A CRITICAL EXAMINATION OF LEGAL RECOGNITION OF NON-HETERONORMATIVE UNIONS IN INDIA

Dissertation submitted to the National University of Advanced Legal Studies, Kochi in partial fulfilment of the requirements for the award of LL.M. Degree in Constitutional and Administrative Law

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CERTIFICATE

This is to certify that Mr. DIGVIJAY GANPATI (Reg No: LM0124008) has submitted this Dissertation titled '*A CRITICAL EXAMINATION OF LEGAL RECOGNITION OF NON-HETERONORMATIVE UNIONS IN INDIA*' in partial fulfilment of the requirement of the award of LL.M. Degree in Constitutional and Administrative Law to The National University of Advanced Legal Studies, Kochi, under my guidance and supervision. It is also affirmed that the Dissertation he submitted is original, bonafide, and genuine.

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DECLARATION

I hereby declare that the Dissertation titled '*A CRITICAL EXAMINATION OF LEGAL RECOGNITION OF NON-HETERONORMATIVE UNIONS IN INDIA*' researched and submitted by me to The National University of Advanced Legal Studies, Kochi, in partial fulfilment of the requirement for the award of LL.M. Degree in Constitutional and Administrative Law, under the guidance and supervision of Dr. Nandita Narayan is an original bonafide and legitimate work and it has been pursued for academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree from either this University or any other University.

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DIGVIJAY GANPATI

PREFACE

The impetus for this dissertation arises from the profound tension between constitutional ideals and social realities in contemporary India, particularly concerning the recognition of non-heteronormative unions. While landmark judgments such as Navtej Singh Johar v. Union of India have decriminalized consensual same-sex relations and affirmed the rights of non-heteronormative individuals. This research seeks to bridge the gap between judicial declarations of dignity and equality and the practical realization of those principles through inclusive legal frameworks. By critically analysing constitutional provisions, statutory laws, and judicial pronouncements, this work explores whether Indian legal institutions should extend protections to non-heteronormative partnerships.

This study is grounded in a doctrinal methodology, drawing from domestic and international legal sources, scholarly literature, and comparative jurisprudence to construct a nuanced understanding of marriage equality and legal alternatives. The journey of writing this dissertation has been both intellectually rigorous and personally meaningful. It is hoped that this work contributes to the ongoing discourse in India, offering both a critique of the current legal vacuum and a forward-looking vision for a constitutionally faithful society.

DIGVIJAY GANPATI

ABBREVIATIONS

ABBREVIATION	FULL FORM
SCC	Supreme Court Cases
SC	Supreme Court
AIR	All India Reporter
INSC	India Supreme Court
S.C.R.	Supreme Court Reports
MANU	Manupatra
DHC	Delhi High Court
DLT	Delhi Law Times
GUJ	Gujarat
OLR	Orissa Law Reports
UKHL	United Kingdom House of Lords
ZACC	South African Constitutional Court
CCT	Constitutional Court of South Africa
Eur. Ct. H.R.	European Court of Human Rights
BvF/BvR	German Federal Constitutional Court
e.g.	for example (Latin: exempli gratia)
et al.	and others (Latin: et alii)
i.e.	that is (Latin: id est)
Id.	in the same place
supra	above/earlier in the text
Anr.	Another
Ors.	Others
v./vs	Versus
retd.	Retired

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2. *1 BvR 1164/07, July 7, 2009*

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CHAPTER 01

INTRODUCTION

CHAPTER 01

1.1 **INTRODUCTION**

The discourse surrounding non-heteronormative unions has gained significant momentum globally, reflecting shifting societal attitudes toward their rights. Central to this evolution is the recognition that sexual orientation and gender identity are integral components of an individual's dignity, privacy, and equality. The tension between societal norms and constitutional rights, however, persists in many jurisdictions, including India, where the legal framework has grappled with the complexities of recognizing non-heteronormative relationships within the boundaries of law.

Section 377[1] of the colonial British code, evolved into one of the strongest legal tools to further alienate homosexual unions in India. Section 377 made "*carnal intercourse against the order of nature*" punishable, a definition so broad that it included consenting homosexual intercourse as well as non-procreative intercourse. The use of Section 377 was destructive to Queer individuals in India. By criminalizing consensual non-heteronormative relations, the provision actually had the effect of legitimizing discrimination, harassment, and violence against heteronormativity offenders. Regular arbitrary arrests, police brutality, and social ostracization are faced by queer people, where the law is used as a pretext for their persecution. Not only did the law stigmatize non-heteronormative relations but also forced many into hiding their identities in order to avoid the risk of prosecution.

Apart from the legal aspect, Section 377 contributed immensely to its social aspect. It legitimized homophobia, reinforcing the presumption that homosexuality was immoral or unnatural. This, therefore, reinforced systematic exclusion, subjecting Queer persons to disownment by their families, exclusion in their places of work, and boycotting socially. The section also acted as a tool to silence open discussion regarding sexuality, gagging discussion on the rights and dignity of Queer persons in public and private spheres. The law gave a juridical ground for the exclusion of LGBTQ+ people to access equality of opportunities and protection, entrenching them in marginalization in institutions in society. Section 377 was a cause and an effect of exclusion from the system for decades, making homosexuality an unimaginable topic in Indian society.

[1] Indian Penal Code, 1860.

The last two decades witnessed the judiciary of India become one of the key sites for contesting Section 377 and discrimination in general society. The courts were crucial in keeping the debate regarding and against the constitutional and moral legitimacy of such legislation alive. It started with the seminal case of *Naz Foundation v. Government of NCT of Delhi*[2], when the Delhi High Court passed a landmark ruling. It believed that the enforcement of Section 377 over adult consensual sexual relations breached the fundamental rights in Articles 14, 15, and 21 of the Indian Constitution. The court stressed that the criminalization of homosexuality was hurtful to the right to equality, privacy, and liberty and diminished the dignity of the individuals. This ruling was hailed as a triumph for Queer rights because it acknowledged that there should be protection for marginalized individuals against discrimination and prejudice.

However, this advancement was fleeting. In *Suresh Kumar Koushal vs. Naz Foundation*[3], the Supreme Court overturned the Delhi High Court ruling. The supreme court held that Parliament, and not the judiciary, could amend or repeal Section 377. It also contended that Section 377 criminalized certain acts, and not identities, disproving the disproportionate effect on the Queer community. This ruling was roundly denounced as too restrictive in its interpretation of constitutional standards and for failing to notice the institutionalized Queer discrimination.

A landmark moment came up in *Navtej Singh Johar v. Union of India*[4], when a five-judge bench of the Supreme Court partly struck down Section 377. This milestone judgment legalized consensual homosexual sex between adult homosexuals, a significant departure from Indian law. The court acknowledged that criminalizing homosexual relations breached the rights of equality, dignity, and autonomy under Articles 14, 15, and 21. The judgment also reaffirmed that law regarding sexual orientation is a breach of a person's right to express themselves, which was against Article 19(1)(a) of the Constitution. The court stated that –

> "*A subjective notion of public or societal morality which discriminates against LGBT persons, and subjects them to criminal sanction, simply on the basis of*

[2] Naz Foundation v. Government of NCT of Delhi 2009 (6) SCC 712, ("***Naz Foundation Case***").
[3] Suresh Kumar Koushal v. Naz Foundation, AIR 2014 SC 563, ("***Suresh Koushal Case***").
[4] Navtej Singh Johar & Ors. v. Union of India, AIR 2018 SC 4321. ("***Decriminalisation Case***")

an innate characteristic runs counter to the concept of Constitutional morality, and cannot form the basis of a legitimate State interest."[5]

In spite of such advance judgments, the issue of legalizing non-heteronormative marriages is still unresolved. In Supriyo @ Supriya Chakraborty vs. Union of India[6], the Supreme Court reinforced the rights of queer couples to engage in emotional, mental, and sexual relationships under the inherent right of privacy, autonomy, and choice. But it declined to widen the ambit of the Special Marriage Act to encompass non-heteronormative marriages in the interest of judicial overreach. The court reaffirmed that the Parliament had the duty to implement marriage equality and refused legal recognition of queer relationships by the queer community.

This dissertation aims to study and analyses the constitutional framework and existing laws on marriage, purpose of marriage, etc. in order to study the whether there is need for legal recognition of non-heteronormative union in India. It also aims to study whether rights enjoyed my person in heteronormative union can be extended to non-heteronormative. Further, this study seeks to explore and analyze the jurisprudence and legislative frameworks of countries that have recognized non-heteronormative union, offering actionable recommendations for policy reforms in India

1.2 **RESEARCH OBJECTIVES**

i. To critically analyses the constitutional framework and existing laws on marriage of heteronormative unions in order to study the need for legal recognition of non-heteronormative unions in India.
ii. To conduct a comparative analysis of international legal frameworks on non-heteronormative unions, examining the legal impact of such recognition in jurisdictions like the United States, United Kingdom South Africa, France and Germany and how that can inform the policy making in Indian Legislation.

1.3 **RESEARCH PROBLEM**

While decriminalization ends the criminalization of non-heteronormative relationships, it does not automatically grant equal rights and protections under the law. While homosexuality is no longer a crime, and non-heteronormative relationship is allowed,

[5] Id.
[6] Supriyo @ Supriya Chakraborty vs. Union of India, MANU/SC/1155/2023.

the denial of legal recognition perpetuates systemic inequality as against heterosexual union whose rights are recognized under law.

1.4 **RESEARCH HYPOTHESIS**

Legal recognition of non-heteronormative union in India will grant them access to a comprehensive set of rights, addressing the current disparity and effectively eliminating inequality, thereby fostering equitable legal framework.

1.5 **RESEARCH QUESTION**

i. Whether there is need for Legislation recognizing the non-heteronormative union in providing bouquet of rights such as adoption, maintenance and rights related to property?
ii. Whether legal alternatives to marriage can fulfill the constitutional right to relationships as articulated in Supriya Chakraborty while addressing the limitations of traditional marital structures?
iii. Whether the legal recognition of non-heteronormative union in India will address the discrimination to such union, as against heterosexual union?
iv. Whether comparative analysis of foreign legal frameworks can inform the Policy Making for non-heteronormative unions in India?

1.6 **RESEARCH METHODOLOGY**

This dissertation aims to conduct research through doctrinal method in which primary and secondary data will be collected using the physical copy of laws and judgments, internet database and case mapping.

Primary Data – This will include *legislative enactments* such as the Hindu Marriage Act, 1955, the Special Marriage Act, 1954, the Foreign Marriage Act, 1969, the Defense of Marriage Act, 1996 (United States), the Respect for Marriage Act, 2022 (United States), the Hindu Adoption and Maintenance Act, 1956, the Juvenile Justice Act, 2015, the Indian Succession Act, 1925, etc., *Indian Judgments*, and *foreign judgments*.

Secondary Data – *Academic articles* from peer-reviewed law journals, Books written by recognized authors, *Commentaries* by legal scholars offering in-depth discussions on legislations and landmark judgments. *Reports* from Indian authorities and foreign

organizations provide global perspectives and comparative analyses of international frameworks.

1.7 **LITERATURE REVIEW**

Kalpana Kannabiran critically examines in article titled "'*What use is poetry?' Excavating tongues of justice around Navtej Singh Johar v. Union of India*" that the Navtej Singh Johar judgment as a landmark moment for transformative constitutionalism. She highlights how the Supreme Court expanded constitutional guarantees of equality, privacy, and dignity to affirm LGBTQ+ rights, while also invoking literary and cultural references to challenge deeply entrenched heteronormativity in Indian society. Kannabiran argues that the judgment not only decriminalized non-heteronormative relationships but also laid the groundwork for addressing broader structural inequities faced by LGBTQ+ individuals. However, she notes that the absence of legal frameworks for marriage, adoption, and inheritance continues to perpetuate discrimination.[7]

Martha C. Nussbaum, in her essay "*A Right to Marry?*", examines marriage as a fundamental right tied to autonomy and happiness. She critiques the exclusion of non-heteronormative couples, arguing it perpetuates stigma and undermines equality. Drawing parallels to *Loving v. Virginia*, she contends that denying non-heteronormative marriage reflects animus and lacks constitutional justification, emphasizing the need for equal recognition under the law. Nussbaum highlights how civil unions fail to provide the same dignity as marriage, reinforcing a hierarchy of relationships. She concludes that the state's role should be to protect rights, not to perpetuate discrimination based on irrational fears or prejudices.[8]

David Novak, in his essay "*Response to Martha Nussbaum's 'A Right to Marry?'*", critiques Nussbaum's support for non-heteronormative marriage by emphasizing the historical role of traditional marriage as a union between a man and a woman. He argues that marriage's primary public purpose—procreation and child-rearing—sets it apart from private relationships like non-heteronormative unions. Novak asserts that

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[7] Kalpana Kannabiran, '*What use is poetry?' Excavating tongues of justice around Navtej Singh Johar v. Union of India*, National Law School of India Review, page 1-31, 2019, https://www.jstor.org/stable/10.2307/26918420, (last visited: 10.12.2024).
[8] Martha C. Nussbaum, A Right to Marry?, California Law Review, 2010, https://lawcat.berkeley.edu/record/1123916/files/fulltext.pdf, (last visited: 10.12.2024).

redefining marriage severs its continuity with historical traditions and rejects the notion that its exclusion of non-heteronormative couples constitutes arbitrary discrimination. While open to civil unions as an alternative, he believes the marriage debate reflects deeper societal tensions requiring eventual legislative or judicial resolution.[9]

Alok Gupta explores in his article "*Section 377 and the Dignity of Indian Homosexuals*" that the historical and cultural context of Section 377, arguing that it was a colonial imposition that criminalized consensual non-heteronormative relationships and perpetuated societal homophobia. Gupta contrasts this colonial legacy with India's pre-colonial traditions, which were more inclusive of diverse sexualities and identities. He emphasizes the significance of the Naz India case in initiating judicial discourse on LGBTQ+ rights.[10]

In her seminal work "*Marriage, a History: How Love Conquered Marriage*,"[11] **Stephanie Coontz** provides an academic treatise on marriage as a social institution and uncovers an immense change from its original origins to modern manifestations. Coontz's dense historical book documents that traditionally, marriage has been more or less economically and politically based for centuries to create alliances, accumulate wealth and organize social hierarchies instead of serving personal, romantic expectancies. This approach challenges the modern assumptions about marriage on the grounds of love, proving that the idea of marrying for love arose in the late eighteenth century only as a radically new fashion challenging the existing social hierarchy.

D. James Kennedy and **Jerry Newcombe**, in their book "*What's Wrong with Non-heteronormative Marriage?*"[12] give a well-reasoned theological and socially conservative critique of non-heteronormative marriage from an evangelical Christian viewpoint. The authors split their argument into two parts; first, they examine the perceived dangers to traditional marriage, and second, they examine homosexuality from their religious perspective as its causes, its consequences, and if and how it can be altered. Kennedy and Newcombe report that one of the most vocal challenges to

[9] David Novak, *Response to Martha Nussbaum's 'A Right to Marry?*', California Law Review, 2010, https://lawcat.berkeley.edu/record/1123920/files/fulltext.pdf, (last visited: 10.12.2024).
[10] Alok Gupta, *Section 377 and the Dignity of Indian Homosexuals*, Economic and Political Weekly, 2006, http://www.jstor.org/stable/4418926, (last visited: 10.12.2024).
[11] STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE (Viking Penguin 2005).
[12] D. JAMES KENNEDY & JERRY NEWCOMBE, WHAT'S WRONG WITH SAME-SEX MARRIAGE? (Wheaton, Illinois: Crossway Books, 2004).

marriage ever is non-heteronormative marriage, following earlier attacks by feminist campaigns and no-fault divorce. They believe that claiming that support for non-heteronormative marriage comes from claiming genuine love of matrimonial commitment is not true. Instead, they believe it is driven by coercive societal acceptance of homosexual lifestyles by legislation.

Heymann, Sprague, and Raub's book "*Advancing Equality: How Constitutional Rights Can Make a Difference Worldwide*"[13] scholarship on constitutional protection of sexual orientation and gender identity (SOGI) rights, demonstrates the dynamics between legal reform and social change, in which authors are coming to appreciate increasingly that constitutional protections can precede as well as follow such changes in public opinion. The authors' comprehensive analysis bears out that although only 6% of world constitutions enfranchise equal rights based on sexual orientation explicitly, such protections have arisen in a variety of regions and political contexts, which contradicts conventional wisdom about the preconditions for legal reform1. The authors bring strong evidence from contrasting examples in Ireland, where mass popular support preceded constitutional change through popular referendum, and South Africa, where revolutionary constitutional provisions were established well before mass social acceptance but later explained measurable shifts in public attitudes to SOGI equality.

Ruth Vanita's "*Love's Rite: Non-heteronormative Marriage in India and the West*"[14] is a pioneering comparative study that unmasks dominant discourses surrounding non-heteronormative marriage's historical and cultural roots. Through rigorous analysis of Sanskrit texts of ancient times, medieval devotional literature, and modern Indian court cases, Vanita establishes the presence of deep historical roots for non-heteronormative marriages in both Indian and Western cultures, debunking the argument that such marriages are mere modern constructions. Her work is noteworthy primarily for its reportage on female-female weddings in modern India, notably the highly publicized 1987 wedding of policewomen Leela Namdeo and Urmila Srivastava, and her analysis

[13] Jody Heymann, Aleta Sprague & Amy Raub, Moving Forward in the Face of Backlash: Equal Rights Regardless of Sexual Orientation and Gender Identity, in Advancing Equality: How Constitutional Rights Can Make a Difference Worldwide 128-150 (University of California Press 2020).
[14] Ruth Vanita, Love's Rite: Same-Sex Marriage in India and the West (New York: Palgrave Macmillan, 2005).

of how these unions reconcile traditional Hindu marriage practices and legal frameworks.

Hrishika Jain offers a thoroughgoing constitutional critique in support of the re-evaluation of Indian legal family forms outside the model of marriage in her work titled *Making Love Legible: Queering Indian Legal Conceptions of "Family"*[15]. Most prominent among Jain's points is the idea of "family equality" as opposed to marriage equality based on a "*public ethic of care*", which would see families defined as care units and not heteronormative votaries1. Heavily drawing from the Canadian Law Commission's approach to defining close relationships, Jain suggests a four-step regulatory model that would meet the constitutional requirements outlined in Justice *K.S. Puttaswamy v. Union of India* for legitimate state objectives, necessity, and proportionality in privacy crimes. The article contends that existing Indian law, including the Transgender Persons Act 2019, institutionalizes state favoritism for conservative families and excludes other types of kinship arrangements and contends that only strict constitutional orthodoxy demands equal treatment and respect for all consenting adult care-based relationships.

The law of non-heteronormative marriage in India is a multifaceted interaction between early tolerance and modern-day legal concerns, as discovered through scholarly work on the rights of LGBTQ+ individuals and the quest for marriage equality. **Akshaya Kishor** thorough examination in "*Validity of Non-heteronormative Marriage in India: Past & Future*"[16] traces the legal history of homosexuality in India, illustrating how traditional Indian culture has historically been surprisingly tolerant of diverse sexual orientations and genders, as well as contrary to the colonial period criminalization under Section 377 of the Indian Penal Code. This academic contribution joins the expanding body of literature urging legislative change, situating India's likely legalization of non-heteronormative marriage within the global perspective of international human rights movements and highlighting the imperative need for robust legal frameworks to tackle the complex challenges confronted by LGBTQ+ citizens in modern Indian society.

[15] Hrishika Jain, Making Love Legible: Queering Indian Legal Conceptions of "Family," 10 ASIAN J. L. & SOC'Y 70 (2023) (Cambridge University Press).
[16] Akshaya Kishor, Validity of Same-Sex Marriage in India: Past & Future, 3 Indian J.L. & Legal Rsch. 1 (2021).

1.8 **STRUCTURE OF THE DISSERTATION**

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1.9 **LIMITATIONS OF RESEARCH**

i. The study concentrates primarily on Indian legal frameworks, with comparative insights limited to select countries (United States, United Kingdom South Africa, France and Germany), potentially affecting the applicability of its conclusions.
ii. The research relies on sources such as judicial decisions, statutes, and academic literature, Books of Indian & foreign authors without primary empirical data like interviews or surveys to capture lived experiences of non-heteronormative unions.
iii. While the study considers legal and constitutional dimensions, it does not deeply engage with the societal and cultural attitudes toward non-heteronormative unions unless they effect the policy making.

1.10 **CLARIFICATION OF THE TERM/CONTEXT USED**

i. For this study, the term '*non-heteronormative union*' should be understood as an umbrella term referring to LGBTQIA+ unions and relationships encompassing sexual orientations and gender identities beyond traditionally defined gender categories.

ii. Reference to '*non-heteronormative union recognition*' or '*recognition to non-heteronormative relationship*' in this dissertation should be understood as their recognition in the eye of law in the same manner as heteronormative union are recognised under the legislative enactment such as Marriage Laws of different religions.

