

QUEER IDENTITY, HEALTH AND THE LAW

(Based on the Madras High Court judgment in Arunkumar and Another v Inspector General of Registration and Others)

2019 SCC OnLine Mad 8779

A MARRIAGE INTERRUPTED

This is the story of Arunkumar and Srija.

In October 2018, at a temple in the port town of Tuticorin in Tamil Nadu, a marriage took place between two individuals, Arunkumar & Srija. However, it was only in April 2019, upon the Madras High Court's intervention, that it came to be legally recognised.

What were the hurdles that this couple faced? And how does this case fall under the umbrella of an individual's right to health?

This case exemplified complex intersectionalities that the law must deal with. As the story unfolds, we will come across matters of interpersonal relationships, queer identity, intersex status, health and caste...



APPROACHING THE COURT

After their marriage in 2018, Arunkumar and Srija found themselves as petitioners before the High Court.

Upon completion of their marriage as per Hindu rites and rituals, when the two approached the appropriate government authorities to register their marriage in accordance with the Tamil Nadu Registration of Marriage Rules, the authorities refused.

Their appeal against this decision before the relevant authority also failed.

With no other option, Arunkumar and Srija approached the Madras High Court under Article 226 of the Constitution of India to challenge the denial of legal registration of their marriage.



But what *was* the objection to registering their marriage?

DOES THE LAW ONLY RECOGNISE GENDER BINARIES?

The objection to registering their marriage was that according to the authorities, Srija did not qualify as a “bride” as per Section 5 of the Hindu Marriage Act, 1955.

While Arunkumar identified as male, Srija was intersex and identified as female.

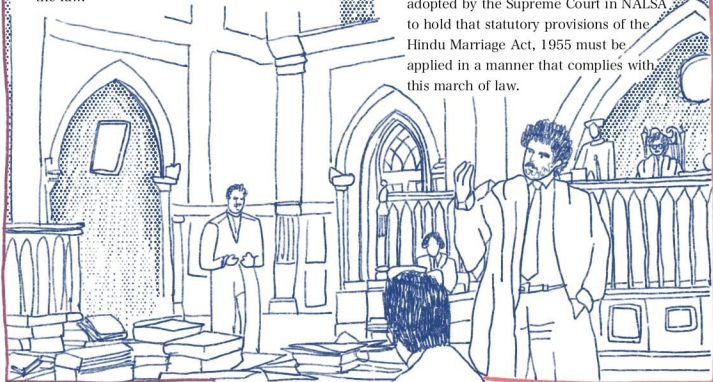
The respondents argued that Srija was a transgender person and not a woman, and could thus not be considered a bride as per the law.

HOW DID THE COURT DEAL WITH THIS?

Upon being confronted with this issue, the court noted that it was a matter that had in fact already been settled by the Supreme Court of India.

In National Legal Services Authority (NALSA) v Union of India (2014) 5 SCC 438, the Supreme Court had upheld a transgender person’s right to self-determination of gender identity.

The court recapitulated the rationale adopted by the Supreme Court in NALSA to hold that statutory provisions of the Hindu Marriage Act, 1955 must be applied in a manner that complies with this march of law.



A BRIEF BACKGROUND:

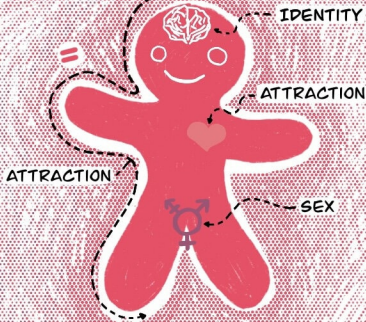
THE CONSTITUTION DOES NOT RESTRICT ITSELF TO GENDER BINARIES

THE NALSA CASE HAD INVOKED ARTICLE 14 (RIGHT TO EQUALITY), ARTICLE 15 (FREEDOM FROM DISCRIMINATION), ARTICLE 19(1)(A) (FREEDOM OF SPEECH AND EXPRESSION) AND ARTICLE 21 (RIGHT TO LIFE AND PERSONAL LIBERTY) TO HOLD THAT THESE WERE CONSTITUTIONAL GUARANTEES GIVEN TO ALL "PERSONS", INCLUDING RECOGNIZING EQUALITY BEFORE THE LAW REGARDLESS OF ONE'S GENDER IDENTITY.

It held,

"Article 15...sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. The Constitution-makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of "sex" under Article 15... therefore includes discrimination on the ground of gender identity."

