. Marriage is only a legal right because the legislature has made laws to recognise and regulate it. Therefore, only the legislature (Parliament at the Center or State Legislatures) can make new laws or change laws to recognize LGBTQIA+ persons' right to marriage. The court cannot make existing marriage laws gender-neutral to apply to all persons regardless of their gender or sexuality because there may be unintended negative consequences that the court did not think of. It is the work of the government to conduct extensive community consultations and consider all possible outcomes.

There is some difference in the minority opinion: CJI Chandrachud recognizes the right of LGBTQIA+ persons to marry, while Justice Kaul recognizes only civil unions.

**However, all 5 judges held that transgender and intersex persons who identify as male/female (binary gender) and are in heterosexual relationships (relationship with someone from the opposite gender) have the right to marry under all marriage laws, regardless of religion, caste, class, place of birth, etc.** This is not a new right, but a clarification of the existing law.

The majority held that all LGBTQIA+ persons have the right to relationships, but these relationships are not legally recognized. **The community has the right to live together, cohabit, feely express, and celebrate their relationships. LGBTQIA+ people in relationships have the right to be protected by the State and its agencies/authorities whenever their relationships are under threat, coercion, or forced to be broken.** CJI Chandrachud issued specific guidelines to the police not to separate couples, and protect couples from harassment and violence of their natal families.

## 5. What does the court say about the right of LGBTQIA+ persons to adoption?

The majority held that the current laws/regulations of adoption which allow married couples to adopt a child as parents, and unmarried individuals to be the sole parent, are valid. The law may have an unintended effect of discriminating against LGBTQIA+ couples, but it is still valid. However, the majority urged the government to remove marriage as a condition for adoption. CJI Chandrachud held in the minority that Regulation 5(3) of CARA was unconstitutional as it led to indirect discrimination. However, the minority opinion is not binding.

## 6. What does the court say about prohibiting conversion therapy and operations on intersex children?

All 5 judges categorically prohibited conversion therapy and operations performed on intersex children.

## 7. What does the court say about discrimination in access to entitlements?

All 5 judges agreed that there is a need to address the unintended discriminatory effects of different laws governing insurance, healthcare, benefits, etc. However, the court left it to the government, through the High Power Committee, to resolve.

## 8. What does the court say about the High Power Committee?

In his submission on 3rd May 2023, the Solicitor General Tushar Mehta highlighted the Central Government's willingness to set up a High Power Committee under the Cabinet Secretary to consider all aspects of the right of LGBTQIA+ persons' right to marry, the legal changes this would require, and impacts of these legal changes. All 5 judges held that this Committee must be set up at the earliest consisting of relevant stakeholders, experts, and community representatives. The Committee should work quickly to conduct comprehensive community consultations to inform their proposed legal changes.