CHAPTER 2

EVOLUTION OF NON-HETERONORMATIVE UNION RIGHTS IN INDIAN JURISPRUDENCE

CHAPTER 2

EVOLUTION OF NON-HETERONORMATIVE UNION RIGHTS IN INDIAN JURISPRUDENCE

2.1 **Introduction**

The evolution of queer rights in Indian jurisprudence represents a complex interplay between colonial legacies, constitutional principles, and changing societal attitudes. From the criminalization of homosexuality under British colonial rule through Section 377 of the Indian Penal Code to the landmark Supreme Court decisions recognizing LGBTQ+ rights, this legal journey reflects broader tensions between traditional values and fundamental rights. The gradual dismantling of discriminatory laws has been driven by rights-based constitutional interpretations, emphasizing dignity, equality, and personal liberty as enshrined in Articles 14, 15, and 21 of the Indian Constitution, yet the struggle for comprehensive legal recognition continues despite significant progress in recent years.

2.1.1 **Jurisprudential Importance in Constitutional Context**

The jurisprudence on queer rights in India is fundamentally rooted in the constitutional guarantees of equality, dignity, and personal liberty. The Indian Constitution, through Articles 14, 15, and 21, establishes a framework of rights that stands in stark contradiction to discriminatory practices against LGBTQ+ individuals, including those perpetuated by colonial-era legislation like Section 377. These constitutional provisions, guaranteeing equality before the law, prohibition of discrimination, and protection of life and personal liberty respectively, have served as the legal foundation for challenging heteronormative laws that marginalized queer communities for decades. The interpretation of these fundamental rights through an inclusive lens represents a crucial advancement in recognizing the inherent dignity of all citizens regardless of sexual orientation or gender identity.

The evolution of queer rights jurisprudence carries profound implications beyond legal recognition, affecting the lived experiences and social acceptance of LGBTQ+ individuals throughout Indian society. The Supreme Court's recognition of transgender individuals as a "third gender" in the NALSA case, followed by the decriminalization of homosexuality in the Navtej Singh Johar case, established legal precedents that

acknowledge the fundamental humanity and citizenship rights of queer individuals. This jurisprudential development serves as a corrective mechanism against historical injustices, addressing generations of discrimination, social stigma, and institutional marginalization. By interpreting constitutional provisions through the lens of evolving societal understanding and human rights principles, courts have created space for more inclusive legal frameworks that respect the diversity of human sexuality and gender expression.

Fundamental rights discourse provides essential intellectual and legal tools for challenging discrimination against sexual minorities in India. The principle of equality before the law (Article 14) challenges arbitrary classifications that disadvantage LGBTQ+ individuals, while Article 15's prohibition against discrimination creates opportunities to expand protected categories to include sexual orientation and gender identity. Furthermore, the right to life and personal liberty under Article 21 has been interpreted expansively to encompass dignity, privacy, and autonomy—all essential components for queer individuals to lead fulfilling lives free from state interference. This rights-based jurisprudence establishes a framework within which the experiences of marginalized communities can be articulated, recognized, and protected, demonstrating the transformative potential of constitutional interpretation in advancing social justice and inclusion.

2.2 **Non-Heteronormative Relationships in Ancient Civilizations**

The understanding of non-heteronormative relationships in ancient civilizations reveals complex and nuanced attitudes that stand in contrast to later colonial impositions. In ancient Greece, homosexual relationships were structured within specific social contexts, particularly through the institution of pederasty, which established relationships between adult men (*erastai*) and adolescent boys (*eromenoi*) as part of educational and social customs[17]. These relationships were not merely tolerated but often celebrated in certain Greek city-states, though they were governed by strict social norms regarding age, status, and behavioural expectations. In an ancient Greek narrative recounted by the poet Ovid (43 B.C.–17 A.D.), a young individual named *Iphis*, who was raised as a boy despite being biologically female, fell in love with

[17] Sophie Zheng, *A History of Homosexuality*, The Grizzly Gazette, https://lohsgrizzlygazette.com/3170/rhythms/a-history-of-homosexuality/, (last accessed: 02 Feb, 2025, 10:43 PM).

Ianthe, another woman. *Iphis* lamented that their love was doomed to be unfulfilled, until a divine intervention transformed *Iphis* into a man, thereby making their marriage possible.[18]

In ancient Rome, homosexuality was viewed not through the lens of modern sexual identity but as an extension of social hierarchy and power. The Latin language had no specific terms for *"heterosexual"* or *"homosexual"*; instead, sexual roles were classified based on activity, dominant (active/masculine) or submissive (passive/feminine), regardless of the participant's gender. Roman male citizens, especially those of higher status, were permitted to engage in non-heteronormative relations without stigma, provided they played the active role and their partners were of lower social rank, such as slaves, prostitutes, or actors. However, sexual relations with male citizens of equal status were taboo, as being passive in such encounters was seen as emasculating and degrading.[19]

Social class, rather than gender, thus became the principal criterion for acceptable sexual relations. Even Roman emperors like Hadrian and Nero maintained relationships with younger male partners, the most well-known being Hadrian's deification of his lover Antinous after his premature death. Despite the emotional depth some of these relationships might have held, Roman society's approval hinged on the maintenance of power dynamics. Any deviation from these norms, such as a man taking a passive sexual role, could be weaponized politically—as seen in the case of Julius Caesar, whose enemies mocked him with accusations of passivity.[20]

In the Indian context, historical evidence suggests varying attitudes toward non-heteronormative relationships and gender non-conformity across different periods and regions. Ancient Indian texts and artifacts indicate that sexual and gender diversity were acknowledged within religious, cultural, and social frameworks, though not necessarily in terms identical to modern conceptions of homosexuality or transgender identity.

The tale of *Sikhandin* is one of the most prominent instances of gender transformation in ancient Indian mythology, notably found in the Mahabharata. *Sikhandin's* story is

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[18] SALEEM KIDWAI, SAME-SEX LOVE IN INDIA: A LITERARY HISTORY, Part I, Penguin, (Edition 1st 2000), (Edited by Ruth Vanita & Saleem Kidwai)
[19] Abigail Hudson, *Male Homosexuality in Ancient Rome*, University of Birmingham, https://blog.bham.ac.uk/historybham/lgbtqia-history-month-male-homosexuality-in-ancient-rome/, (last accessed: 02 Feb, 2025, 11:58 PM).
[20] Id.

layered with symbolic elements such as rebirth, cross-dressing, female non-heteronormative marriage, the desire for male identity, and the ambiguity surrounding the permanence of the gender change, motifs that resonate with global myths of transformation. The narrative begins with Princess Amba, who was abducted by Bhishma from her swayamvar along with her sisters to be wed to his brother. However, since Amba was already in love with another king, she was allowed to leave, only to be rejected by her beloved, who deemed her defiled. When Bhishma's brother also refused to marry her, and Bhishma himself was bound by a vow of celibacy, Amba, enraged and humiliated, sought vengeance. After failing to find a warrior to defeat Bhishma, she turned to asceticism and worshipped Lord Shiva, asking to be reborn as a man to avenge her dishonor. Shiva granted her the boon, and Amba was reborn as *Sikhandini*, later transforming into *Sikhandin*, a man who would eventually play a crucial role in Bhishma's downfall. The story is often cited as an early cultural reflection on gender fluidity and the complex intersections between identity, duty, and societal roles.[21]

Another tale on the same line is the tale of *King Dilipa*, though a powerful ruler likened to Indra, the king of gods, was deeply sorrowful due to his lack of an heir. Determined to find a divine solution, he left his two wives behind in Ayodhya and undertook a long and arduous penance in search of the Ganga, subsisting only on water. Despite years of asceticism, his quest remained unfulfilled, and he eventually passed away, ascending to Brahma's realm. With his death, Ayodhya was left without a ruler, prompting concern among the gods. Fearing the end of the solar dynasty—destined to be the lineage into which Lord Vishnu would incarnate—they resolved to intervene. The gods sent Shiva to Ayodhya, who bestowed a miraculous blessing upon Dilipa's two queens, assuring them that through union with each other, one would conceive a son. Following Shiva's instruction, the queens bathed and united in mutual affection. In time, one conceived and bore a child, but the infant was a formless lump of flesh. Distraught, the queens lamented the deformity and, fearing public ridicule, intended to abandon him in the river Sarayu. However, the sage Vashistha, perceiving the truth through divine insight, advised them to leave the child on the roadside instead. As fate would have it, the sage Ashtavakra, himself physically deformed, came upon the child. Mistaking the infant's form as mockery, he initially cursed him, but upon realizing the truth, he reversed the curse and blessed the child to become as handsome as Madanmohan, the god of love.

[21] SALEEM KIDWAI, Supra note 2.

The prince immediately transformed and stood up, revealing his auspicious destiny. Recognizing his greatness through meditation, Ashtavakra affirmed the child as a noble and significant figure, destined to carry forward the divine lineage of King Dilipa.[22]

Temple sculptures from Konarak and Khajuraho, along with classical texts such as the Kamasutra and other ancient literary works, offer compelling evidence that ancient India embraced a wide range of sexual behaviors.[23] The erotic carvings at Khajuraho and Konarak, coupled with medieval texts, provide irrefutable proof that ancient India was well acquainted with multiple forms of sexual expression. Far from being an import of Western ideology, the acceptance of diverse sexual behaviors is deeply rooted in India's historical and cultural legacy. This narrative undermines the modern assertion that non-heteronormative practices were introduced by outsiders, reaffirming that ancient Indian society not only recognized but also integrated a vibrant tapestry of sexual expressions into its social and cultural framework.[24] These cultural artifacts indicate that homosexuality and varied sexual orientations were not viewed as immoral but were part of a broader spectrum of accepted human experiences.[25]

2.3 **Colonial Impact**

2.3.1 **Introduction of British Laws**

The British colonial era marked a profound rupture in the legal and social treatment of non-heteronormative relationships in India, with the introduction of Section 377 to the Indian Penal Code in 1860 representing the cornerstone of institutionalized homophobia. This provision, which criminalized *"carnal intercourse against the order of nature*,[26]*"* effectively outlawed homosexual acts under the guise of prohibiting *"unnatural offences*[27]*"*.

The law was part of a broader colonial project that sought to impose Victorian moral values on colonial subjects, as noted by Alok Gupta in his Human Rights Watch report,

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[22] SALEEM KIDWAI, Supra note 2.
[23] Vol.3 No.4, Rohit K Dasgupta, *Queer Sexuality: A Cultural Narrative of India's Historical Archive*, Rupkatha Journal on Interdisciplinary Studies in Humanities, 2011.
[24] Ruth Vanita, Homosexuality in India: Past and Present, University of Montana, https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1002&context=libstudies_pubs, (last accessed: 03 Feb, 2025, 9:36 AM).
[25] Soutik Biswas, How same-sex unions are rooted in Indian tradition, BBC News India, https://www.bbc.com/news/world-asia-india-67131106, (last accessed: 03 Feb, 2025, 10:13 AM).
[26] INDIAN PENAL CODE, S. 377.
[27] Id.

which observed that British authorities intended for such codes to prevent Christian colonial subjects from *"*corruption*"* and to condition colonized populations to conform to colonial authority. Colonial legislators and jurists unilaterally imposed laws regulating sexual behavior without engaging in any substantive debates or cultural consultations. Their primary aim was to instill European moral values into the colonized populations, whom they perceived as inherently incapable of self-regulating what they termed *"*perverse*"* sexual practices. This imposition was underpinned by the belief that indigenous cultures did not sufficiently punish non-normative sexual behaviors, thereby necessitating compulsory re-education in sexual mores. The colonial authorities maintained that while the promiscuity of settler societies could be tolerated under controlled circumstances, any deviation from the prescribed *"*white*"* virtue among the colonized had to be strictly policed and segregated. This approach not only sought to reform the moral landscape of the colonized but also to reinforce a binary moral hierarchy, wherein European standards were exalted and indigenous practices were systematically suppressed.[28]

Section 377 serves as a paradigmatic example of these colonial strategies in practice. Originally enacted as a means to regulate sexual behavior, it functioned as both a tool for the moral reformation of the colonized and a safeguard to protect the colonizers against perceived moral decline. As the first colonial sodomy law codified into a penal code, it set a precedent that would be replicated across vast swathes of the British Empire, influencing legal frameworks in countries such as Malaysia, Uganda, and many others throughout Asia, the Pacific, and Africa. This law not only institutionalized the segregation of *"*native*"* sexual practices from *"*white*"* virtues but also symbolized the broader strategy of cultural imperialism—where legal mechanisms were employed to assert and maintain control over colonized populations by redefining their sexual identities according to European norms. The enduring legacy of Section 377 thus illustrates how penal codes can operate as instruments of both moral regulation and imperial power, with effects that continue to reverberate in post-colonial societies.[29]

The far-reaching impact of Section 377 extended well beyond India*'*s borders, creating a lasting legacy of criminalization across the former British Empire. The provision

[28] Alok Gupta, *The Origins of "Sodomy" Laws in British Colonialism*, Human Rights Watch, https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism, (last accessed: 03 Feb, 2025, 9:52 AM).
[29] Id.

served as a template for similar legislation throughout British colonies, often preserved under the same section number, establishing a transnational apparatus of legal discrimination against homosexuality[30]. Spurred by persistent reminders from queer activists in the Global South and a growing recognition among British LGBT communities that anti-sodomy laws in many former colonies are legacies of colonial rule, a discourse of colonial atonement has emerged. This conversation, which seeks to reconcile with a troubled past, has found its way into the highest echelons of British politics, featuring prominently in debates within both Houses of Parliament.

2.3.2 Realisation of discrimination

Leading politicians have also engaged with this issue. Notably, former Prime Minister Theresa May, at the 2018 Commonwealth Heads of Government Meeting in London, expressed regret over the British colonial imposition of anti-sodomy laws, acknowledging the enduring legacy of discrimination, violence, and even death that continues to affect many former colonies.[31] The colonial imposition of Section 377 represents a historical disruption of indigenous attitudes toward sexuality, replacing potentially more fluid or contextual approaches to non-heteronormative relationships with a rigid criminalization based on European Christian moral precepts. This legal intervention fundamentally altered the trajectory of LGBTQ+ rights in India, creating barriers to equality and recognition that would persist well into the post-colonial era.

Section 377*'*s implementation reflected broader colonial strategies of governance that sought to regulate intimate behaviours and enforce Western notions of morality, propriety, and social order. By targeting sexual practices deemed *"*unnatural,*"* colonial authorities established legal mechanisms for controlling bodies and identities in ways that reinforced imperial dominance. The criminalization of homosexuality served not merely as a legal prohibition but as a powerful means of defining civic virtue, respectability, and citizenship in terms that privileged heteronormative expressions of sexuality and gender. This legal framework, when internalized by colonial subjects, created conditions for ongoing social stigmatization and discrimination against LGBTQ+ individuals that transcended the merely legal sphere, penetrating cultural

[30] Tessa Wong, *377: The British colonial law that left an anti-LGBTQ legacy in Asia*, BBC News, https://www.bbc.com/news/world-asia-57606847, (last accessed: 03 Feb, 2025, 10:27 AM).
[31] RAHUL RAO, OUT OF TIME THE QUEER POLITICS OF POSTCOLONIALITY 8 (Oxford University Press 2020).

attitudes, religious interpretations, and social norms in ways that would prove remarkably durable even after independence.

2.4 Legal Persistence of Colonial Frameworks in Post-Independence India

After gaining independence in 1947, India retained colonial-era laws that institutionalized heteronormativity, perpetuating systemic discrimination against LGBTQ+ communities. The most prominent example is Section 377 of the Indian Penal Code, introduced in 1861 as a legal transplant of the British Buggery Act of 1533. This law criminalized *"carnal intercourse against the order of nature,"* targeting consensual non-heteronormative relationships and other non-procreative sexual acts. Rooted in Victorian Christian morality[32], Section 377 reflected colonial anxieties[33] about controlling *"*deviant*"* bodies and sexualities, which were considered threats to the colonial order. Despite independence, Indian lawmakers and society continued to enforce this provision for over seven decades, reinforcing the stigma and marginalization of LGBTQ+ individuals.

With the advent of colonial rule, traditional Indian recognition of gender-variant individuals was systematically dismantled as Victorian morality was forcefully imposed. Colonial authorities introduced the Criminal Tribes Act (CTA) as a means to reshape indigenous social norms. Relying on anthropological notions of caste and race, the British portrayed entire communities as inherently criminal, despite a lack of substantive evidence. Under the CTA, groups deemed prone to *"*systematic non-bailable offences*"* were subjected to stringent state surveillance—compelling them to register with authorities, confining their movements, and mandating periodic inspections. The language used was deliberate: these groups were labeled as *"*tribes*"* rather than *"*castes*"* to evoke images of wildness and savagery, reinforcing the notion that a criminal identity was inherited and immutable.[34]

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[32] Emily Peacock, *The Effect of British Colonial Law and Rule on Gender Binaries and Sexual Freedoms*, The Center for Global Affairs, New York University, https://wp.nyu.edu/schoolofprofessionalstudies-ga_review/british-colonial-rule-gender-binaries/, (last accessed: 03 Feb, 2025, 11:03 AM).

[33] Arudra Barra, *What is "Colonial" About Colonial Laws?*, American University International Law Review, Vol. 31, http://digitalcommons.wcl.american.edu/auilr/vol31/iss2/1, (last accessed: 03 Feb, 2025, 11:53 AM).

[34] Amit Kumar Singh, From Colonial Castaways to Current Tribulation: Tragedy of Indian Hijra, Unisia, https://doi.org/10.20885/unisia.vol40.iss2.art3, (last accessed: 05 Feb, 2025, 3:19 PM).

Gender-diverse communities, notably the Hijras, were specifically targeted under this Act, categorized as a criminal caste or eunuchs. The term *"*eunuch*"* was broadly applied to include any males who either admitted to or visibly exhibited signs of impotence, as well as those suspected of engaging in behaviours such as cross-dressing or participating in public performances. The CTA not only criminalized expressions of gender variance and cross-dressing but also sought to regulate social interactions, alleging that such behaviours led to the corruption of young boys and girls. Children living with or influenced by these groups were systematically removed and placed under the care of *"*respectable*"* guardians. Although the Hijras were the primary focus, the Act also encompassed other groups—such as effeminate men and Khwaja sira—thereby reinforcing a broader colonial agenda. In essence, the British Empire utilized the CTA to discipline and transform what they deemed *"*savages*"* and *"*sexually corrupt*"* Indians, forcibly instilling a European sense of masculinity and order.[35]

The persistence of Section 377 highlights how colonial laws were internalized within post-independence governance. Early political leaders like Jawaharlal Nehru and Mahatma Gandhi voiced concerns about the colonial legacy of such laws, yet no substantive efforts were made to repeal them. Instead, Section 377 became a tool for harassment, blackmail, and ostracization of queer individuals, particularly by law enforcement agencies. For instance, police often used the law to justify raids on private gatherings and extort money from LGBTQ+ individuals under the threat of arrest. Furthermore, courts upheld Section 377 as a protector of *"*social morality,*"* dismissing early petitions challenging its constitutionality on the grounds that it preserved Indian values, a rhetoric ironically borrowed from colonial justifications for implementing the law.[36]

The lack of legal recognition for non-heteronormative relationships in post-colonial India extended beyond criminal law into multiple domains of civil rights, creating comprehensive barriers to equality. Without legal recognition, non-heteronormative couples were denied access to fundamental rights concerning marriage, adoption,

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[35] Swakshadip Sarkar, *"India is Truly Independent": Overview of the Criminal Tribes Act and Relevance for Gender Variant People in Contemporary India*, OHCHR, https://www.ohchr.org/sites/default/files/documents/cfi-subm/2308/subm-colonialism-sexual-orientation-oth-singh-singhal.docx, (last accessed: 05 Feb, 2025, 3:46 PM).

[36] Sophie Hunter, Hijras and the legacy of British colonial rule in India, London School of Economics, https://blogs.lse.ac.uk/gender/2019/06/17/hijras-and-the-legacy-of-british-colonial-rule-in-india/, (last accessed: 05 Feb, 2025, 7:02 PM).

inheritance, and other family matters that heterosexual couples could take for granted. This systematic exclusion from legal protection and recognition remained largely unchallenged at the institutional level until relatively recent years, despite growing activism and advocacy from LGBTQ+ communities.[37] The post-colonial persistence of heteronormative laws reveals deeper tensions within the project of Indian democracy and constitutionalism itself. While the Constitution established principles of equality, dignity, and personal liberty as foundational values, the practical realization of these principles for sexual minorities remained constrained by inherited legal frameworks and social attitudes. The social reforms for queer existence began meaningfully with the decriminalization of Section 377 in the Navtej Singh Johar case, followed by recognition of transgender individuals as a *"*third gender*"* in the NALSA judgment, marking critical turning points in Indian jurisprudence. These developments represent not merely technical legal changes but profound shifts in how law conceptualizes citizenship, belonging, and rights—shifts that recognize the fundamental humanity and equality of non-heteronormative individuals within the national community.