THE GINGERBREAD PERSON



GENDER IDENTITY

- ♀ → Woman-ness
- ♂ → Man-ness

GENDER EXPRESSION

- ♀ → Femininity
- ♂ → Masculinity

ANATOMICAL SEX

- ♀ → Female-ness
- ♂ → Male-ness

IDENTITY = EXPRESSION = SEX
GENDER = SEXUAL ORIENTATION

SEXUALLY ATTRACTED TO.. and/or (a/o)

- ♀ → Women a/o Feminine a/o Female People
- ♂ → Men a/o Masculine a/o Male People

ROMANTICALLY ATTRACTED TO..

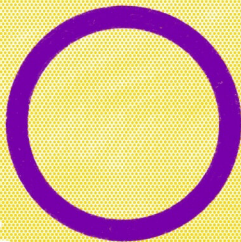
- ♀ → Women a/o Feminine a/o Female People
- ♂ → Men a/o Masculine a/o Male People

Genderbread Person Version 4 created and uncopyrighted 2017 by Sam Killermann

The second petitioner in this case was born intersex and raised as a male child by her parents. During the course of the hearing, the court was made aware of the issue of forced corrective surgeries on intersex children.

BUT FIRST, WHAT DOES 'INTERSEX' MEAN?

The United Nations defines intersex people as those that are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies. Intersex is an umbrella term used to describe a wide range of natural bodily variations. In some cases, intersex traits are visible at birth while in others, they are not apparent until puberty. Some chromosomal intersex variations may not be physically apparent at all.



THE COURT LOOKED AT THE FOLLOWING ASPECTS...

1

The Union Ministry of Health and Family Welfare's official response to a complaint regarding forced corrective surgeries was that medical practitioners generally obtained the consent of the parents or guardians prior to perform these surgeries.

2

The World Health Organisation in its report 'Sexual Health, Human Rights and the Law' recommends that any surgery on intersex persons should not take place without their informed consent. Any consideration of a medical procedure ought to be deferred until the person is old enough to make an informed decision and give their informed consent. The report also notes that several human rights bodies and ethical and health professional organizations have recommended that free and informed consent should be ensured in medical interventions for people with intersex conditions, including full information, orally and in writing, on the suggested treatment, its justification and alternatives.

3

Article 39(f) of the Indian Constitution's Directive Principles of State Policy provides that the State shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

... TO HOLD THAT:

The consent of the parents/guardians cannot serve as a substitute for the consent of the child.

NALSA's direction on the prohibition of mandating medical procedures (sex reassignment surgery, sterilisation or hormonal therapy) as a requirement for legal recognition of gender identity applies to intersex persons.

Since these surgeries are being carried out despite the decision in NALSA, the State of Tamil Nadu shall issue a government order enshrining the aforesaid principle so as to effectively ban forced corrective surgeries on intersex infants and children.

1

2

3

ADDING ANOTHER LAYER:

SOCIAL WELFARE ENTITLEMENTS BASED ON CASTE

The court further recalled Dr. Ambedkar's words that "Intercaste marriages alone would ultimately lead to social integration and fulfill the preambular promise of fraternity."



The court travelled even further and noted that since Arunkumar was a Kuravan, a notified scheduled caste community, and Srija belonged to the Saiva Vellalar community, as an inter-caste couple, they were entitled to receive the benefits of the Dr. Ambedkar Scheme for Social Integration through Inter-Caste Marriages.

THE FINAL WORD

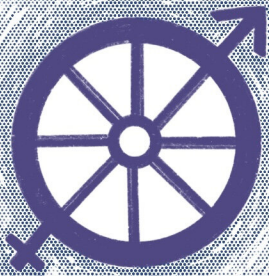
Finally, the court directed the respondents to register the marriage of the petitioners, as a refusal to do so violated a transgender woman's fundamental rights under Article 14 (equality), Article 19(1)(a) – freedom of expression, Article 21 (right to life) and Article 25 (freedom of religion) of the Constitution.

It held that the expression 'bride' in Section 5 of the Hindu Marriage Act must be interpreted to mean and include a transwoman as well as an intersex person who identifies as a woman. The **only** consideration is how the person identifies, and it is not open for the government authorities to question the right to self-determination of gender identity by transgender persons.



SETTING THE WHEEL OF CHANGE IN MOTION

In 2019, in the aftermath of this case, Tamil Nadu became the first Indian state to ban forced corrective surgeries on infants and children, a groundbreaking development regarding the rights of intersex people in India.



Following in its footsteps, in February 2021, the Delhi Commission for Protection of Child Rights (DCPCR) gave directions to the Delhi Government requiring them to ban forced corrective surgeries on infants and children.

