

SAME-SEX COUPLES: A JUDGE TO THE RESCUE

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Madras High Court judge Justice Anand Venkatesh. Photo: Special Arrangement

Justice Anand Venkatesh of the Madras High Court has innovated yet again. On November 17, 2023, in *Sushma vs Commissioner of Police*, he [tasked the State government with working out a “Deed of Familial Association”](#) which would provide legal status to relationships between same-sex couples and other LGBTQIA+ couples. This order is truly trendsetting in the light of the recent Supreme Court decision in *Supriyo vs Union of India* wherein the [Supreme Court refused to recognise](#) the right to marry, or even the right to civil unions, of same-sex couples.

While the SC Bench in *Supriyo* was unanimous, sadly, in holding that there was no fundamental right to marry, there was a difference in the majority and minority opinions when it came to the question of civil unions. While all the judges paid eloquent lip service to the rights of queer couples to form relationships, to cohabit and to enjoy intimacy under Article 21 of the Constitution, the action was a rather different story. The minority endorsed recognition of a bouquet of entitlements but failed to carry the matter further by spelling out rights and giving focused directions. The majority wiped out even this timid advance and went into wholesale retreat by abandoning the field and leaving same-sex couples to the mercy of the government and the legislature, whose policy on this matter is clear. The State should not interfere, the State should protect them from violence (should it not for everyone?) but the State need not give them legal status from which rights and entitlements would follow. How an avowedly, and loudly, liberal and progressive Court can become so retrograde is a question rich for enquiry.

Against the backdrop of gloom and despondency, Justice Venkatesh shines not just a candle but a strong beacon lamp. What he has done is nothing short of genius. In law school, we were taught the doctrines of Maine and Graveson that the law moved from status to contract, thence to statute. Since the SC has declared that statute, i.e. the Constitution and marriage laws, cannot be invoked, this Judge has adroitly shifted from the forward line to the midfield and taken possession of the ball of contract. With this, he has fashioned the concept of a Deed (basically agreement) of Familial Association. Into this Deed, he conceptualises the inclusion of rights and protections for them against harassment and violence, and discrimination in matters of employment, housing and assimilation in society. The State government is directed to put this into effect. The analogy of a football game is that while star-studded forwards bungle five easy goals, a determined half-back boots the ball from 50 yards out into the corner of the goalkeeper's net.

Civil unions have been recognised in a few countries across all continents. Primarily created to provide recognition to same-sex couples, they refer to a legal arrangement wherein the benefits and entitlements arising from the relationship are extended to couples. This provides legal and social validity to queer couples who can now proclaim and celebrate their relationship in the face of an intolerant society and thus protect them from interference either from the State or others in society. It also stands as documentary “proof” of their relationship which would help couples in obtaining various benefits and entitlements that would previously be impossible.

A simple example would be getting a dependent visa.

This would not amount to creating a new legal institution of marriage, but a procedure to register such a contract would mean that “the State will be able to give its stamp of approval to persons, who are in a relationship in the community and to a great extent, this will enhance the status of such persons in the Society”. They will “... have protection to live in society without being disturbed or harassed”. Bravo!

So, what should the Tamil Nadu Government do now? At a minimum, establish the framework to recognise such relationships through registrations of such Deeds. However, much more is possible. The State government could enact legislation creating the institution of Civil Unions and accord such status to same-sex couples; the Supreme Court’s rationale is that this is the business of the legislature. Even more laws relating to marriage, divorce, inheritance, succession, minors, adoption etc., are all present in the Concurrent List under the Seventh Schedule to the Constitution, thereby giving powers to the State to legislate on the same. The Constitution provides the means to handle differences in legislation between State and Central legislatures, but peculiar to Tamil Nadu is another constitutional hazard in the person of its Governor, R.N. Ravi, who imagines that his antiquarian office calls the shots in a democratic Republic; hopefully, he will be straightened out by the Supreme Court soon.

Tamil Nadu has long been known for being progressive. The State can add another feather to its cap and shine as a trendsetter that respects and recognises the inherent principles of self-respect, equality and social justice. Considering that these are the planks on which the politics of the State runs, it should not be too difficult to do so.

What is remarkable about this order is that it is issued in the wake of a disastrous Supreme Court judgement which cribbed, crabbed, confined and worse, decimated hopes of equality and equal treatment before law that members of the LGBTQIA community may have harboured. With one stroke, this High Court Judge has created hope. He has worked change into the interstices of law (remember Oliver Wendell Holmes Jr. famously said “legal progress is often secreted in the interstices of legal procedure”) and expertly worked his way to arrive at a principled legal conclusion as well as a perfectly enforceable order. He deserves congratulations. This also brings hope. In this country’s troubled judicial history, it is frequently the High Courts that have come to the rescue. Remember, they did so brilliantly during the Emergency but were spectacularly upended by some famous names in the Supreme Court. It is heartwarming to see that our High Court judges continue to meet the challenge.

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