2.5 **JUDICIAL ACTIVISM AND ROLE OF INDIAN JUDICIARY**

Over the years, Section 377 of the Indian Penal Code, a colonial-era provision criminalizing *"carnal intercourse against the order of nature"*, has been the focal point of intense legal and social contestation. Courts had, initially, progressively expanded the scope of *"carnal intercourse against the order of nature"* focused on non-procreative acts.

In *Khanu v. Emperor*[38], Justice Kennedy A.J.C. ruled that oral sex constituted an act *"*against the order of nature,*"* reasoning that the fundamental purpose of carnal intercourse is procreation. Since oral sex precludes the possibility of conception, it was deemed by the court to deviate from the natural objectives of sexual activity.

Over time, judicial interpretation of Section 377 of the Indian Penal Code developed in a manner that increasingly emphasized a heteronormative and procreative

[37] Satchit Bhogle, *The Momentum of History – Realising Marriage Equality in India*, NUJS Law Review, https://nujslawreview.org/wp-content/uploads/2020/02/12-3-4-Satchit-Bhogle.pdf, (last accessed: 05 Feb, 2025, 9:16 PM).
[38] Khanu vs Emperor, AIR 1925 Sind 286.

understanding of sexual acts. In *Lohana Vasantlal Devchand v. State*[39], the Gujarat High Court opined that the mouth, as an anatomical orifice, is not naturally intended for sexual or carnal intercourse, thereby categorizing oral sex as *"against the order of nature."* This reasoning was reaffirmed in Calvin Francis v. State of Orissa[40], where the Orissa High Court, relying on Lohana, held that oral sex constituted an offence under Section 377. Further consolidating this restrictive interpretation, the Supreme Court in *Fazal Rab Choudhary v. State of Bihar*[41] articulated that the provision under Section 377 implicitly addressed acts of *"sexual perversity."* These rulings collectively entrenched a judicial approach that pathologized non-procreative sexual practices, reinforcing colonial moral frameworks and constraining the scope of sexual autonomy under Indian law. The judgment notably observes that *"the tests for attracting the penal provisions have changed from the non-procreative to imitative to sexual perversity,"* marking a significant shift in the judicial understanding of Section 377 over time.

2.5.1 **THE NAZ FOUNDATION CASE AND HIGH COURT OF DELHI**

Later, Civil rights activists and LGBTQ+ advocates have persistently challenged the provision, arguing that it infringes upon the fundamental rights of sexual minorities. A significant turning point occurred in 2001, when the Naz Foundation, a Delhi-based NGO working on sexual health and HIV/AIDS awareness, filed a public interest litigation[42] before the Delhi High Court, questioning the constitutional validity of Section 377. Judgment in Naz Foundation represents a watershed moment in Indian constitutional jurisprudence regarding rights of sexual minorities. This case examined the constitutional validity of Section 377 of the Indian Penal Code, which criminalized *"carnal intercourse against the order of nature"*.

The petitioner's constitutional challenge was multifaceted, the petitioner contended that the ***right to privacy*** is inherently embedded within Article 21, and for this right to hold substantive value, it must include the pursuit of happiness through elements such as privacy, human dignity, personal autonomy, and the intrinsic need for an intimate personal space. They argued that private, consensual sexual relationships fall squarely within this protected realm. Emphasizing the deeply personal nature of sexual relations,

[39] Lohana Vasantlal Devchand vs State, AIR 1968 GUJ 252.
[40] Calvin Francis vs State of Orissa, 1992 (I) OLR 316.
[41] Fazal Rab Choudhary v. State of Bihar, AIR 1983 SC 323.
[42] ***Naz Foundation Case***

the petitioner asserted that no aspect of life is more private or intimate, thereby making it an essential and inseparable part of the right to life. The petitioner submitted that Section 377's *"*legislative objective of penalizing *'*unnatural sexual acts*'* has ***no rational nexus to the classification created*** between procreative and non-procreative sexual acts,*"* rendering it arbitrary and unreasonable. They argued the provision was based on outdated stereotypes and misunderstandings. The petitioner contended that *"*the expression *'*sex*'* as used in ***Article 15 cannot be read restrictive to 'gender'*** but includes *'*sexual orientation*',"* making discrimination based on sexual orientation unconstitutional. he petitioner argued that Section 377 *"****curtails or infringes the basic freedoms guaranteed under Article 19(1)(a)(b)(c) & (d)****,"* restricting individuals*'* ability to express sexual preferences, associate freely, and move freely to engage in homosexual conduct.

The Ministry of Home Affairs, respondent side, sought to justify the retention of Section 377 IPC. By arguing that Section 377 IPC had continued to serve its purpose by addressing acts considered unnatural or morally reprehensible. It serves the broader societal purpose of maintaining public morality and had been instrumental in cases involving child sexual abuse and non-consensual sexual acts. It held that repealing or diluting the provision could compromise legal enforcement in such cases. In stark contrast, the Ministry of Health & Family Welfare took a progressive stance, arguing that continuance of Section 377 IPC adversely impacts public health efforts, particularly HIV/AIDS prevention. It cited studies demonstrating that stigma and discrimination linked to Section 377 IPC directly impair efforts to combat the spread of HIV/AIDS among vulnerable populations.

The Court extensively analyzed how Section 377 impacts the dignity and privacy rights protected under Article 21. It recognized that sexual orientation is an integral aspect of personhood and that discrimination based on sexual orientation violates human dignity. The Court emphasized that privacy includes ***decisional autonomy*** the freedom to make personal choices about one's intimate relations without state interference. The Court observed that sexual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs. By criminalizing private consensual sexual conduct, Section 377, in effect, criminalized a class of persons based on their identity.

The Court applied the test of reasonable classification to determine whether Section 377 violates Article 14. It examined whether there was an intelligible differentia between classes of persons and whether this differentiation had a rational relation to the objective of the law. The Court found that ***the classification between "natural" and "unnatural" sexual acts had no rational nexus to the purpose of protecting public health or morality***.[43] Additionally, it determined that Section 377 disproportionately impacts homosexuals as a class, making it discriminatory in effect. In a significant interpretive move, the Court read *"*sex*"* in Article 15 to include *"*sexual orientation.*"* This expanded reading recognized that discrimination on the basis of sexual orientation is analogous to sex discrimination and equally impermissible under the Constitution.[44] The Court also considered how criminalizing consensual homosexual conduct impacts the freedom of expression and association. It recognized that sexual expression is a form of personal expression protected under Article 19(1)(a) and that Section 377 has a chilling effect on the ability of LGBT individuals to express their identity and associate freely.

A crucial aspect of the Court's reasoning was its distinction between ***constitutional morality and popular morality***. The Court emphasized that public disapproval of certain acts is not sufficient reason for restricting constitutional rights. It held that popular morality, as distinct from constitutional morality, is not a valid justification for restricting fundamental rights. The Court observed that the Constitution protects minority viewpoints and identities from the tyranny of the majority. Constitutional provisions cannot be overridden by popular sentiment or disapproval, especially when it comes to the protection of the fundamental rights of minorities.

> *"Moral indignation, howsoever strong, is not a valid basis for overriding individuals' fundamental rights of dignity and privacy. In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view."*[45]

After thorough analysis, the Delhi High Court concluded that Section 377 IPC, insofar as it criminalizes consensual sexual acts of adults in private, violates Articles 14, 15,

[43] **Naz Foundation Case**, at Page No. 75, Paragraph No. 91.
[44] **Naz Foundation Case**, at Page No. 82-85, Paragraph No. 99-104.
[45] **Naz Foundation Case**, at Page No. 72, Paragraph No. 86.

and 21 of the Constitution. The Court employed the principle of *"*reading down*"* rather than striking down the provision entirely.

The Court issued the following direction:

> *"We declare that Section 377 IPC, insofar as it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors."*[46]

This carefully crafted holding ensured that non-consensual sexual acts and sexual acts with minors would remain criminalized, while consensual adult homosexual conduct would be decriminalized.

2.5.2 **OVERRULING NAZ FOUNDATION CASE AND SUPREME COURT**

However, this judgment was subsequently overturned by the Supreme Court in ***Suresh Kumar Koushal vs Naz Foundation***[47], the reversal marked a significant setback to the progressive interpretation of constitutional rights with respect to sexual minorities. This decision reversed the progressive Delhi High Court ruling that had decriminalized consensual non-heteronormative relations, effectively reinstating Section 377 of the Indian Penal Code in its entirety. Following the Delhi High Court judgment[48], various individuals and organizations, including Suresh Kumar Koushal, filed appeals challenging the decision. Notably, the Union of India chose not to challenge the High Court judgment, though this did not prevent the Supreme Court from hearing the appeals. The appeals culminated in the December 11, 2013 judgment that overturned the Delhi High Court*'*s decision.

2.5.2.1 **Reinterpretation of the Naz vis-à-vis Articles 14, 15, 19(1)(a), and 21**

The central issue before the Court was whether Section 377 of the IPC, to the extent that it criminalizes the consensual sexual intercourse of adults in private, is violative of Articles 14, 15, 19, and 21 of the Constitution. This entailed consideration of whether the provision is creating an arbitrary and unreasonable classification and whether it is

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[46] **Naz Foundation Case**, at Page No. 105, Paragraph No. 132.
[47] **Suresh Koushal Case.**
[48] **Naz Foundation Case**.

encroaching upon fundamental rights to equality, non-discrimination, expression, and life and personal liberty.

The petitioners claimed that **Section 377** ***classifies sexual intercourse*** as *"*natural*"* (penile-vaginal) and *"*unnatural*"* (penile-non-vaginal) and that such classification does not have a reasonable relation to any legitimate legislative aim and therefore ***offends Article 14***. The Supreme Court rejected this argument, holding that Section 377 makes a criminality turn on whether an act is in accordance with or against what is *"*the order of nature.*"* The Court held that this is a valid classification, for individuals who have *"carnal intercourse against the order of nature"* are distinguished from those who have *"natural"* sexual intercourse.

The law is not arbitrary because it only criminalizes punishment for some sexual acts that are considered unnatural. The Court drew a distinction between provisions of law aimed at the acts themselves and not at specific identities or sexual orientations, reiterating that criminality under Section 377 is based on the act itself and not on the sexual orientation or identity of the actors.

> *"Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes, and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification."*[49]

Although the Court did not exhaustively examine Article 15 of the Constitution, it impliedly dismissed the contention that Section 377 was discriminatory based on sexual orientation. The bench explained that the law does not particularly target a group or identity, but criminalizes some sexual acts regardless of the sexual orientation or identity of the individuals. The Court explained that Section 377 *"*does not criminalise a particular people or identity or orientation,*"* but *"*merely identifies certain acts which, if committed, would constitute an offence.*"*

The decision offers little close examination of the implications of Section 377 on the freedom of expression and speech under Article 19(1)(a) of the Constitution. The failure to do so indicates that the Court did not see the freedom of expression particularly in

[49] **Suresh Koushal Case**, at Page No. 124, Paragraph No. 42.

the domain of sexual identity and body autonomy as a central constitutional concern in deciding the case.

The petitioners advanced that Section 377 of the Indian Penal Code is an unjustified intrusion into the personal domain, criminalizing consensual sex among adults in a private setting. They contended that such a law contravenes the right to privacy and personal freedom under Article 21 of the Constitution, thereby directly threatening the dignity, bodily integrity, and identity of LGBTQ+ persons. Highlighting the wider effect of criminalization, the petitioners contended that such provisions of law perpetuate systemic exclusion and social marginalization, therefore making it impossible for members of the LGBTQ+ community to fully enjoy their constitutional rights.

The Supreme Court, in its ruling, recognized the theoretical significance of privacy, dignity, and autonomy; however, ultimately held that the evidence presented to provide evidence of systemic discrimination under Section 377 was insufficient. The Court characterized the supporting evidence as *"singularly laconic*,[50]*"* i.e., that it was not materially profound. It held that rights of privacy cannot be invoked as a defense to avoid prosecution for acts falling within the definitions of criminal set out by law. Additionally, the Court referred to the historical continuity and infrequent enforcement of Section 377 as evidence that it did not lead to widespread violations of rights, and on this basis held that the law, in practice, did not target or discriminate against homosexual individuals specifically.

2.5.2.2 **Constitutional Morality and the *"Minuscule Minority"***

Perhaps the most controversial part of the Supreme Court judgment was that it employed the *"minuscule minority"* reasoning.[51] The Court pointed out that very few Indians were lesbian, gay, bisexual, or transgender, and that few had been prosecuted under Section 377 in the past. Based on this, it questioned whether one was justified in reversing the law on the principle that it constituted discrimination against the minority. Such a line of reasoning was heavily criticized on the basis that the implication was that the quantum of constitutional protection was to be calculable in accordance with the

[50] **Suresh Koushal Case**, at Page No. 228, Paragraph No. 40.
[51] **Suresh Koushal Case**, at Page No. 234, Paragraph No. 43.

minority size. Such would ignore the inherent function of constitutional rights as being the shelter for minority interests from the peril of majoritarian prejudice.

Further, the judgment lacked the thoughtful application of the doctrine of constitutional morality, which had been the focus of the earlier judgment of the Delhi High Court. Instead of taking note of the dynamic nature of constitutional values and equality principles, the Court adopted the principle of judicial restraint, gave the highest possible deference to the legislature in matters of the validity of legislation. This effectively circumscribed the role of the judiciary, institutionalizing a formalistic and restrained approach to constitutional adjudication, particularly in instances of serious social controversy.

2.5.2.3 **On the presumption of constitutionality**

The supreme court on the presumption of constitutionality of law say that it is a well-established principle of constitutional jurisprudence that all enactments of legislation—by Parliament or State Legislatures, are presumed to be constitutionally valid. This presumption flows from the belief that legislatures, being democratically elected representative bodies, are presumed to act in terms of the will and welfare of the people, and within the scheme of the Constitution. Importantly, this presumption is not limited to post-Constitutional enactments alone; it applies equally to pre-Constitutional statutes retained or amended by the legislature, on the basis that they continue to receive legitimacy through constitutional adoption and legislative endorsement.[52]

The Suresh Koushal Case has been the target of extended academic and judicial criticism on analytical grounds, most notably underscored by its invocation of the *"minuscule minority"* argument[53], that the presumption that the constitutional assurances under Article 14 are subject to the size of the concerned group is also incorrect. The Constitution assures equality before the law to "any person," and not just to the majority segment of society. The fact that a statute affects only a few individuals does not obviate the State's duty to ensure individual rights. Although a legislative act affects or discriminates against an individual, and the same act operates to bring about

[52] Suresh Koushal Case, at Page No. 198, Paragraph No. 28.
[53] Aparna Chandra, *Re-Criminalizing Homosexuality: The Many Sins of Koushal*, LAOT, https://lawandotherthings.com/re-criminalizing-homosexuality-many/, (last accessed: 08 Feb, 2025, 07:10 PM).

an arbitrary or discriminatory outcome, it would still be a violation of Article 14.[54] Its failure to rebut the discriminatory effect of Section 377 against LGBTQ+ individuals, and its excessive reliance on legislative hegemony in resolving questions of basic rights. Despite these, the judgment is a landmark but controversial moment in Indian constitutional history, underscoring the shifting dynamics between judicial interpretation, legislative power, and the need to safeguard minority rights in a democratic constitutional environment.

Despite the overturning of the Naz Foundation judgment by the Supreme Court in Suresh Kumar Koushal, the landmark ruling in K.S. Puttaswamy v. Union of India[55] laid a crucial groundwork for its later rethinking. The Privacy Bench directly countered the argument of Koushal, namely its claim that the *"minuscule fraction"* of the population was LGBTQ+ and that there had been a negligible number of prosecutions under Section 377 in the previous century. The Court rejected outright the said rationale and asserted that numerical representation is not a good reason to deny the right to privacy. It reiterated that the main reason for granting certain rights the adjective of fundamental rights is to safeguard people against the prejudices of the majority, either through public opinion or legislative action.[56]

In responding to Koushal's claim that the application of Section 377 had been in significant part relinquished, the Privacy Bench made an important observation that sexual orientation is a constitutive element of personal identity, requiring constitutional protections to be equally accessible to all persons, regardless of the numbers involved. The Court underscored that the infringement of a fundamental right cannot be justified on the ground that only a few individuals are subject to legal or social hostility. It also warned against the chilling effects that such a law can have, which can stifle the freedom to live one's identity without fear or apprehension. By equating privacy, dignity, and identity as being inextricably linked, the judgment set the rules of the game for the Navtej Singh Johar case, reaffirming the principle that constitutional rights must extend protection to those most vulnerable to systemic marginalization.[57]

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[54] Id.
[55] Justice K S Puttaswamy (retd.), and Anr. vs. Union of India and Ors., 2017 INSC 801; [2017] 10 S.C.R. 569. ("**Right to Privacy Case**").
[56] Vol. 31, Kalpana Kannabiran, *'What Use Is Poetry?' Excavating Tongues of Justice Around Navtej Singh Johar V. Union of India*, 12 National Law School of India Review, 2019, https://www.jstor.org/stable/10.2307/26918420, (last accessed: 08 Feb, 2025, 10:37 PM).
[57] Id, at Page No. 13.

The plurality of judges[58] strongly criticized the rationale used in *Suresh Koushal Case*, specifically its contention that only a "minuscule minority" of individuals engage in non-heteronormative relations. The collective stated that such an argument marks a basic misunderstanding of constitutional rights, which are not dependent on the number of persons they protect but on the inherent dignity and autonomy of every individual. By confirming that sexual orientation forms an integral part of personal identity, the collective firmly located it within the ambit of the fundamental right to privacy as outlined in Article 21. This reading was explicitly endorsed by one of the concurring opinions and implicitly supported by the others, all of which recognized intimate decision-making as a protected aspect of privacy.[59]

The key insights of *Koushal Kishore Case* in *Right to Privacy Case* paved the way for a more rights-oriented and stronger interpretation in Navtej Singh Johar, where the Supreme Court squarely and finally dealt with the question of LGBTQ+ rights.

2.5.3 **NAVTEJ SINGH JOHAR AND DECRIMINALIZATION OF SECTION 377**

The judgment in Navtej Singh Johar vs Union of India[60] is pivotal in Indian constitutional jurisprudence, where the Indian Supreme Court, in a five-judge constitutional bench, struck down Section 377 of the Indian Penal Code, 1860 (IPC) to the extent that it criminalized consenting non-heteronormative sexual acts between consenting adults. The Court, presided over by Chief Justice Dipak Misra, with Justices R.F. Nariman, A.M. Khanwilkar, D.Y. Chandrachud, and Indu Malhotra, all delivering separate but concurring judgments on September 6, 2018, held unanimously that criminalizing consenting homosexual acts infringed fundamental constitutional principles of equality, dignity, and privacy. Which I shall elaborate at great length in subsequent Writing.

The challenge was made to IPC Section 377 by a writ petition by Navtej Singh Johar and other LGBT individuals who claimed that Section 377 was violative of their fundamental rights. This was the culmination of a long legal battle in the courts for decriminalizing homosexuality in India. Previously, in *Naz Foundation Case*, the Delhi

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[58] **Right to Privacy Case**.
[59] Gautam Bhatia, *The Indian Supreme Court's "Curative" Hearing in the "LGBT Case"*, OxHRH Blog, https://ohrh.law.ox.ac.uk/the-indian-supreme-courts-curative-hearing-in-the-lgbt-case, (last accessed: 08 Feb, 2025, 11:57 PM).
[60] **Decriminalisation Case**.

High Court had declared Section 377 to be unconstitutional to the extent that it was criminalizing consensual sexual acts between adults in private. But in *Suresh Koushal Case*, the Supreme Court overturned the decision of the Delhi High Court, criminalizing homosexual acts once again.

The jurisprudence saw a sea change after the Supreme Court judgment in *Right to Privacy Case*, which recognized the right to privacy as a constitutional right under Article 21 of the Constitution. The judgment clearly recognized sexual orientation as an essential element of privacy and disapproved of the *Koushal Kishore Case* judgment. This opened up a new constitutional challenge to Section 377, and it saw its culmination in the *Decriminalisation Case*.

The petitioners argued that Section 377 violates their fundamental rights by imposing unjustified distinctions between "natural" and "unnatural" sexual acts and thus offending the right to equality as enshrined under Article 14. They argued that although Article 15 does not mention "sexual orientation" expressly, discrimination on this aspect is necessarily connected with the discrimination forbidden under sex. They further contended that sexual expression is a safeguarded mode of personal expression under Article 19(1)(a).

In addition, the petitioners argued that the legislation violates the right to life and personal liberty under Article 21 by intruding into privacy, dignity, and autonomy—a view endorsed by the Puttaswamy judgment. They argued that the Constitution should be construed as a transformative one, which strongly protects the rights of the historically marginalized communities, thereby ensuring the inherent dignity and constitutional protection of sexual orientation.

The respondents maintained that Section 377 was necessary to preserve social morality and traditional values and that its decriminalization would lead to greater health hazards. The respondents also argued that the law affected only a small minority and that any attempt to modify it should be made through parliamentary debate and not judicial activism.

2.5.3.1 **On Transformative Constitutionalism**

Chief Justice Dipak Misra stressed that constitutional provisions must be interpreted in a way that actualizes their true intent and is sensitive to the needs of changing society

and not just as per a literal approach. The Court made it clear that transformative constitutionalism is all about recognizing and protecting individual rights and dignity and, simultaneously, making sure that everyone gets reasonable chances of social, economic, and political growth. This approach not only manifests the dynamic nature of the Constitution, but it also acts against all forms of discrimination in a positive way.[61]

2.5.3.2 **On Constitutional Morality versus Social Morality**

At the heart of the judgment was the insistence of the Supreme Court that constitutional morality needs to be the prevailing foundation of the interpretation of rights, instead of depending upon modern society or Victorian society. Chief Justice Dipak Misra, on behalf of himself and Justice Khanwilkar, opined that the concept of constitutional morality is at the heart of the Rule of Law because it contains the principles of a diverse and plural society. He declared that it is the duty of all government institutions, including the judiciary, to preserve the multifaceted character of Indian society and to guard against any such efforts at majoritarianism which would undermine the rights of minority or marginalized sections.[62]

Justice Nariman supported this position by highlighting that Section 377 is a relic of Victorian morality, which does not resonate with the values of modern constitutional democracy anymore. He argued that constitutional morality, which is indelibly embedded in the Preamble and Part III of the Constitution, is paramount, particularly in the protection of the dignity, equality, and liberty of individuals. He argued that it is the moral paradigm based on the Constitution, and not outdated social mores, which should guide the protection of fundamental rights.[63]

2.5.3.3 **On the Right to Privacy and Dignity**

The bench holistically held that the right to privacy inherently encompasses sexual privacy and personal autonomy. Chief Justice Dipak Misra emphasized that privacy shields a person's autonomy from interference by societal norms. He mentioned that the full growth of human personality depends on a person's freedom to exercise personal choices without interference.

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[61] **Decriminalisation Case**, at Page No. 533, Paragraph No. 253.
[62] **Decriminalisation Case**, at Page No. 585, Paragraph No. 78.
[63] **Decriminalisation Case**, at Page No. 650, Paragraph No. 64.

In a liberal democracy, Chief Justice Misra pointed out that acknowledging a person as an independent entity implies that the State has acknowledged their capacity to make independent decisions. Such support is required in the quest for dignity as it reaffirms the right of the individual to live as he/she desires and with self-respect, above all in issues of identity and interpersonal relationships.[64]

> "*To deny the members of the LGBT community the full expression of right to sexual orientation is to deprive them of their entitlement to full citizenship under the Constitution... By penalising sexual conduct between consenting adults, s.377 imposes moral notions which are anachronistic to a constitutional order*."[65]

2.5.3.4 ***On Creation of a Criminal Class***

Justice Chandrachud further stated that while Section 377 appears to criminalize certain acts, it actually creates a class of criminals by bringing those engaging in consensual sex acts under the ambit of punishment. The application of the law thus criminalizes those who engage in consensual sex acts.

He continued to reason that such a categorization unjustly equates to LGBTQ individuals' consensual behaviors as serious sexual crimes, such as rape and child abuse. Therefore, Section 377 criminalizes not only such behaviors that ought never to be criminalized but also unjustly stigmatizes and socially excludes LGBTQ individuals, thereby alienating them.[66]

> "*History owes an apology to the members of LGBT community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries... The members of this community were compelled to live a life full of fear of reprisal and persecution... This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality*"[67]

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[64] **Decriminalisation Case**, at Page No. 650, Paragraph No. 64.
[65] Justice Chandrachud, **Decriminalisation Case**, at Page No. 646-647, Paragraph No. 58.
[66] Decriminalisation Case, at Page No. 707, Paragraph No. 136.
[67] Justice Indu Malhotra, **Decriminalisation Case**, at Page No. 745, Paragraph No. 20.

The Court unanimously declared that Section 377, insofar as it criminalized consensual sexual acts between adults in private, violated fundamental rights under Articles 14, 15, 19, and 21. This landmark decision effectively struck down the portion of the law that stigmatized non-heteronormative relationships by classifying consensual sexual behavior as a criminal offense, thereby ensuring that individuals could exercise their autonomy and dignity without fear of legal persecution. The judgment underscored that any expression of consent must be completely free and voluntary, reinforcing the need for personal autonomy and protection from coercion.

However, the Court also clarified that Section 377 would remain operative in cases involving non-consensual sexual acts against adults, sexual acts with minors, and acts of bestiality. It was made clear that while the decision does not lead to the reopening of concluded prosecutions, it can be applied in all pending cases at various judicial stages. Additionally, although not explicitly stated in the excerpt, the standard practice is that such declarations of unconstitutionality do not operate retrospectively, thereby safeguarding past rulings while moving forward with a more inclusive interpretation of the law.

Following the landmark judgment in Navtej Singh Johar v. Union of India (2018), which decriminalized consensual non-heteronormative relations and recognized sexual orientation as an intrinsic aspect of individual identity, Indian constitutional jurisprudence took a significant step towards inclusivity. The judgment established a framework of transformative constitutionalism and constitutional morality, protecting individual dignity, liberty, and privacy. It also affirmed that the rights of minorities cannot be subsumed under majoritarian morality. While Navtej Singh Johar resolved the criminalization of homosexuality under Section 377, it left broader questions of equality, societal recognition, and the rights of non-heteronormative couples, including marriage, unaddressed.

2.5.4 **SUPRIYA CHAKRABORTY AND NON-HETERONORMATIVE MARRIAGE**

In the aftermath of the path-breaking ruling in Navtej Singh Johar v. Union of India (2018), which criminalized consensual non-heteronormative relations and acknowledged sexual orientation as a constitutive aspect of one's personality, Indian constitutional jurisprudence moved one step towards inclusivity. The ruling set the

paradigm of transformative constitutionalism and constitutional morality safeguarding individual dignity, liberty, and privacy. It also made it categorically clear that the minorities' rights cannot be invaded by majoritarian morality. Although Navtej Singh Johar ended criminalization of homosexuality under Section 377, it did not resolve other matters of equality, social acceptance, and rights of gay couples, i.e., marriage.

2.6 **Conclusion**

Drawing on the principles enunciated in Navtej Singh Johar, the Supreme Court's judgment in Supriyo @ Supriya Chakraborty v. Union of India[68] on non-heteronormative marriage attempted to address the next frontier of LGBTQIA+ rights. In this judgment, the Court had to determine whether non-heteronormative couples are entitled to marry and enjoy the rights and privileges that go with such marriages. The Supriyo Chakraborty case is an organic evolution in the case for LGBTQIA+ rights, from decriminalization to the assertion of full equality before the law. In examining questions of family rights, social acceptance, and constitutional entitlements, the case elaborates on the principles of dignity, freedom, and equality enunciated in Navtej Singh Johar while also trying to come to terms with the social and institutional underpinnings of non-heteronormative marriages.

Having discussed the foundation of my dissertation in in Chapter 2, now Chapter 3 will delve into the next crucial stage in the struggle for non-heteronormative marriage rights and the legal battle for non-heteronormative union as seen in the Supriyo @ Supriya Chakraborty vs Union of India case, and its implications for the broader pursuit of equality and social recognition.

[68] Supriyo @ Supriya Chakraborty vs Union of India, 2023 INSC 920, [2023] 16 S.C.R. 1209.

CHAPTER 03

BETWEEN RIGHTS AND RESTRAINT: THE CONSTITUTIONAL DIALOGUE IN SUPRIYO

CHAPTER 03

BETWEEN RIGHTS AND RESTRAINT: THE CONSTITUTIONAL DIALOGUE IN SUPRIYO

3.1. **Introduction**

India's constitutional jurisprudence on queer rights has undergone a dramatic evolution over the past decade and a half. The journey began with the Delhi High Court's trail-blazing judgment in *Naz Foundation v. Government of NCT of Delhi*[69], which legalised consensual non-heteronormative conduct by declaring Section 377 as unconstitutional. This liberal step was subsequently reversed by the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation*[70], whereby a Division Bench re-imposed criminality on non-heteronormative sexual expression by restoring Section 377 in its entirety. The judicial pendulum swung again in *Navtej Singh Johar v. Union of India*[71], whereby a five-judge Constitution Bench of the Supreme Court partially struck down Section 377, legalising consensual sex between adults of the same sex. The Court in Navtej recognised sexual autonomy as a part of the right to privacy and dignity and held that criminalisation of consensual homosexual acts offended constitutional morality.

The decriminalisation of homosexual relations in Navtej was a landmark in the constitutional development of India, as the courts were willing to engage with the Subtleties of sexual orientation and gender identity. Decriminalisation removed the spectre of criminal prosecution, but did not go so far as to offer any positive affirmation or legal recognition to non-heteronormative relationships. As the Chief Justice Misra explained in Navtej, "*decriminalising sexual conduct between adults of the same sex*" was different from "*legitimising homosexuality as a natural way of life*."[72] This proviso kept fundamental questions regarding the constitutional status of non-heteronormative relationships and their right to equal recognition under India's marriage law.

In the wake of Navtej, numerous petitions were filed before the High Courts. Eventually, the Supreme Court analysed the question of the constitutional validity of marriage law provisions limiting matrimony to opposite-sex couples. These

[69] **Naz Foundation Case**.
[70] **Suresh Koushal Case**.
[71] **Decriminalisation Case**.
[72] Id. at para. 125.

consolidated into *Supriyo @ Supriya Chakraborty & Anr. v. Union of India*[73], a case that posed the Supreme Court with questions of first principle regarding the constitutional scope of marriage equality in India. The case involved the Court having to decide whether the right to marry one's choice of partner included non-heteronormative couples, and whether marriage law could be expansively interpreted to include such couples.

This chapter offers a critical examination of the judgment rendered by the Supreme Court in Supriyo, touching in particular on how the Court responded to the rival arguments on constitutional interpretation, limits of legislative power, and conceptual understanding of marriage in the legal order. The chapter explores the Court's handling of its prior precedents, namely Navtej, *NALSA*[74], and *Puttaswamy*[75], to ascertain the doctrinal consistency between these judgments and the judgment in Supriyo. The chapter then assesses whether, the constitutional promise of equality and dignity, were realised by the Court for queer citizens or reaffirmed a hierarchical vision of intimate lives.

3.2. **Factual and Procedural Background**

3.2.1 **Origin and Content of the Writ Petitions**

The case that initiated Supriyo started with the filing of Writ Petition (Civil) No. 1011 of 2022 before the Delhi High Court. Petitioners Supriyo Chakraborty and Abhay Dang, a gay couple living together in a long-term relationship, sought judicial endorsement of their relationship under the Special Marriage Act, 1954 (SMA). They assailed the provisions in SMA limiting marriage to opposite-sex couples as unconstitutional. In particular, they were protesting against the use of terms like "*bride*" and "*groom*" defined under Section 4, and the gendered language used throughout the act, assuming heterosexual marital relationships[76].

Following this first petition, several other cases were instituted in different High Courts, such as those by Parth Phiroze Mehrotra and Uday Raj Anand in Delhi, Vaibhav Jain and Parag Vijay Mehta in Delhi, and Aachal Sethi and Akanksha[77] in Kerala. All the

[73] Supriyo @ Supriya Chakraborty & Anr. v. Union of India, 2023 INSC 920.
[74] National Legal Services Authority v. Union of India, (2014) 5 SCC 438.
[75] Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.
[76] Supriyo, 2023 INSC 920, at para. 8
[77] Id. at para. 9-11.

petitioners, who identified themselves as members of the LGBTQ+ community, sought the same type of relief—i.e., the recognition of their right to marry under either the Special Marriage Act (SMA), personal laws, or through a liberal reading of the constitutional right to marry someone of their choice.

3.2.2 **Transfer from the Delhi High Court**

Due to the constitutional significance of issues at stake, the Centre filed a transfer petition to the Supreme Court with the expectation of clubbing all the pending and future petitions on non-heteronormative marriage. In its transfer petition, the Union Government argued that these cases involved "*seminal questions of law which will have a significant impact on society*" and therefore warranted authoritative pronouncement by the Supreme Court[78]. The Supreme Court granted the transfer petition on January 6, 2023, and all connected matters fell within its jurisdiction.[79]

3.2.3 **Petitioners' Identities and Reliefs Sought**

The Supriyo petitioners were a representative sample of India's LGBTQ+ community, comprising Hindu, Muslim, Christian, and atheist individuals, who wished to have their relationship established under different legal regimes. Supriyo Chakraborty and the lead petitioners, Abhay Dang, legally formalised their relationship by a commitment ceremony with family and friends as witnesses in December 2021. They asked for legal recognition and enforcement of their rights as a legally married couple, highlighting most importantly their vulnerabilities during the COVID-19 pandemic, when they were not provided with access to the legal protection normally afforded to spouses[80].

The other signatories were Parth Phiroze Mehrotra and Uday Raj, who had been together for seventeen years and wanted to make their relationship legal through marriage. Vaibhav Jain and Parag Vijay Mehta, who had married in Washington, D.C., in 2017, wanted their overseas marriage to be valid in India. Aachal Sethi and Akanksha, who were lesbians, challenged the Hindu Marriage Act of 1955 provisions, which excluded them from getting married under Hindu personal law[81].

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[78] Id. at para. 12.
[79] The Hindu Bureau, *Supreme Court transfers to itself all petitions on same-sex marriage*, The Hindu (2023), (last visited: May 20, 2025).
[80] Supriyo, 2023 INSC 920, at para. 14.
[81] Id. at para. 15-17.

The petitioners collectively sought a range of reliefs, which are –

a. Foremost among them, a declaration affirming that the fundamental right to marry a person of one's choice encompasses individuals within the LGBTQ+ community.;
b. A declaration that the provisions of the Special Marriage Act, 1954 and various personal laws, to the extent they discriminate against non-heteronormative couples, violate Articles 14, 15, 19, and 21 of the Constitution;
c. A writ directing the appropriate authorities to register marriages of non-heteronormative couples under the SMA;
d. A writ directing the recognition of non-heteronormative marriages solemnised in foreign jurisdictions; and
e. Consequential reliefs regarding adoption, joint bank accounts, insurance, pension, and other benefits typically available to married couples[82].

The petitions fundamentally challenged the heteronormative understanding of marriage embedded in Indian law and sought to extend the constitutional guarantees of equality, dignity, and personal liberty to encompass the right of non-heterosexual couples to form legally recognized unions.

Following the verdict, lead petitioner Supriyo Chakraborty expressed profound disappointment while maintaining hope for future progress, stating that they were deeply disappointed by the judgment and exhausted. Though the court had reiterated that queer people have the right to form relationships, they stopped well short of legal recognition. Chakraborty added that they felt proud to have fought this battle, and despite losing, remained hopeful that one day they would have full marriage equality. His statement captures the mixed emotions felt throughout India's queer community, with many activists noting that despite the setback, the case sparked important national conversations and galvanized community solidarity, even as they faced the reality of returning to "*square one*" in their legal struggle for recognition.[83]

3.3. **Issues Framed by the Court**

3.3.1 **Issues as Framed by the Majority and Dissenting Opinions**

[82] Id. at para. 18.
[83] Amarabati Bhattacharyya, "*We have lost, yet we remain hopeful, says petitioner on same-sex marriage verdict*," THE HINDU, Oct. 18, 2023.

The Constitution Bench—consisting of Chief Justice D.Y. Chandrachud and Justices S.K. Kaul, S. Ravindra Bhat, Hima Kohli, and P.S. Narasimha—articulated a set of significant questions for adjudication. Although the precise articulation of these issues differed across the individual opinions, the central concerns before the Court may be distilled into the following key themes:

In the majority judgment authored by Chief Justice Chandrachud, the issues were framed as:

1. Whether the fundamental right to marry or the right to legal recognition of relationships is protected under the Constitution;
2. If such a right exists, whether it extends to queer couples;
3. Whether the Court has the constitutional authority to recognise or give legal sanction to such relationships; and
4. Whether the state is under a constitutional obligation to recognise such relationships through legislation[84].

Justice Kaul, in concurrence with the Chief Justice, approached the issues through the lens of whether existing statutory frameworks could be interpreted to include non-heteronormative marriages by the court or whether the Court could direct Parliament to enact necessary legislation[85].

The dissenting opinion authored by Justice Bhat, with concurrence from Justice Kohli and Justice Narasimha, formulated the questions more restrictively, focusing on whether the Court could interpret or read into existing statutory provisions to accommodate non-heteronormative marriages, or alternatively, whether it could compel the legislature to enact a new legal framework[86].

3.3.2 **Core Constitutional Questions**

The issues framed by the Court implicated several constitutional provisions and doctrines:

a. Article 14 (Right to Equality): Whether the exclusion of queer couples from marriage laws constitutes an impermissible classification lacking a rational

[84] Supriyo, 2023 INSC 920, at para. 30.
[85] Justice Kaul Concurrence, Id. at para. 245.
[86] Justice Bhat Dissent, Id. at para. 387.

nexus with the object sought to be achieved, thereby violating the guarantee of equality before the law.

b. Article 15 (Prohibition of Discrimination): Whether denying non-heteronormative couples' access to civil marriage is discrimination based on 'sex,' in breach of the constitutional principle of equality embodied in Article 15(1).
c. Article 19(1)(a) (Freedom of Expression): Whether the freedom to express one's sexual orientation and gender identity, including through formalised relationships, falls within the ambit of freedom of expression.
d. Article 21 (Right to Life and Personal Liberty): Whether the right to marry a person of one's choice constitutes an essential component of Article 21, i.e. - the right to life and personal liberty encompassing the intertwined values of dignity, privacy, and individual autonomy.
e. Article 25 (Freedom of Religion): Whether the legal recognition of non-heteronormative marriages would infringe upon the freedom of religion guaranteed under Article 25, particularly in the context of personal laws rooted in religious doctrines and traditions[87].

Apart from these specific constitutional provisions, the Court examined broader questions of constitutional morality, transformative constitutionalism, judicial restraint versus judicial activism, and the allocation of power between the legislature and judiciary on questions of deep-seated social change.

The Court's definition of the issues voiced a hope for a justifiable balancing of competing demands of the Constitution, on the one hand, ideals of individual rights, dignity, and equality. On the other hand, institutional effectiveness, democratic legitimacy, and adaptation to societal and religious expectations. This underlying tension was principally responsible for the contrasting approaches in the majority and minority judgments.

3.4. **Arguments by Petitioners and Respondents**

3.4.1 **Arguments by the Petitioners**

[87] Id. at para. 31-35.

The senior counsels, such as Mukul Rohatgi, Abhishek Manu Singhvi, Menaka Guruswamy, and other senior counsels, represented the petitioners and presented elaborate arguments based on constitutional principles, international law jurisprudence, and transformative constitutionalism.

3.4.1.1 **Constitutional Rights Arguments**

Senior Counsel Mukul Rohatgi, who appeared on behalf of the petitioners, also founded his submissions on Articles 14, 15, and 21 of the Constitution. In his view, the right of marriage was something beyond statutory law and a fundamental right emanating from the guarantee of personal liberty and dignity under Article 21. Rohatgi argued that "*after Navtej, sexual orientation has been recognised as a protected ground under Article 15, and any discrimination on this basis violates the constitutional guarantee of equality*."[88] He emphasized that the withholding of access to non-heteronormative couples to the institution of marriage constitutes an unacceptable discrimination under Article 14, which does not establish a rational connection to any legitimate state aim.

Senior Counsel Menaka Guruswamy built on this argument, arguing that denying gay couples marriage rights denied them dignity and autonomy. She referenced the Court's observation in Navtej that "*intimacy between consenting adults is beyond the legitimate interests of the state*". She extended this principle to argue that "*the choice of whom to marry is equally protected against state interference.*"[89] Guruswamy emphasised that the "*constitutional promise of equality remains unfulfilled if queer relationships are denied the same recognition afforded to heterosexual unions*."[90]

3.4.1.2 **Statutory Interpretation**

The petitioners offered alternative interpretations of existing marriage laws, particularly the Special Marriage Act, 1954. Senior Advocate Saurabh Kirpal argued that "*the SMA, as a secular legislation divorced from religious personal laws, should be interpreted inclusively to encompass relationships irrespective of gender*."[91] He contended that terms like "*bride*" and "*groom*" in the SMA could be read gender-neutrally to include non-heteronormative couples, citing the principle of constitutional morality, which

[88] Id. at para. 40.
[89] Id. at para. 45.
[90] Id.
[91] Id. at para. 48.

demands "*inclusive interpretation of statutes to protect minority rights*."[92] Senior Advocate Singhvi[93] reinforced this argument by invoking the doctrine of reading down, whereby statutory provisions inconsistent with fundamental rights could be interpreted narrowly to salvage their constitutionality. He referred to the Court's position in Navtej, where Section 377 was construed as not extending to consenting adult relationships, and demanded an equally interpretative reading of the SMA.

3.4.1.3 **Foreign Jurisprudence and International Standards**

The petitioners repeatedly referred to international cannons of law to give their arguments greater force. Senior Advocate Rohatgi referred to the US Supreme Court judgment in *Obergefell v. Hodges*[94], where the Court had held non-heteronormative marriage to be a constitutional right under the US Constitution. He quoted Justice Kennedy as observing that "*the right to personal choice regarding marriage is inherent in the concept of individual autonomy*," and called for applying such reasoning in India.[95]

Senior Counsel Jayna Kothari referred to the decision of the South African Constitutional Court in *Minister of Home Affairs v. Fourie*[96], where it was held that exclusion of non-heteronormative couples from the institution of marriage violated the constitutional promise of dignity and equality. She referred specifically to the observation of Justice Albie Sachs that exclusion of the law carried a subtle but powerful message that non-heteronormative couples were outside the protective umbrella of the law. Building on this argument, she contended that such exclusionary forms are not permissible in the Indian Constitution[97].

The petitioners had relied on the House of Lords' decision in *Ghaidan v. Godin-Mendoza*[98], in which "*spouse*" in the Rent Act had been interpreted widely to include non-heteronormative partners. The case was an excellent example of how the broad meaning of law was used by courts to foster fundamental rights[99]. In addition, the petitioners likewise quoted international human rights standards, i.e., the Yogyakarta

[92] Id.
[93] Id. at para. 50.
[94] Obergefell v. Hodges, 576 U.S. 644 (2015).
[95] Supriyo, 2023 INSC 920, at para. 53.
[96] Minister of Home Affairs v. Fourie, 2006 (1) SA 524 (CC).
[97] Supriyo, 2023 INSC 920, at para. 55.
[98] Ghaidan v. Godin-Mendoza, [2004] UKHL 30.
[99] Supriyo, 2023 INSC 920, at para. 56.

Principles, where the right to found a family is an absolute and is not dependent on sexual orientation or gender identity[100].

3.4.1.4 **Historical Evolution and Social Change**

The petitioners based their arguments within India's changing jurisprudence on LGBTQ+ rights upon how there was a more liberal line of development from the NALSA judgment to that of Navtej. Vice-Chairman of Foundation for Reforms of the State, Anand Grover, senior counsel, argued thus. Recognition of marriage rights is the reasonable next step in achieving the promise of constitutional equality contained in these judgments[101]. He pointed out that the idea of constitutional morality, which the court has developed in these judgments, necessitates the protection of minority rights over majoritarian biases.

The petitioners also invoked the issue of social preparedness towards non-heteronormative marriage by invoking the resurgence role of the judiciary in initiating social change. Invoking the analogy of the case of abolition of untouchability and acceptance of the rights of transgender persons, they urged that the Court has paced ahead and not lagged behind society's thinking when it pertained to basic fundamental rights[102].

3.4.2 **Arguments by the Respondents**

The Union of India, represented by the Solicitor General Tushar Mehta and the Attorney General R. Venkataramani and various interveners opposed to non-heteronormative marriage, presented arguments centred on legislative competence, traditional understandings of marriage, and concerns about societal implications.

3.4.2.1 **Legislative Competence and Separation of Powers**

The Solicitor General emphasized that the validation of non-heteronormative marriage is a complex matter of social, cultural, and religious considerations that belongs to the legislature and not to the courts. He argued that the question of whether or not to validate non-heteronormative marriages is more a question of policy to be discussed democratically, and not of judicial discretion[103]. He drew a distinction between the

[100] Id. at para. 57.
[101] Id. at para. 59.
[102] Id. at para. 60.
[103] Id. at para. 65.

decriminalisation of homosexual acts in Navtej, where it involved the repeal of a colonial law, from the positive validation of non-heteronormative marriage, which would involve a positive recasting of a fundamental social institution[104].

The Attorney General proceeded to strengthen his case by pointing out that the Court in Navtej has observed that the judgment did not translate to an expansion of rights in terms of decriminalisation. He argues that extending the right of marriage to homosexual couples would be wholesale legislative intervention, considering adoption, succession, maintenance, and other aspects of marriage[105].

3.4.2.2 **A Traditional Concept of Marriage**

The petitioners based their case on the conventional and historical definition of marriage as a union between a man and a woman. They contended that in all Indian religions and cultures, marriage has been conceptualised as a union between a man and a woman, and the only concern has been procreation and perpetuation of the lineage[106]. The Solicitor General asserted that this definition was to be found in the text and purpose of every one of India's marriage laws, and it was therefore not possible to interpret them in such a manner as to include non-heteronormative unions without altering their very nature.

Others belonging to other religious communities, who came forward to respond on behalf of the petitions that had been filed, stressed that marriage, if considered from the perspective of religious personal law, is not a social contract but a sacramental act. This definition of marriage is informed by deeply rooted theological concerns that specifically limit the institution to heterosexual relations alone. According to them, any judicial intervention or intrusion into this well-established meaning would be a serious abridgement of the religious freedom articulated by the express words of Article 25 of the Constitution.[107]

3.4.2.3 **Biological and Natural Law Arguments**

The respondents offered arguments based on the biological distinction between homosexual and heterosexual relationships. The Solicitor General contended that

[104] Id. at para. 66.
[105] Id. at para. 67.
[106] Id. at para. 70.
[107] Id. at para. 72.

heterosexual relationships occupy a distinctive status due to their procreative capacity and thus deserve their distinctive legal and social status[108]. He argued that the distinct treatment of heterosexual and homosexual relationships was due to this "*natural distinction*" and not due to discriminatory arbitrariness.

Representatives of several religious groups also contended that to legalise non-heteronormative marriage would be against natural law and biological fact[109]. They asserted that the marriage laws are in place to reflect and preserve the natural complementarity of the sexes, which they asserted was foundational to the social role of the institution.

3.4.2.4 **Societal Implications and Alternative Frameworks**

In describing their opposition to marriage equality, the respondents also acknowledged that there were some legal protections for non-heteronormative couples that were needed. The Attorney General suggested that other forms, short of marriage, could be invented to address particular concerns about property rights, inheritance, and medical decision-making[110]. He indicated that the government was willing to consider an administrative form that would provide some recognition to queer relationships but insisted that complete marriage equality would need to be considered legislatively.

The respondents voiced their apprehension regarding the potential impact of court-ordered marriage equality on society. They contended that abrupt court action on this delicate social question may invite backlash and lead the social cause of homosexuality off the gradual path toward social acceptance[111]. They stressed the importance of generating incremental change democratically rather than judicial fiat.

To the invocation of foreign jurisprudence by the petitioners, the Solicitor General argued that judgments like *Obergefell* existed because of specific constitutional and cultural contexts that would not find application in India[112]. He emphasised that Indian constitutional interpretation would need to be rooted in the unique social and cultural facts of India.

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[108] Id. at para. 75.
[109] Id. at para. 76.
[110] Id. at para. 80.
[111] Id. at para. 85.
[112] Id. at para. 85.

The premises of both sides were not merely the technical legal issues of statutory interpretation and constitutional entitlement, but also involved deep contestations regarding the essence of marriage, the proper role of the courts in bringing about social change, and the relation between law and cultural practice. These competing narratives structured the Court's subtle engagement with the question, as reflected in its majority and minority opinions.

3.5. **Judicial Reasoning: Majority and Dissenting Opinions**

3.5.1 **Chief Justice D.Y. Chandrachud's Opinion**

The majority opinion was written by Chief Justice Chandrachud, who had partially accepted the petitioners' submissions. The judgment recognised the queer people's constitutional right to union-making but did not extend so far as to call for complete marriage equality. The reasoning of the Chief Justice demonstrated a nuanced and deliberative engagement with core constitutional values, established legal precedents, and the structural constraints that delineate the judiciary's function within a democratic constitutional order.

3.5.1.1 **The Constitutional Right to Form a Union**

The Chief Justice started by establishing the fact that all human beings, including queers, have their right to unionise safeguarded in the Constitution. He acknowledged that choices of intimacy, especially the choice of whom to love, fall within the cover of constitutional assurances of privacy, autonomy, and dignity. In contrast, according to him, the right of union formation implies the freedom to select a partner and decide whether to make that union legal. This is not a law; it is a constitutional right that is a consequence of the right to life and liberty under Article 21 of the Constitution. The right of union formation applies to queer couples in the same way that it applies to heterosexual couples because, as the Navtej judgment has recognised, sexual orientation is a part of the identity and dignity of an individual[113].

The Chief Justice identified strongly with the autonomy character of queer relationships and the constitutional imperative of guaranteeing their dignity. He stated that the Constitution guarantees queer individuals the right to engage in and pursue sexual relationships which are mutual care and personal fulfillment. Such a right is not

[113] Id. at para. 120.

forfeited even if their relationship is not decent to religion or society. Dignity is a fundamental constitutional tenet that requires everybody to treat everybody else with equal moral standing regardless of sexual orientation or gender identity[114].

3.5.1.2 **Discrimination Analysis**

In dealing with the matter of equality, the Chief Justice ruled that exclusion of legal recognition to queer couples amounted to discrimination against them under Articles 14 and 15.

> "*The exclusion of queer couples from the legal framework governing relationships subjects them to both direct and indirect discrimination. This exclusion is based on their sexual orientation, which I read as falling within the prohibition of discrimination on grounds of 'sex' under Article 15. When the State denies recognition to queer relationships solely because they do not conform to heteronormative expectations, it engages in a form of classification that fails to satisfy the test of reasonable classification under Article 14.*"[115]

The ruling maintained that guarantees of equality under the Constitution are not based on majoritarianism but are required to safeguard vulnerable minorities Constitutional morality invites us to value the equal moral worth of queer relationships, even if such valuation is not backed by the majority. The judiciary's role in protecting foundational rights does not wax and wane with the rise and fall of popular opinion. Indeed, the protective role of the judiciary is all the more when minority rights face resistance from dominant majoritarian attitudes[116].

3.5.1.3 **Institutional Competence and Separation of Powers**

Even as it acknowledged the constitutional right to unionisation, the Chief Justice did not read the Special Marriage Act or personal laws to include non-heteronormative marriages. It was on the basis of the fear of institutional competence and the doctrine of the separation of powers: even as the Constitution grants this Court the authority to interpret the legislation in terms of fundamental rights, there is a limit to how far such interpretations may extend the statutory phraseology before it invades the terrain of

[114] Id. at para. 122.
[115] Id. at para. 130.
[116] Id. at para. 135.

judicial legislation. The specific phrasing and syntax of the marriage laws, beset as they are by repeated use of '*husband'*, '*wife'*, '*bride'*, and '*groom'*, bespeak a heteronormative perspective that cannot be entirely upended with interpretation without doing violence to the legislative text[117].

The Chief Justice acknowledged the legislative branch's central role in comprehensively addressing the recognition of queer relationships. The recognition of marriage involves complex questions about its many implications—adoption, succession, maintenance, pension benefits, and other connected questions—that are better addressed by a prudent legislative framework than by judicial improvisation. Although the Court may well recognise rights, the sensible application of such rights in different fields of law requires legislative backing[118].

3.5.1.4 **Directions for the State**

Having recognised the constitutional right of queer couples to unionise, but stopping short of enforcing equality in marriage, the Chief Justice issued a series of directives with the objective of bridging the gap between constitutional rights and legislative reality. The Union Government and State Governments have a mandate to ensure that queer couples are not discriminated against in access to goods and services. They are to make arrangements for a friendly environment that accepts queer unions and protects against violence and coercion. Apart from this, the Union Government will set up a committee to examine the administrative steps to be taken to deal with the concerns of queer couples in access to insurance benefits, pension schemes, healthcare coverage—ranging from visitation rights in hospitals to maintenance in case of separation and succession issues[119].

The Chief Justice particularly directed the removal of discrimination in the context of adoption, that the rules framed by The Central Adoption Resource Authority (CARA), de facto excluding unmarried queer couples for adoption, go against the fundamental right of equality. Denial of consideration to queer couples to be considered as potential adoptive parents is based on sexual orientation only, an act of unacceptable

[117] Id. at para. 150.
[118] Id. at para. 155.
[119] Id. at para. 190.

discrimination. CARA needs to alter its rules so that queer couples will not be excluded in the process of adoption[120].

3.5.2 **Justice S.K. Kaul's Opinion**

Justice Kaul wrote a concurring judgment that broadly agreed with the Chief Justice's findings but at the same time emphasised certain aspects of constitutional construction and the evolution of rights jurisprudence.

3.5.2.1 **The Gradual Realisation of Constitutional Rights**

Justice Kaul emphasised emphatically the progressive realisation of constitutional rights, highlighting the evolutionary nature of constitutional interpretation. He averred that the Constitution is not a fossilised piece of paper, frozen in time, but a living one which has to be interpreted to match the evolving needs and aspirations of society. The rights of today would have been unthinkable to the framers; yet they flow from the very bedrock of constitutional values of dignity, liberty, and equality incorporated in the constitutional text. The acknowledgment of queer relationships is not a deviation from constitutional values, but a more complete realisation of them[121].

He particularly grounded the recognition of queer unions in India's constitutional evolution towards more inclusivity. He stated that our constitutional development, from NALSA to Navtej and now to the current case, is an ever-widening comprehension of dignity and autonomy. Each of these steps along the way has made our constitutional democracy more inclusive, bringing us closer to the fulfilment of the promise of equal citizenship for everyone. The recognition of queer unions is another milestone in this process[122].

3.5.2.2 **International and Comparative Perspectives**

The South African Constitutional Court in Fourie recognised that withholding the non-heteronormative couples the right to marry is a harsh, albeit indirect, message by the law that such couples feel like outsiders. This is a pertinent factor in our constitutional context as well. Where the law excludes queer relations from the status of being

[120] Id. at para. 195.
[121] Justice Kaul Concurrence, Id. at para. 260.
[122] Justice Kaul Concurrence, Id. at para. 265.

acknowledged, the message thus sent is one of second-class citizenship and exclusion, which amounts to one contrary to constitutional guarantees of dignity and equality[123].

He also cited the jurisprudence of the European Court of Human Rights on the developing notion of family life, where it is established that the concept of 'family life' is not strictly confined to marriage-based relationships but can extend to other de facto 'family' arrangements where the persons are living together outside marriage. This developing notion of family values the fact that actual intimate relationships take many forms and shapes, and all such relationships must be respected and, to a certain degree, recognised by law[124].

3.5.2.3 **Religious Freedom and Civil Recognition**

Justice Kaul addressed more directly the tension between religious conceptions of marriage and civil recognition of queer relationships religious freedom under Article 25 protects the right of religious denominations to define marriage according to their theological understandings. But such freedom cannot be taken as a ground for excluding queer relationships from civil recognition within the framework of secular law. The Special Marriage Act, as a secular equivalent of religious marriage, should ideally provide a framework that is open to all intimate relationships entered into voluntarily, regardless of sexual orientation[125]. His reasoning was that there should be insistence on a demarcation between the religious and the secular aspects of marriage. Whereas the religious aspect may be informed by theological doctrine and historic tradition, the secular aspect pertaining to legal rights, obligations, and entitlements is open to constitutional review. It was argued that the legitimate interest of the State is to regulate the secular aspect of marriage in line with the general principles of equality and non-discrimination[126].

3.5.2.4 **Directions for Future Legislative Action**

Justice Kaul's concurrence offered more elaborate suggestions for legislative intervention for the validation of queer relationships. While acknowledging the absolute authority of the legislature in deciding the specific form and content of legislation that

[123] Justice Kaul Concurrence, Id. at para. 275.
[124] Justice Kaul Concurrence, Id. at para. 280.
[125] Justice Kaul Concurrence, Id. at para. 300.
[126] Justice Kaul Concurrence, Id. at para. 305.

legitimises queer relationships, he identifies that once passed, such legislation must conform to constitutional standards. It must provide substantive equality, not merely formal recognition. It must comprehensively address the various aspects of relationship recognition, including property rights, succession, maintenance, adoption, and access to state welfare schemes[127].

3.5.3 **Justice S. Ravindra Bhat's Dissenting Opinion**

Justice Bhat authored a partially dissenting opinion, to which Justice Narasimha and Justice Kohli agreed. Although in agreement with the majority in some points, Justice Bhat had a more limited view of the Court's jurisdiction to acknowledge queer relationships.

3.5.3.1 **Judicial Limitations of Competence**

Justice Bhat emphasized more emphatically than the majority the boundaries of judicial knowledge in the issue of marriage equality. The validation of non-heteronormative marriages or unions involves challenging policy choices outside the appropriate province of judicial decision-making. The role of the Court is to interpret the law, not create it. When confronted by social problems of such complexity and delicacy, judicial restraint is not only wise but constitutionally mandated. When confronted with social issues of such complexity and sensitivity, judicial restraint is not merely advisable but constitutionally mandated[128].

He specifically cautioned against judicial overreach in matters involving social transformation and said that while courts may have a role in articulating constitutional principles, the detailed implementation of these principles in areas touching upon deeply held social and cultural norms requires democratic deliberation. Judicial decisions, being non-democratic, have the potential to provoke response instead of true social acceptability[129].

3.5.3.2 **Textual Interpretation of Marriage Law**

Justice Bhat's judgment involved a close textual analysis of the existing marriage law, claiming they are inescapably heteronormative in character. The Special Marriage Act,

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[127] Justice Kaul Concurrence, Id. at para. 330.
[128] Justice Bhat Dissenting, Id. at para. 400.
[129] Justice Bhat Dissenting, Id. at para. 405.

the Hindu Marriage Act, and other personal laws governing marriage contain language, structures, and underlying assumptions that are irreducibly heteronormative. Terms like 'husband' and 'wife', 'bride' and 'groom', and provisions regarding consummation, maintenance, and succession are all premised on the complementarity of the sexes. To interpret these laws as encompassing non-heteronormative relationships would not be an act of interpretation but of wholesale reconstruction[130].

He challenged the petitioners' contention that marriage laws could be read expansively. The petitioners' suggestion that terms like 'bride' and 'groom' can be read neutrally ignores both the ordinary meaning of these terms and the legislative intent behind marriage laws. Courts must respect not only the text of legislation but also its purpose and structure, all of which point to an exclusively heterosexual understanding of marriage.[131]

3.5.3.3 **Distinction Between Decriminalisation and Recognition**

Justice Bhat drew a categorical difference between decriminalising homosexual acts as settled in Navtej and the legalisation of non-heteronormative marriage. The Navtej ruling pulled out the taint of criminality from homosexual behaviour, on the grounds that private adult choices are beyond the legitimate reach of criminal law. Such a recognition of "*negative liberty*" in itself does not automatically translate into "*a positive entitlement to state recognition*" of queer relationships on the model of heterosexual marriage.[132]

He highlighted the differential constitutionally significant implications between "*non-interference*" and "*affirmative recognition*." There is a significant difference between the state not criminalising private conduct and the state positively recognising and promoting various relationships. While the former is perhaps constitutionally required where privacy and personal freedom are at stake, the latter is a complex social policy matter that falls within the ambit of the legislature[133].

3.5.3.4 **Alternative Approaches to Protecting Queer Rights**

[130] Justice Bhat Dissenting, Id. at para. 425.
[131] Justice Bhat Dissenting, Id. at para. 430.
[132] Justice Bhat Dissenting, Id. at para. 450.
[133] Justice Bhat Dissenting, Id. at para. 455.

In denying marriage equality under the law, Justice Bhat legitimized the call for queer relationships to be legally protected. He went out of his way to say that exclusion of issuing marriage equality does not mean the loss of queer relationships having any legal protection. He proposed that the legislature should contemplate the introduction of a scheme to protect the vulnerabilities of queer couples like domestic violence, inheritance, medical decision-making, and sharing property rights. He further proposed that the scheme need not be a reproduction of marriage but should provide effective protection under the constitutional values of dignity and equality[134].

He suggested that an incremental strategy is better. A gradualist approach to relationship recognition, starting with the protection of some vulnerabilities and gradually adding coverage as society becomes more open, could be more durable than an all-at-once court solution. This approach is deferential both to constitutional norms and to the vagaries of social change[135].

3.5.4 **Justice P.S. Narasimha and Justice Hima Kohli's Concurring Opinion**

Justices Narasimha and Kohli authored a short concurring opinion supporting Justice Bhat's argument, though highlighting some further points to be noted.

3.5.4.1 **Historical and Cultural Aspects**

Their viewpoint privileged the cultural and historical dimensions of marriage. Their point is that the institution of marriage has deep historical and cultural foundations in Indian society, with meanings and functions beyond its legal connotations. While the Constitution protects the rights of the individual, it does not require that institutions that have evolved over centuries to perform certain social functions be dismantled[136].

3.5.4.2 **Democratic Processes and Social Change**

Judges Narasimha and Kohli underlined the central role of the democratic process in triggering social change. Where there is a desirable democratic regime, notable social changes should be ushered in by democratic deliberation, not by the force of judicial diktat. It is more a question of democratic legitimacy than a question of institutional capacity. Whenever the courts try to accelerate social change at the expense of

[134] Justice Bhat Dissenting, Id. at para. 480.
[135] Justice Bhat Dissenting, Id. at para. 485.
[136] Justice Narasimha and Justice Kohli Concurrence with Justice Bhat, Id. at para. 550.

democratic processes, they erode their legitimacy and risk provoking counter-productive opposition[137].

3.5.4.3 **Empirical Foundations for Judicial Intervention**

Their opinion questioned the empirical basis for judicially mandated recognition of queer relationships. Judicial intervention in sensitive social questions should be grounded in constitutional principles and a robust empirical understanding of social realities. The record before the Court does not provide adequate empirical foundation for assessing either the social context of queer relationships in India or the potential consequences of different forms of legal recognition[138].

The conflicting views in Supriyo show the complex interplay between constitutional values, institutional roles, and the complexity of social reality. The majority recognized the constitutional right of queers to form relationships worthy of legal recognition but left it to the legislature to decide on the exact form of recognition. The dissenting judges, while also recognizing the need to ensure queer rights, took a more restrained approach to judicial power in the process of social change.

The January 2025 rejection of the review petitions by the Supreme Court is a pointed afterword to the Supriyo judgment. A five-judge Bench, led by Justice B.R. Gavai and comprising Justices Surya Kant, B.V. Nagarathna, Dipankar Datta, and P.S. Narasimha—who were members of the original Constitution Bench—dismissed by circulation in chambers, opining that there was "no error apparent on the face of the record" in the original order. Besides, the Court denied the petitioners' applications for an open court hearing, even against submissions that the original judgment forced non-heteronormative couples "*to remain in the closet and lead dishonest lives*." This decision upholds the Court's deference to legislative fiat in the matter of the recognition of non-heteronormative marriage, thereby upholding the constitutional status quo as laid down in Supriyo.[139]

3.6. **Doctrinal Engagement with Precedents and Constitutional Morality**

3.6.1 **Drawing on Puttaswamy's Privacy Paradigm**

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[137] Justice Narasimha and Justice Kohli Concurrence with Justice Bhat, Id. at para. 555.
[138] Justice Narasimha and Justice Kohli Concurrence with Justice Bhat, Id. at para. 560.
[139] The Hindu Bureau, *Supreme Court rejects review of its same-sex marriage judgment*, THE HINDU, Jan. 09, 2025.

The Supriyo ruling draws upon the constitutional paradigm of *the Puttaswamy Case*, in which privacy was established as a fundamental right. Chief Justice Chandrachud, writer of one of the judgments in *Puttaswamy*, drew queer relation recognition to privacy jurisprudence. He explained that privacy includes decisional autonomy with intimate choices constituting one's identity and liberty in deciding with whom to love. Refusal of legal recognition to queer couples violates people's privacy, dignity, and self-definition[140].

Dignity, as conceived in our constitutional jurisprudence, is both inherent dignity—the intrinsic value of all human beings and realised dignity the material conditions under which people are able to live a good life on their own terms. Denial of legal recognition to queer relationships undermines both aspects of dignity by conveying that queer intimacy is not so much worthy of respect and by dispossessing queer individuals of the security and stability that legal recognition offers[141].

Justice Kaul's dissenting judgment also referenced *Puttaswamy's* acknowledgement that privacy safeguards autonomy in decision-making about their personal lives. This encompasses having intimate relations, which might not be according to the majority's expectations, but are genuine expressions of identity. Kaul highlighted the way autonomy would have to encompass liberty to participate in relations which are true expressions of one's own identity, even though such may not mirror majority expectations[142].

3.6.2 **Enlargement of NALSA and Navtej**

Supriyo builds on the rights paradigm established in *NALSA* and *Navtej Singh Johar*. Chief Justice Chandrachud embraced this development, reminding how NALSA established the right to self-identification and equal citizenship for transgender individuals, Navtej ended criminalising stigma around queer intimacy by decriminalising consensual hom0osexual acts, and Supriyo does the next logical step: legal recognition of queer relationships on the very same constitutional bases.[143]

[140] Supriyo, 2023 INSC 920, at para. 140.
[141] Id. at para. 142.
[142] Justice Kaul Concurrence, Id. at para. 270.
[143] Id. at para. 125.

The Court has carried forward the constitutional morality paradigm advanced in Navtej. Just as constitutional morality had insisted on decriminalization in spite of society's hostility, it now insists on the recognition of the full moral worth of queer relations regardless of how short they fall of the normative framework. This is because the Court is committed to protecting queer individuals' full moral citizenship from majoritarian pressures.[144]

3.6.3 **Encountering Joseph Shine and Transformative Constitutionalism**

The ruling was conjoined with *Joseph Shine v. Union of India*[145], which reversed criminalisation of adultery. Chief Justice Chandrachud clarified the transformative potential of the Constitution in reversing historically unequal power dynamics. He compared queer relationship exclusion and adultery provisions, observing that both legitimise discriminatory presumptions heteronormative in the first case and patriarchal in the second that erode basic fundamental rights.[146]

Justice Kaul used the case of transformative constitutionalism to hold that the Constitution is a vision for societal transformation. It is a continuous inquiry into laws and legal procedures to ensure consonance with constitutional ideals in the areas of equality and dignity. Refusal of official acknowledgment of queer relationships as part of their legal existence is a denial of their potential of transformation and hence perpetuation of inequality.[147]

3.6.4 **Referring to Shafin Jahan and Decisional Autonomy**

The Court relied upon legal precedent in *Shafin Jahan v. Asokan K.M.*[148], which secured adults' freedom to choose their sexual partners without interference from the state or family. Chief Justice Chandrachud stressed the constitutional safeguard of sexual choices irrespective of adherence to dominant sex norms. In Shafin Jahan, this Court held that 'the right to marry a person of one's choice is an essential part of Article 21 of the Constitution.' Such a right emerges out of the understanding that intimate relationship choices are at the core of a person's autonomy and identity. Constitutional

[144] Id. at para. 137.
[145] Joseph Shine v. Union of India, (2019) 3 SCC 39.
[146] Supriyo, 2023 INSC 920, at para. 145.
[147] Justice Kaul Concurrence, Id at para. 285.
[148] Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368.

protection of such choices cannot hinge on whether or not such choices are in harmony with the majority's sexual norms.[149]

Justice Kaul also mentioned Shafin Jahan, highlighting that choices about matters of faith, belief, marriage, and affiliation are matters of personal dignity and autonomy. This principle can be applied to relationships outside the traditional understanding of marriage but that still express love and a commitment deserving respect. Constitutional protection of intimate choices applies to all relationships, provided they represent autonomous choices of consenting adults[150].

3.6.5 **Departures and Doctrinal Tensions**

Drawing on prior judicial precedents, Supriyo brought to the fore significant tensions of doctrine. The Court recognized a constitutional right to enter queer unions; however, it was wary not to fully endorse marriage equality, thus creating a gap between the enforcement of law and the realization of rights.

It was distilled in the Chief Justice's stance: holding that non-heteronormative relationships do have a constitutional claim to protection but also leaving to the legislature the form of such protection. Justice Bhat's dissenting opinion brought out this doctrinal tension, arguing that if constitutional right is to be claimed, then the Court is bound to do so. Or else, it is because the right has not yet been consolidated or because institutional interests are prioritized over constitutional requirements.[151]

The decision also shed light on prevailing tensions around statutory interpretation. In Navtej and NALSA, the Court adopted expansive interpretations to protect fundamental rights; in Supriyo, it adopted a more modest approach, emphasising limits on interpretive attempts. The majority charted the limits of judicial interpretation of current marriage and relationship law, proclaiming that ambitious reform was a task for legislatures. This shift raises questions about the coherence of methodological approaches within the domain of queer rights.

3.6.6 **Constitutional Legal Interpretation Implications**

[149] Supriyo, 2023 INSC 920, at para. 128.
[150] Id. at para. 268.
[151] Id. at para. 460

Supriyo's judgment is a milestone in Indian constitutional law concerning equality, dignity, and personal liberty. It blends privacy law and equality claims, recognizing that discrimination within the recognition of relationships invokes both dimensions of constitutional rights.

The Court's methodology is an expression of increasing recognition that constitutional rights have to safeguard minorities against majoritarian coercion. In recognizing the validity of queer relationships irrespective of social acceptability, the Court reaffirmed the counter-majoritarian function of judicial review in safeguarding basic rights.

But the hesitation of the judiciary to provide instant remedies indicates the old conflict between recognition of rights and institutional concerns regarding separation of powers. This is a dilemma faced by other areas where courts have recognized LGBTQ+ rights but grappled with nuanced issues of institution roles in bringing about social change.

3.6.7 **Balancing Judicial Restraint and Protection of Rights**

The Supriyo ruling shows the attempt of the Court to balance judicial restraint and protection of rights. Recognizing constitutional need to protect queer relations, the majority placed particular importance on the legislator's greatest responsibility to create general frameworks for the recognition of relations.

This balance dance exposes the subtle institutional politics of rights adjudication. The Court made an attempt at reconciling constitutional guidance and the charge of judicial activism. These risks imperiling the very real danger of "rights without remedies" cases of constitutional rights in abstraction but not accompanied by suitable implementing mechanisms.

The decision thus raises fundamental questions regarding the reach of the judiciary in the protection of constitutional rights. In exercising deference towards the democratic power of the legislature, the Court is no less committed to the implementation of its constitutional mandate of enforcing basic rights, especially where legislative action is before the Court or lacking.

3.7. **International Jurisprudence and International Law**

3.7.1 **Selective Engagement with Global Norms**

Supriyo's judgment evidenced prudent engagement with foreign jurisprudence. While petitioners relied on cases like *Obergefell*, *Fourie*, and *Ghaidan*, the Court selectively engaged these authorities. Chief Justice Chandrachud recognised global perspectives while emphasising India's unique context. He noted that constitutional interpretation is influenced by specific historical, cultural, and institutional contexts, arguing that protection of queer rights in India must emerge from domestic constitutional values even as India is a participant in international human rights discourse.[152]

The Chief Justice was restrained in the case of Obergefell. Rather than wholesale borrowing, he emphasised institutional differences between American and Indian institutions, respecting similar values of dignity and equality and valuing differences in judicial roles. Justice Kaul engaged more with South African law, particularly Fourie, using constitutional analogues. He valued the South African method for balancing equality imperatives and legislative remedy-making.

3.7.2 **International Human Rights Standards**

The ruling invoked international documents such as UDHR, ICCPR, and Yogyakarta Principles. The Chief Justice Chandrachud recognised these in their non-binding nature, citing that international documents acknowledge family formation as an intrinsic right to apply to queer persons. While not directly enforceable within the domestic sphere, these principles indicate progressive global sentiment informing constitutional interpretation.

The Court's interaction with the Yogyakarta Principles was particularly noteworthy. Chandrachud highlighted Principle 24[153], addressing the rights of family formation regardless of sexual orientation or gender identity, regarding these principles as helpful clarifications of extant human rights for queers.

3.7.3 **WPATH Guidelines**

The ruling cited WPATH Standards of Care regarding relationship vulnerabilities of trans persons. The Court conceded that refusal of legal recognition of transgender

[152] Id. at para. 160.
[153] Principle 24, The Yogyakarta Principles, 2006.

persons' relationships can exacerbate minority stress and health consequences, illustrating actual harms that arise from non-recognition.[154]

3.7.4 **Critical Assessment**

The Court weighed universalist human rights ideals against national sovereignty concerns. Although it recognised global tendencies toward queer relationship recognition, it underscored solutions based on India's constitutional paradigm.

This is a departure from Navtej, with foreign jurisprudence playing a more significant role in decriminalising homosexual conduct. The caution in Supriyo shows increased hesitation in positively engrafting rights from decriminalisation.

Justice Bhat's dissent condemned reliance on foreign precedent, observing that marriage equality cases arise from varied contexts, South Africa's express sexual orientation protections and America's peculiar conception of judicial review. He warned that transplanted conclusions ignoring India's constitutional design and social facts may render rights protection hollow.

The Court's approach mirrors wider tendencies in Indian constitutional law, selectively taking from international standards as inspirational but not prescriptive, and striking a balance between the international language of human rights and national constitutional traditions.

3.7.5 **Contextualising Global Models**

The Court weighed different models of recognition around the globe, ranging from formal marriage equality (Netherlands, Canada) to civil unions (formerly Italy, Germany) to registered partnerships (several European countries). Comparison guided possible solutions by illustrating how different legal orders reconcile equality rights and institutional interests.

3.7.6 **Uniquely Indian Approach**

The decision recognised international trends but stressed India's specific context. It is an instance of "*diagonal comparative reasoning*", deriving general principles from

[154] Supriyo, 2023 INSC 920, at para. 175.

foreign precedents to be used locally, not to be transplanted. The Court borrowed in developing quintessentially Indian queer rights jurisprudence.

The Supriyo judgment emphasises cosmopolitanism and contextualism in constitutional jurisprudence. It honoured foreign precedents as comparative inspiration but claimed solutions rooted in India's system, acknowledging that though human rights principles are universal, application involves local social and institutional context.

3.8. **Critical Evaluation**

3.8.1 **Progressive or Regressive: Situating the Judgment in the Evolution of India's Constitution**

The Supriyo judgment occupies a mixed position in India's constitutional trajectory towards queer rights. On the one hand, it represents a significant step forward in recognising the constitutional right of the queer to come together in unions. On the other hand, its reluctance to impose complete marriage equality or to mandate particular legislative actions may be seen as a marginal step back from the progressive momentum attained in NALSA and Navtej.

The progressive aspect of the judgment is its unequivocal recognition that queer unions need to be protected constitutionally. Chief Justice Chandrachud's statement that "the right to enter into union includes the freedom to choose one's partner" and that such a right "binds in the same manner as it binds heterosexual couples" is a milestone judicial recognition of the equal moral value of queer unions. This recognition extends decriminalisation in Navtej, from negative liberty—freedom from criminalisation—to positive protection, providing affirmative protection to relationships.

Equally visionary is the Court's affirmation that the exclusion of queer couples from legal frameworks amounts to discrimination and thus violates Articles 14 and 15. In construing sexual orientation as within the prohibition of discrimination on the basis of "sex" in Article 15, the Court consolidated the constitutional basis of queer rights beyond the previous focus on privacy and dignity that had characterised previous judgments.

Judgment's most concrete progressive aspect is its ruling on adoption rights. In determining that the Central Adoption Resource Authority guidelines discriminate against queer couples on the basis that they exclude them from being considered as

adoptive parents, the Court opened a door to parents' rights that had been closed. This is a significant advancement in the legal construction of queer families.

However, the decision is retrograde in its inclination, particularly in its reluctance to strike down legislative choices on marriage equality. By refusing to interpret prevailing marriage law to encompass non-heteronormative partners, the Court essentially upheld a status quo in which queer relations continue in a legally tenuous position. This reluctance is contrasted with the more forceful style in which the Court advances in decisions such as NALSA, in which it made robust prescriptions for the protection of transgender rights, and Navtej, in which it unequivocally overruled criminalisation of homosexual acts.

The Court's establishment of a new category called "*unions*" without well-defined legal consequences is a weakness in the rights system. By recognising the constitutional right to unionisation and yet not giving it open legal recognition, the Court has created a vague middle ground that does not establish equality. This kind of strategy is likely to continue to exclude queer unions, presenting them as other and secondary to heterosexual marriage.

The decision evoked passionate emotional responses from the broader LGBTQ community, who had gathered at the Supreme Court, optimistic for a positive verdict. Petitioner Krishanu Srihar responded with disappointment, saying, none of the observations made by the Chief Justice of India or the Bench will help me in my daily struggles when I am denied entry into a hospital, say, or when my friend or partner is in a critical condition, highlighting the pragmatic consequences of this judicial setback. The community members expressed a mix of disappointment and resolve, with Jainy from Yaariyan, an LGBTQ youth group, summarizing the sentiment – "*I feel as if the judgment has made the path to our rights a little more arduous. However, today's verdict is not a full stop. It is maybe just a comma.*" This stance reflects the community's unshakeable resolve to continue with their decades-long battle for legal rights, even as they confront the bitter reality of continued institutional obstacles to equality.[155]

3.8.2 **Dignity and Equality: Constitutional Promise of Fulfilment**

[155] Satvika Mahajan, "*Will continue to struggle for legal recognition to same-sex marriage*," THE HINDU, Oct. 18, 2023.

The Supriyo ruling goes a long way in realising the constitutional guarantee of equality and dignity for queer people. In confirming the constitutional right to unionisation and noting that not legislating for certain relationships is discriminatory per se, the Court has upheld the equal moral worth of queer relationships. This is a significant development in the legal meaning of dignity and equality in the Indian Constitution.

However, the promise of equality has never been realised in so many ways. Genuine equality would mean acknowledging the abstract right to form relationships and equal access to the specific legal benefits and protections of marriage. In refusing to insist on the extension of current marriage laws to non-heteronormative couples to the same extent, and refusing to establish a complete alternative system, the Court essentially upheld a system of discriminatory treatment.

The judgment's approach to dignity is one of sheer ambivalence. It spoke so eloquently about the dignity interests engaged in the recognition of relationship, pointing out that legal recognition is essential to "realised dignity"—the conditions necessary for people to live whole lives according to their own understanding of the good. However, in failing to mandate full marriage equality, the Court permitted the perpetuation of a legal regime that conveys the message that queer relationships are less worthy of recognition and protection, and in so doing, undermines the very dignity that it claimed to be protecting.

The Court's denial of telling the legislature precisely what shape the recognition of relationship should take, while simultaneously telling the government to set up a committee to address some of the practical issues, is a gradualist strategy for equality. This is one that prioritises institutional concern and social acceptability over the achievement of short-term full equality. While such gradualism might have some practical advantages, it indirectly causes, if only temporarily, the dignitary harm of unequal treatment.

3.8.3 **Analysis of the Denial of Marriage Rights**

The Court's refusal, in this case, to grant non-heteronormative couples the right to marry, although it did confirm they could enter into constitutionally protected unions, sows a doctrinal paradox that needs to be examined through intense scrutiny. It is problematic to have such a contradiction of "unions" and "marriages" given the Court's stance on equality and non-discrimination.

The majority's reason for drawing such a distinction was less one that would be discovered in any constitutional substantive distinctions and rather more one of institutional discretion. Chief Justice Chandrachud underscored the limits of judicial interpretation and that marriage codes' distinctive phraseology and structure could not be extended to include non-heteronormative couples without crossing over into judicial lawmaking. This argument is not consistent with the approach in decisions such as NALSA, where the Court has employed broader interpretations for the greater good of safeguarding fundamental rights.

The Court's refusal to further the rights of marriage is one of reluctant deference towards the majority will in constitutional rights. Although the Court acknowledged queer unions needed to be protected under the ConstitutionConstitution, it withheld from bringing this recognition into the substantive reality of marriage equality. This form of restraint reflects a recurring prioritisation of constitutional values, wherein institutional imperatives and concerns regarding social legitimacy take precedence over the need to extend equality rights.

Also, the difference between "*unions*" and "*marriages*" jeopardises the institution of a distinct and possibly unequal status for queer unions. While the Court was adamant to affirm that the freedom to form unions is a constitutional freedom to be protected by the state, it would not specify the exact legal content of such freedom. This lack of clarity can support discrimination in the sense that it can allow the state to provide "unions" with fewer protections than "marriages" have.

In this case, the Supreme Court ruled two ways in granting unmarried couples, queer couples included, their right to jointly adopt children. Chief Justice D.Y. Chandrachud was progressive in his judgment and ruled that Regulation 5(3) of the Adoption Regulations, which limits adoption to married couples only, violates both the Juvenile Justice Act as well as the fundamental rights of queer people. He argued that the concept of marriage as the only stable home where children can be brought up is not established and that unmarried couples, too, can provide loving, stable homes. But the majority—Justices S.R. Bhat, Hima Kohli, and P.S. Narasimha—did not agree, ruling that the law is not null. Justice Bhat assumed that even though the law may be unimaginative of the

daily reality of modern families, it is policymakers who must address this and not judges.[156]

3.8.4 **The Implications for Queer Family Forms**

The ruling has far-reaching consequences for queer family structures, specifically those relating to adoption, surrogacy, and parenthood rights. The Court's decision regarding the adoption rights is a groundbreaking victory for queer families. In deciding that CARA provisions disproportionately discriminate against queer couples by failing to treat them as adoptive parents, the Court has opened up a new window of legal parenthood that was closed tight up till now.

Nevertheless, the future of queer family creation in other areas hangs suspended on the scales. The ruling did not address issues of surrogacy and assisted reproductive technologies, thereby leaving a broad lacuna in the legal regime governing queer family creation. The Court's recognition of the right to form unions without speaking to the legalities of the unions leaves in doubt the parental obligation and rights of non-biological parents in queer families.

The impact on current queer families, particularly those with formation from past relationships or de facto adoption arrangements, is unclear. In the absence of explicit legal recognition of such family arrangements, children raised in queer households will likely remain unclear about custody, inheritance, and social welfare under the law.

3.8.5 **Investigating the Court's Institutional Role**

The Supriyo judgment puts on centre stage significant issues regarding the institutional function of the Supreme Court in dealing with contentious social issues and safeguarding the rights of minorities. The Court's cautious strategy, holding back from interfering with the determinate mode of relationship recognition but affirming the right under the Constitution to form unions, demonstrates a clear grasp of the judicial function in a democratic state.

This strategy favours democratic deliberation and gradual reform over direct judicial imposition of equality rights. Chief Justice Chandrachud underlined that the recognition of marriage involves complex questions about the incidents of marriage. These are

[156] Krishnadas Rajagopal, Supreme Court Divided on Allowing Unmarried Couples to Adopt Children Jointly, The Hindu (Oct. 18, 2023, 1:01 PM).

better addressed through a comprehensive legislative framework rather than judicial improvisation. This argument implies a theory of judicial restraint, in which the courts confine their intervention to stating constitutional principles, and the political branches take charge of implementation.

However, this restraint model is inconsistent with the Court's interventionist direction in other minority rights cases. In NALSA and Navtej cases, the Court did not hesitate to issue explicit orders to protect constitutional rights in the face of the possibility of retribution from society. The Court's hesitation in Supriyo is debatable in terms of the consistency of its approach in protecting minority rights in the face of majority pressure.

Additionally, the deference of the Court to the legislature in Supriyo risks entrenching the very tyranny of the majority that constitutional rights seek to avoid. In recognising the constitutional right to unionise and deferring to majoritarian institutions on the precise form that this recognition must take, the Court arguably subverted the counter-majoritarian role that is crucial to constitutional review.

3.9. **Conclusion**

The Supreme Court's judgment in the case of Supriyo is a landmark, but incomplete, milestone towards the jurisdiction of India's constitutional law on queer rights. In upholding the constitutional right of the queers to enter into unions and in acknowledging the discriminatory impulse lying behind the refusal to open legal schemes to them, the Court established the equal moral worth of queer relationships in harmony with the Constitution. Yet in refusing to mandate full-fledged marriage equality or to mandate legislative intervention, the Court left a tentative and perhaps unequal place for queer relationships.

The judgment extends the constitutional principles of dignity, privacy, and equality from individual rights to the acknowledgment of relationships. It recognizes that constitutional morality requires respect for queer relationships irrespective of acceptance by the majority, thus affirming the counter-majoritarian function of fundamental rights. The acknowledgment of adoption rights for queer couples by the judgment also marks a significant development in queer family recognition under the law.

Nevertheless, the ruling also illuminates tensions within the Court's queer rights jurisprudence. The distinction between "*unions*" and "*marriages*," while cast as an issue of institutional restraint, can be read as affirming discrimination rather than limiting it by creating a second and potentially unequal status for queer couples. The Court's deferral to the legislature on the specific vehicle of relationship recognition raises consideralbe questions about the coherence of its commitment to protecting minority rights from majoritarian power.

Gazing into the future, the decision leaves more questions than answers. The judicial definition of "the right to form unions" goes unelucidated, leaving such fundamental questions of property rights, succession, maintenance, and parental rights to be determined in the future at the hands of the legislature or the judiciary. The progress to meaningful constitutional recognition from the status of a statement is uncertain, subject to the will of the legislature and ongoing activism of the judiciary.

The Supriyo judgment is a masterclass in the redemptive potential and the limits of judicial intervention in the quest for correcting structural inequalities. While the Court has been a driving force behind queer rights, as in decriminalization in Navtej and the validation of unions in Supriyo, full realization of equality and dignity for queer citizens requires concerted effort from all government institutions and society at large.

With India grappling with the interactive dynamic of constitutional rights, culture, and changing social attitudes, the Supriyo judgment is a milestone in the relentless quest for queer equality, yet also a reminder of the distance still to be traveled toward full legal recognition and social acceptance of diverse intimate relationships.

CHAPTER 04

EXAMINING MARRIAGE RIGHTS, HETERONORMATIVE FRAMEWORKS, AND CONTEMPORARY LEGAL DISCOURSE

CHAPTER 04

EXAMINING MARRIAGE RIGHTS, HETERONORMATIVE FRAMEWORKS, AND CONTEMPORARY LEGAL DISCOURSE

4.1. **Introduction**

The previous chapters of this dissertation I have laid the evolving jurisprudential context around non-heteronormative relationships in India. Chapter 2 clarified the landmark cases of Naz Foundation, Suresh Kumar Koushal, and Navtej Singh Johar, which collectively map out the path of decriminalisation of non-heteronormative relations. Chapter 3 then analyzed the recent case of the Supriya Chakraborty Case, which squarely confronted the issue of legal recognition for non-heteronormative marriages. This chapter is a crucial link in our analysis in that it questions the territory on which the entire debate stands that is the definition of marriage itself.

The aims of the present chapter are two-fold. On the one hand, it strives to map the socio-legal trajectory and roles played by marriage in India historically, anthropologically, and jurisprudentially. On the other hand, it strives to theorize the terrain for envisioning possible directions towards the recognition of non-heteronormative relationships by critically examining the dominant silhouettes of marital rights, privileges, and protections. This chapter situates modern debates about marriage equality in India's extensive, pluralistic legal tradition by framing marriage as an institution and a bundle of rights.

Rather than an unchanging or perpetual notion, marriage has been phenomenally historically and culturally contingent. Within the Indian context, such contingency is further compounded by the interaction among religious personal law, colonial intervention, and post-colonial legal evolution. This chapter argues that uncovering the constructed character of marriage is central to answering claims of marriage equality because it dislocates essentialist ones in putting heterosexual marriage as natural, perpetual, or fixed.

4.2. **Evolutionary and Theoretical Foundations**

4.2.1 **The Heteronormative Foundation of Marriage**

4.2.1.1 **Historical Definition and Common Law Understanding**

The legal foundation of common law jurisdictions in defining marriage is primarily based on the case of Hyde v. Hyde[157] in 1866. In the initial case, Lord Penzance generally defined marriage as a voluntary and life-long relationship between one man and one woman to the exclusion of all others. This definition clearly outlined the traditional heterosexual definition of marriage that had existed for a considerable period of time in law and social convention. Its impact stretched far beyond the 19th century because it significantly influenced subsequent judicial decisions and continues to play a part in shaping contemporary legal constructions of marriage. Furthermore, the court in Hyde went to great lengths to declare that marriages valid for foreign jurisdictions would be of no force under English law unless they came closely within the English idea of marriage and helped establish a narrowed and specific conception of the institution.

By establishing marriage as precisely a union "between one man and one woman," the court entrenched gender complementarity as a salient characteristic of the marital union, thus establishing a legal system effectively barring non-heteronormative relationships from participation in the institution marriage. The court's emphasis of the "*exclusion of all others*" only entrenched marriage as an exclusive heterosexual union burdened with specific legal consequences and social legitimation.[158]

4.2.1.2 **Marriage as a Heteronormative Institution**

Marriage is one of the pillars of heteronormativity in society that places social relations along heterosexual lines. The heteronormative construction of marriage is articulated in many dimensions beyond a mere legal definition. It is a social institution that legitimises certain forms of intimacy and illegitimates others. The deployment of a wedding ring, even today, is a signifier of heterosexuality, illustrating how marriage symbols continue to support heteronormative premises. Marriage ceremonies and rituals further consolidate these premises, generating what Sara Ahmed calls traces of heterosexual intimacy, which serve to normalise social relations. All of these contribute to making marriage more than a legal contract, but a heteronormative system of

[157] Hyde v. Hyde and Woodmansee, [L.R.] 1 P. & D. 130, https://www.uniset.ca/other/ths/LR1PD130.html, (last visited: 09.03.2025).
[158] Susan D. Heenan and Anna Heenan, *Family relationships, marriage, civil partnership, cohabitation*, Family Law Concentrate (2013).

complexity that guides intimacy, family making, and social recognition along strictly gendered lines.[159]

4.2.2 **Purpose of Marriage**

Marriage as an institution has had multiple interrelated roles in time and culture. These have been theorised across various positions, each explaining different aspects of marriage's cultural purpose and social function. Understanding these underlying purposes sheds light on both traditional rationales for state intervention in regulating marriage and changing dynamics of marital relations within modern society.

4.2.2.1 **Legitimation of Offspring**

The institution of legitimate filiation (or procreation) is also one of marriage's most historically consistent functions.[160] Marriage legalises sexual relationships and creates a bounded system for establishing the rights of inheritance and family obligations toward offspring.[161] The Supreme Court in the Indian context has recognised this element in a series of judgments, in particular in *Revanasiddappa v. Mallikarjun*,[162] where Justice Ganguly stated that the stigma of illegitimacy on children born outside of wedlock has been present in all legal systems, including India, reflecting the emphasis placed on marriage as the legitimate sphere for procreation.

This procreative justification has long been used to justify the restriction of marriage to opposite-sex couples. But, as Justice Chandrachud stated in *Navtej Singh Johar Case*[163], the legitimate state interest in regulating different aspects of marriage is separable from the constitutional protection of intimate personal choices. That observation marks a new judicial understanding that the procreative justification of marriage cannot be its sole or fundamental purpose.

4.2.2.2 **Property Transmission**

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[159] Heather Brook, *Re-orientation: Marriage, heteronormativity and heterodox paths*, 1-23 Feminist Theory (2018).
[160] Vol. 1 JAMES J. PONZETTI JR., INTERNATIONAL ENCYCLOPEDIA OF MARRIAGE AND FAMILY 72 (ed., 2d ed. 2003).
[161] Id. at pg. 344.
[162] Revanasiddappa v. Mallikarjun, (2011) 11 SCC 1.
[163] **Decriminalisation Case**.

Marriage has traditionally served the function of orderly passage of property and growth of family assets.[164] In India's joint family system, the exact role has been very active, wherein marriage alliances were usually utilised for social and economic advancement. The Hindu Succession Act, 1956, amended in 2005, and other personal laws codify spouses' property rights, which indicate the primacy of inheritance rules over marriage as an institution.[165]

The Supreme Court acknowledged this factor in *Githa Hariharan v. Reserve Bank of India*[166], citing that marriage in India has traditionally been inextricably tied with property relations, defining succession patterns and resource allocation within families. This material aspect of marriage brings into focus the economic consequences of marital status recognition beyond symbolic recognition.

4.2.2.3 **Social Regulation and Stability**

Marriage serves as a mechanism of social regulation and community order by channelling sexual activity and organising kinship relations[167]. Many social theorists have portrayed Marriage as central to establishing stable patterns of social organisation. Durkheim, for instance, illustrated marriage as an institution that regulates sexual activity and establishes normative expectations concerning adult relationships.[168]

The role of regulation played by marriage is established under Indian law. In *Shafin Jahan v. Asokan K.M.*,[169] the Supreme Court stated that marriage as a social institution has been subject to regulation both by religion and by statute because of its significance in establishing a stable society. But the court further established that this regulatory interest would not be allowed to supplant personal preference in choosing a spouse, which is a significant restraint on the state's regulation authority in the marriage context.

4.2.2.4 **Companionship and Emotional Support**

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[164] JACK GOODY, THE DEVELOPMENT OF THE FAMILY AND MARRIAGE IN EUROPE 222–239 (Cambridge University Press 1983).
[165] POONAM PRADHAN SAXENA, FAMILY LAW LECTURES: FAMILY LAW II 121–146 (LexisNexis 2016).
[166] Githa Hariharan v. Reserve Bank of India, (1999) 2 SCC 228.
[167] BRONISŁAW MALINOWSKI, SEX, CULTURE, AND MYTH 63–87 (Harcourt, Brace & World 1962).
[168] EMILE DURKHEIM ON INSTITUTIONAL ANALYSIS 229-242 (Mark Traugott ed., University of Chicago Press 1978).
[169] Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368.

The companionate character of marriage, historically secondary to its reproductive and economic roles, has increasingly become integral to contemporary definitions of the institution.[170] The Supreme Court has strengthened this dimension in recent rulings, specifically in recent decisions. In the *Joseph Shine Case*,[171] the Court observed that marriage in contemporary India is understood as a union of equals, a demonstration of the change that companionship has become the characteristic marital value.

This shift towards focusing on the companionate and emotional nature of marriage has dramatic ramifications for marriage equality law. As Justice Chandrachud described in *Navtej Singh Johar*[172], the possibility of deriving satisfaction from sexual relationships is central to human dignity, applicable to all persons regardless of sexual orientation. This line of reasoning argues that because marriage is coming to be understood first and foremost as an emotional union.

4.2.2.5 **State Interest vs. Individual Autonomy**

This conflict between state interest in governing marriage and personal liberty in sexual relations is also at the centre of modern disputes over marriage equality. Historically, the state has asserted legitimate interests in governing marriage for purposes related to population stability, the welfare of children, property transfer, and social coherence.[173] Constitutional doctrine increasingly marks boundaries on this regulatory authority as it threatens constitutional freedoms.

In Shafin Jahan, the Supreme Court left no room to doubt that "*the right to marry a person of one's choice is integral to Article 21*,[174] adjudicating that the choice of spouse falls within the ambit of protected domain of personal liberty. Likewise, in Shakti Vahini v. Union of India[175], the Court acknowledged that social approval for an intimate personal decision is not the basis for recognizing the right to privacy, reaffirming yet again the precedence of individual autonomy in the sphere of marriage.

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[170] LAWRENCE STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800 325–404 (Weidenfeld & Nicolson 1977).
[171] Joseph Shine Case, 2018.
[172] **Decriminalisation Case**.
[173] VOL. 1 FLAVIA, FAMILY LAW: FAMILY LAWS AND CONSTITUTIONAL CLAIMS 15-42 (Oxford University Press 2011).
[174] Shafin Jahan, 2018, at para. 91.
[175] Shakti Vahini v. Union of India, (2018) 7 SCC 192.

This dynamic equilibrium between state interest and individual autonomy is the jurisprudential foundation for likely non-heteronormative relations recognition. Though the Supreme Court, in Puttaswamy v. Union of India declared that privacy, at its core, includes the preservation of personal intimacies while also maintaining the sanctity of family life, implying that state regulation of marriage becomes subject to stricter scrutiny where it intrudes on personal choice within intimate life.

4.2.2.3 **Theoretical Frameworks**

Marriage as an institution has been theorized through various anthropological approaches that each shed light on a different aspect of its social role and cultural significance. These theories place marriage within a wider context beyond the formalism of law, revealing its deeper sociological and cultural dimensions.

4.2.3.1 **Alliance Theory**

The traditional alliance theory of Claude Levi Strauss is that marriage constitutes a system of group exchange for the most part. Departing from thinking of marriage as an association between individuals, Levi-Strauss contended that marriage was an alliance of strategy between lineages or families. By marrying off women (in patrilineal societies), groups created social and mutual obligations that extended beyond the wedded couples.[176] Exchange theory highlights the social and political role of marriage to create webs of alliance and kinship.

4.2.3.2 **Functionalist Theory**

Emile Durkheim and functionalist sociologists saw marriage as fulfilling basic social functions that are required to preserve social continuity and stability. Marriage, according to them, creates social solidarity by managing sexual behaviours, offering legitimate methods of reproduction, and conferring a template of socialization of the child. Durkheim highlighted how marriage creates a ‘moral regulation’ that keeps individuals together within the broader social structure by imposing responsibilities and roles on one another.[177]

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[176] CLAUDE LEVI STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP 46–51 (James Harle Bell et al. trans., Beacon Press 1969) (1949).
[177] EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 20–28 (W.D. Halls trans., Free Press 1984) (1893).

4.2.3.3 **Marriage theorised as Havelock Ellis**

The marriage is actually a natural, predominantly monogamous institution based on the biology and psychology of human beings but influenced by changing social, legal, and religious forces. It laments classical concepts such as the canon law conception of marriage as an indissoluble sacrament and the contractual conception treating the wife as inferior as no longer applicable and often unjust, particularly in the area of divorce. Rather, the new understanding of marriage is a voluntarily made and morally committed union of equals with ongoing consent by both sides required and dissolution requiring permission. Sexual intercourse, the theory says, is a private affair but with a legitimate interest by the State in marriage only in keeping children's welfare secure and in imposing parental responsibilities. Therefore, the marriage of the future is conceived in terms of a balance between individual autonomy and equality in marriage on the one hand, and strict legal obligations to children on the other, in a new shift away from formal control of personal relations towards concern about children's protection and welfare.[178]

4.3. **Religious and Traditional Concepts in the Contemporary Era**

Indian legislation on marriage portrays its religious diversity and historical development. The evolution from traditional and religious concepts to contemporary statutory provisions has resulted in the continuity and metamorphosis of the legal concept of marriage in India[179].

4.3.1 **Hindu Concepts of Marriage**

4.3.1.1 **Traditional Conceptualisation**

In Hindu traditional philosophy, marriage (vivaha) is one of the sixteen compulsory samskaras[180] (sacraments) denoting salient milestones of a person's life.[181] In contrast with contractual views, Hindu marriage has been conventionally conceived as a sacred

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[178] Henry Havelock Ellis, Rational Basis of Leg Institutions, (New York: Macmillan Company, 1923).
[179] WERNER F. MENSKI, HINDU LAW: BEYOND TRADITION AND MODERNITY 375-412 (Oxford Univ. Press 2003)
[180] Fifteenth Sanskara. [***See*** - Shailaja Sarangi, *Understanding Hindu Traditions: 16 Sanskaras in Hinduism and Their Relevance from the Past to the Present*, The Indian School of Cultural Studies, https://www.prathaculturalschool.com/post/16-sanskaras-in-hinduism#:~:text=15.,celebrations%20extend%20for%20several%20days. (last visited: 15.03.2025)]
[181] Nelistra Singh, The Vivaha (Marriage) Samskara as A Paradigm for Religio-Cultural Integration in Hinduism, 31-40, Journal for the Study of Religion, https://www.jstor.org/stable/24764135 (last visited: 15.03.2025).

and non-dissolvable union, remembered by the Saptapadi (seven steps), constituting the symbolic representation of the wedded union. The Dharmashastras, especially the Manusmriti, detailed elaborate regulations on marriage, classifying eight types of marriage with diverse degrees of social acceptance.[182]

The three main aims of Hindu marriage have been classically stated as:

i. *Dharma* (religious duty) – Marriage allows for fulfilling religious duties and rites demanding the wife's and the husband's active participation.
ii. *Praja* (offspring) – Preservation of the family line from generation to generation is envisioned as a basic goal.
iii. *Rati* (pleasure) – Secondary only to the above two, mutual pleasure is accepted as an acceptable aim.[183]

These more established understandings strongly privileged heteronormativity, with procreation being one of the primary goals of the union. As Justice Chandrachud has delineated in Shafin Jahan v. Asokan K.M.[184], marriage is a personal choice, predicated upon the understanding that an individual's liberty consists of a spouse's freedom of choice. This more contemporary understanding coexists uncomfortably with established Hindu understandings predicated on dharmic duty instead of freedom of choice.

4.3.1.2 **Hindu Marriage Act, 1955**

The Hindu Marriage Act, 1955 ("**HMA**") codified Hindu marriage law, aiming to modernise and harmonise conservative with progressive reforms.[185] While preserving some tradition, e.g., the saptapadi (seven circumambulation around the sacred fire) as an acceptable ritual form[186], the HMA swept in radical reforms, e.g., providing for divorce[187], removal of public polygamy rights for men[188], and liberalising inter-caste prohibitions on marriage[189].

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[182] PATRICK OLIVELLE, MANU'S CODE OF LAW: A CRITICAL EDITION AND TRANSLATION OF THE MĀNAVA-DHARMAŚĀSTRA 108-12 (Oxford Univ. Press 2005).
[183] MENSKI WERNER, HINDU LAW: BEYOND TRADITION AND MODERNITY, (Delhi, 2009; online edn, Oxford Academic, 18 Oct. 2012)
[184] Shafin Jahan Case. 2018.
[185] The Hindu Marriage Act, 1955. (hereinafter "**HMA**").
[186] Section 7, HMA.
[187] Section 13, HMA.
[188] Section 17, HMA.
[189] Section 5, HMA, ("*A marriage may be solemnized between any two Hindus*").

The HMA defines marriage as union between a "*bride*" and a "*bridegroom*," –

> "*the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage*"[190]

implicitly requiring heterosexuality for valid marriage by applying gendered terminology. Despite these reforms, the HMA continued to have entrenched gendered inequalities, especially on divorce grounds, and daughters' coparcenary. These inequalities were rectified through later legislative reforms and court decisions to conform the Act to constitutional gender equality standards. In Vineeta Sharma v. Rakesh Sharma[191], the Supreme Court underscored that personal laws must be interpreted in light of fundamental rights guarantees to equality, creating a model of interpretation conceivably capable of supporting liberal readings of statutory marriage provisions.

4.3.2 **Islamic Understandings of Marriage**

4.3.2.1 **Traditional Conceptualisation**

Islamic law thinks of marriage (*nikah*) in terms of a civil contract, although with deep religious significance[192], rather than a sacrament. The contractual nature is based on offer (*ijab*) and acceptance (*qabul*) by the parties or their representatives, and *mahr* (dower) paid to the bride. Though sacred in origin, the contractual aspect of Islamic marriage is implied by the possibility of termination through divorce (talaq) under specified conditions[193].

The following are the requisites of a valid Muslim marriage – First, Proposal and acceptance (*ijab* and *qabul*), Second, Mutual free consent of the parties, Third, Witnesses to the marriage contract, Fourth, Mahr (dower) provided by the husband to the wife[194].

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[190] Section 5 (iii), HMA.
[191] 2020 INSC 487.
[192] ASAF A.A. FYZEE, OUTLINES OF MUHAMMADAN LAW 90-95 (Oxford Univ. Press 5th ed. 2008)
[193] DAVID PEARL & WERNER MENSKI, MUSLIM FAMILY LAW 139-46 (Sweet & Maxwell 3d ed. 1998)
[194] PROF. G.C.V. SUBBA RAO, FAMILY LAW IN INDIA, 627-637, (Narendra Gogia & Company 10th ed. Reprint 2014).

Islamic law has long understood marriage to fulfil various functions: procreation and perpetuation of the human race; regulation of sexual desire by the law; companionship and support; and establishment of families as the fundamental social unit[195]. Such functions, especially procreation, have long been associated with heteronormative notions of marriage.

In its first landmark decision *Danial Latifi v. Union of India*[196], the Supreme Court of India underscored the contractual aspect of Muslim marriage and its religious aspect: Though marriage under Muslim law is a contract, it is a contract of a different nature than pure civil contracts as it has elements of sacredness attached to it. This double categorisation as both contractual and sacred carries deep significance for reform issues and applicability to non-heteronormative marriage.

4.3.2.2 **Statutory Recognition**

The Muslim Personal Law (Shariat) Application Act, 1937, reaffirms the enforceability of Islamic personal law among Muslims in cases such as marriage[197]. Muslim personal law, unlike that for Hindus, has not been codified entirely, though Acts such as the Dissolution of Muslim Marriages Act, 1939 govern some of its provisions.[198] This legislation policy has preserved the largely uncodified character of Muslim marriage law, with the courts also referring to medieval Islamic juridical treatises in adjudicating.

4.3.3 **Special Marriage Act, 1954 – A Secular Option**

India's primary civil marriage legislation is the Special Marriage Act, 1954 ("**SMA**"), which allows citizens to marry across religions[199]. And as the secular alternative to religious personal laws, the SMA was written to implement a liberal model of marriage law. And yet, avowedly heteronormative remains the Act, as witness Section 4, which provides that a marriage can be solemnized "*between any two persons*," but subsequent conditions make clear the Act's assumption of heteronormative unions.[200]

Section 4(c) of the SMA mandates –

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[195] Khurshid Ahmad, *Family Life in Islam*, International Islamic University Malaysia, https://www.iium.edu.my/deed/articles/family_islam/ch03.html (last visited: 17.03.2025).
[196] Danial Latifi v. Union of India, (2001) 7 SCC 740.
[197] The Muslim Personal Law (Shariat) Application Act, 1937.
[198] The Dissolution of Muslim Marriages Act, 1939.
[199] The Special Marriage Act, 1954, (hereinafter "**SMA**").
[200] Section 4, SMA.

"*the **male** has completed the age of twenty-one years and the **female** the age of eighteen years*;[201]"

explicitly providing for a heteronormative union. Likewise, procedural registration rules and ritualistic ceremonial also provides for parties as "*husband*" and "*wife*.[202]" In *Shafin Jahan*[203] it was acknowledged by the Supreme Court that although the SMA was a forward-thinking step towards legitimation of inter-religious marriages, it too was bound by heteronormative assumptions.

4.4. **Rights Enjoyed by Heterosexual Couples**

Marriage bestows many legal rights, privileges, and protections that have a profound impact on the social, economic, and personal lives of the individuals. Comprehension of this "*bundle of rights*"[204] bestowed under marriage is critical in ascertaining the substantive effect of marriage exclusion among non-heteronormative couples. The rights can be divided into some areas, each being a different aspect of legal recognition and protection such as guardianship, adoption and inheritance available to heterosexual married couples.[205]

4.4.1 **Right of Succession and Inheritance**

Marriage provides automatic rights of succession between spouses that unmarried couples do not enjoy, irrespective of the length or intensity of the relationship. According to the Indian Succession Act, 1925,[206] ("**ISA**") a widow or widower has definite rights of inheritance over property belonging to their deceased spouse.[207] In Hindu law, the Hindu Succession Act, 1956[208] ("**HSA**") places the wife in the category of Class I heir on par with children.[209] According to Muslim law, though differing

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[201] Section 4 (c), SMA.
[202] Section 15 (a), SMA.
[203] Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368.
[204] Diksha Sanyal, *Adjudicating Marriage Equality: An Opportunity Lost or a Bullet Dodged?* Supreme Court Observer, https://www.scobserver.in/journal/adjudicating-marriage-equality-an-opportunity-lost-or-a-bullet-dodged/ (last visited: 20.03.2025).
[205] Id.
[206] The Indian Succession Act, 1925. (hereinafter "**ISA**")
[207] Part V, Section 33-35, ISA.
[208] The Hindu Succession Act, 1956, (as amended in 2005), (hereinafter "**HSA**").
[209] Section 8, HSA

between schools of law, spouses have definite shares under Islamic law of inheritance.[210]

In *Vineeta Sharma v. Rakesh Sharma*[211], the Supreme Court reiterated the significance of such rights of succession towards economically securing women in marriage, noting how marriage institutes a presumptive economic union between spouses which is also legally safeguarded.[212] This economic acknowledgment is systematically withheld from non-heteronormative partners in the existing legal system.

4.4.2 **Maintenance and Alimony**

Marriage invokes strong economic and protectionist interests in the form of maintenance and alimony rights. Section 125 of the Criminal Procedure Code provides maintenance to wives who cannot sustain themselves.[213] Personal laws such as the Hindu Adoptions and Maintenance Act, 1956 also codify the right of the wife to be maintained by the husband during marriage and on divorce or separation.

In the case of *Shamima Farooqui v. Shahid Khan*[214], the Supreme Court placed special thrust on maintenance as an instrument of social justice, i.e., shielding women who could have been economically dependent in marriage. Analogously, in Rajnesh v. Neha[215], the Court established elaborate guidelines regarding alimony and maintenance to preserve the exceptional protection given to marital lives. No such protection can be granted to non-heteronormative partners, irrespective of economic dependence or duration of relationship.

4.4.3 **Right of Adoption and Guardianship**

Marriage grants presumptive adoption and guardianship rights that directly impact family formation. The natural guardian of a legitimate child is the father, in preference to the mother, under the Hindu Minority and Guardianship Act, 1956.[216] The Juvenile

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[210] TAHIR MAHMOOD, MUSLIM PERSONAL LAW: ROLE OF THE STATE IN THE INDIAN SUBCONTINENT 180-95 (All India Reporter 2d ed. 1983).
[211] Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1.
[212] Section 125, The Code of Criminal Procedure, 1973, (hereinafter "**CrPC**").
[213] Id.
[214] Shamima Farooqui v. Shahid Khan, (2015) 5 SCC 705.
[215] Rajnesh v. Neha, (2021) 2 SCC 324.
[216] The Hindu Minority and Guardianship Act, 1956.

Justice Act[217], allows "a couple" as "two persons married to each other," excluding unmarried couples and non-heteronormative partners.

In *ABC v. State (NCT of Delhi)*[218], granting rights of adoption to unmarried women, the Supreme Court reaffirmed the preference given to "*stable married couples*" in adoption, a continuation of the privileged status of the heterosexual marriage under Indian family law. Prioritisation necessarily disadvantages non-heteronormative families less in establishing legal parent-child relationships.

4.4.4 **Taxation Advantages**

The Income Tax Act of 1961 gives many concessions to married couples which are not available to unmarried couples. They are as follows –

a. The simplicity in the submission of returns in the form of "Hindu Undivided Family" (HUF) under Section 2(31), which provides certain concessions under taxation[219]
b. Clubbing provisions under Section 64 enable the planned transfer of wealth between spouses to reduce tax burden[220]
c. Deduction of health insurance premium paid to spouses under Section 80D[221]
d. Transfer of property between spouses without raising gift tax[222]

These provisions reflect the economic integration brought about by marriage, giving married persons financial planning opportunities unavailable to others.

4.4.5 **Healthcare Decision-Making**

Marriage automatically provides next-of-kin status for medical decision-making and consent. Spouses become the default decision-makers for incapacitated patients in the absence of advance directives, as the hospital tends to consider them the initial decision-makers.[223] Such autonomy, essential amidst the medical emergency, is legally unclear for non-heteronormative partners.

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[217] The Juvenile Justice (Care and Protection of Children) Act, 2015.
[218] ABC v. State (NCT of Delhi), (2015) 10 SCC 1.
[219] Section 2 (31), The Income Tax Act, 1961, (hereinafter "**ITA**").
[220] Section 64, ITA.
[221] Section 80D, ITA.
[222] Section 5, The Gift Tax Act, 1958.
[223] INDIAN MEDICAL ASSOCIATION, HANDBOOK OF MEDICAL ETHICS 45-52 (IMA House 2016).

In Common Cause v. Union of India[224], the Supreme Court acknowledged the need for well-settled surrogate decision-makers for end-of-life care, a role naturally assigned to spouses in wedlock but needing elaborate legal formalities for others.

4.4.6 **Tenancy and Property Rights**

Certain property rights accrue primarily to spouses, they are –

a. Transfer of Property Act, 1882 rights regarding survivorship and transmission of tenancy rights[225]
b. Shielding under the Domestic Violence Act, 2005, i.e., the right to continue staying in the shared home[226]
c. Right to claim partition by operation of law in ancestral property by Hindu wives[227]
d. Protection in rent control legislation as established in Gian Devi Anand v. Jeevan Kumar[228], where the Supreme Court reaffirmed the right of a spouse to succeed in tenancy.

Such protection on the property does have very tangible economic impacts, specifically in conferring housing security that is still not accorded to non-marital partners.

4.4.7 **Immigration and Citizenship Rights**

Marriage to an Indian citizen offers automatic paths to residence and citizenship. Spouses of foreign nationals are eligible for citizenship after seven years of residence in terms of the Citizenship Act of 1955, and a privilege not extended to unmarried partners.[229] Visa law also offers special categories for spouses but not to single partners.[230]

4.4.8 **Employment Benefits**

Several employment benefits are marital-status-based, they are –

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[224] Common Cause v. Union of India, (2018) 5 SCC 1.
[225] Section 6-8, The Transfer of Property Act, 1882 (hereinafter "**TPA**").
[226] Section 17, The Protection of Women from Domestic Violence Act, 2005, (hereinafter "**DVA**").
[227] MULLA, PRINCIPLES OF HINDU LAW 420-35 (LexisNexis 21st ed. 2016).
[228] Gian Devi Anand v. Jeevan Kumar, (1985) 3 SCC 87.
[229] Section 5, The Citizenship Act, 1955.
[230] Rule 4, Foreign Exchange Management (Non-debt Instruments) Rules, 2019.

a. Nomination for provident fund and pension benefits under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952[231]
b. Family pension entitlements under government pension schemes[232]
c. Health insurance cover for spouses under employer-sponsored insurance schemes[233]
d. Leave travel concession for family members in government employment[234]

The Supreme Court in *Union of India v. V.R. Tripathi*[235] recognized these employment benefits as significant economic entitlements that flow from the legal recognition of relationships.

4.5. **Critical Perspectives on the Concept of Marriage**

Having reflected on the historical development, religious understanding, and legal definitions of marriage in India, and the vast bouquet of rights one gains access to and monopoly over only when one is a heterosexual wedded couple, the section now examines critically why the institution of marriage has been so resistant to being pulled beyond heteronormative pairs. This defiance must be deciphered with care at various levels—textual-statutory, jurisprudential, socio-cultural, and philosophical.[236]

4.5.1 **Textual-Statutory Limitations**

The initial source of defiance is the self-evident textual constraints in India's marriage laws. As detailed in Section 3 (of this chapter), the most prominent Indian marriage laws—the Hindu Marriage Act, the Special Marriage Act, and Muslim, personal laws have decidedly gendered provisions that assume heteronormative marriages. These textual constraints pose very stringent interpretive hurdles for courts trying to extend marriage rights by way of constitutional interpretation judicially.

In *Shayara Bano v. Union of India*[237], Justice Rohinton Nariman stressed the constitutional principle that when a statute cannot conform to constitutional values, the statute has to yield. Wholesale reinterpretation of marriage statutes, though, would

[231] Section 6, The Employees' Provident Funds and Miscellaneous Provisions Act, 1952.
[232] Rule 54, Central Civil Services (Pension) Rules, 1972.
[233] Section 46-50, The Employees' State Insurance Act, 1948.
[234] Rule 3, Central Civil Services (Leave Travel Concession) Rules, 1988.
[235] Union of India v. V.R. Tripathi, (2019) 8 SCC 671.
[236] RATNA KAPUR, EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM 87-112 (Glasshouse Press 2005).
[237] Shayara Bano v. Union of India, (2017) 9 SCC 1.

involve judicial reconstruction in considerable measure rather than interpretation. As Justice D.Y. Chandrachud pointed out in *the Supriya Chakraborty Case*[238] Even though the Court can interpret the statute's provisions following the Constitution, the Court cannot re-make the statute. When the statute has expressively gendered language as an essential, not incidental, characteristic that defines it, the Court has to proceed cautiously to use interpretative strategies that would transform the statutory regime at its core.

This textual problem is particularly pungent when considering the definition of marriage within the specific Indian legal environment. Unlike jurisdictions where marriage lacked a statutory definition (such as formerly in the United States before *the Obergefell Case*[239]), Indian law possesses a number of elaborate statutory provisions that define marriage on heteronormative terms explicitly.

4.5.2 **Legislative Intent and Originalism**

A second layer of defiance stems from arguments concerning legislative intent. Originalist interpretations emphasize that the legislative bodies that enacted India's marriage laws—particularly during the post-independence codification period of the 1950s—clearly intended these laws to apply exclusively to heterosexual unions.[240] Parliamentary debates surrounding the Hindu Marriage Act and Special Marriage Act reveal no contemplation of these laws applying to non-heteronormative union but only to male and female[241], suggesting that such application would contravene legislative intent.

However, as Justice Chandrachud articulated in *Navtej Singh Johar*, constitutional interpretation must be living and organic rather than originalist. He said the Constitution, as a living document, must be interpreted to respond to the changing needs of society. This tension between statutory originalism and constitutional evolutionism creates a complex interpretive landscape when considering extending marriage rights.

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[238] The Supriyo Chakravarty Case, 2018.
[239] It established marriage equality in absence of explicit federal statutory definition.
[240] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 75-85 (Oxford Univ. Press 1966).
[241] Parliamentary Debates, House of The People, 20th May, 1954,

In *Justice K.S. Puttaswamy v. Union of India*[242], the Supreme Court explicitly rejected rigid originalism, holding that constitutional guarantees of liberty and equality must be interpreted in light of evolving understandings of human dignity. Yet this constitutional evolutionism exists in tension with the principle of judicial restraint in matters traditionally left to legislative determination, as emphasized in Supreme Court Advocates-on-Record Association v. Union of India[243].

4.5.3 **Socio-Cultural Entrenchment**

Most frequently, the most powerful defiance to extending marriage beyond heteronormative meanings arises from its socio-cultural entrenchment. Indian marriage is deeply rooted in religious, cultural, and social systems that have developed over time as by nature heterosexual.[244] This entrenchment takes place through several mechanisms –

4.5.3.1 **Religious Significance**

For most religions within India, marriage has a profoundly theological meaning that is inextricably linked to heterosexual union. In Hinduism, the symbolism of Ardhanarishvara (the combined androgynous union of Shiva and Parvati) represents the complementarity of male and female energies, which is often invoked daily in wedding rituals.[245] Islamic law has also long considered marriage to be for God's purposes, like procreation, which has been interpreted as needing different-sex partners.[246]

Religious understandings of marriage tend to highlight procreative possibility as a necessary component and thus build defiance to non-procreative couples. The Delhi High Court also pointed out in *Naz Foundation Case* that public morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights.[247] But in *Navtej Singh Johar Case*, the Supreme Court went to great lengths to

[242] Puttaswamy Case, 2017.
[243] Supreme Court Advocates-on-Record Association v. Union of India, (2016) 5 SCC 1.
[244] PATRICIA UBEROI, FAMILY, KINSHIP AND MARRIAGE IN INDIA 45-67 (Oxford Univ. Press 1993).
[245] STELLA KRAMRISCH, THE PRESENCE OF SIVA 471-78 (Princeton Univ. Press 1981).
[246] ABDOLKARIM SOROUSH, REASON, FREEDOM, AND DEMOCRACY IN ISLAM 125-35 (Oxford Univ. Press 2000).
[247] Naz Foundation Case, 2009.

differentiate between the decriminalization of homosexual acts and the reformation of family law as a whole and saw the deeper socio-religious undertones of the latter.[248]

4.5.3.2 **Gendered Role Complementarity**

Classical Indian ideals of marriage are deeply based on complementary gender roles, and wives and husbands have distinct obligations imposed upon them.[249] The complementarity can be identified in social life and legal provisions like maintenance provisions, inheritance patterns, and guardianship priorities. The assumption of gender complementarity presents conceptual challenges to non-heteronormative unions that do not fit into these classical gendered models.

4.5.3.3 **Familial and Community Dimensions**

Unlike Western conceptions that increasingly emphasize marriage as a private relationship between individuals, marriage in India retains strong familial and community dimensions. marriage often represents an alliance between families rather than merely a union of individuals, with implications for property relations, social status, and intergenerational obligations.[250]

In Shakti Vahini[251], the Supreme Court affirmed individual autonomy in marriage choice while acknowledging these broader social dimensions: The consent of the family or the community or the clan is not necessary once the two adult individuals agree to enter into a matrimonial relationship. This recognition of individual autonomy in partner selection exists in tension with broader social understandings of marriage as a familial and communal institution.

4.5.4 **Philosophical and Ontological Issues**

[248] **Decriminalisation Case**.
[249] Gobinda Chandra Mandal, *Revisiting Hindu Marriage Norms: Unveiling Women's Agency in Ancient India*, 9-15, Journal of the Asiatic Society of Bangladesh, https://www.banglajol.info/index.php/JASBH/article/download/74460/49390/205564 (last visited: 29.03.2025).
[250] Swastika Chakravorty, Srinivas Goli1, & K. S. James, Family Demography in India: Emerging Patterns and Its Challenges, 1-2 SAGE Open, https://philarchive.org/archive/GOLFDI-2 ((last visited: 29.03.2025).
[251] Shakti VahiniCase, 2018.

Defiance to the enlargement of marriage beyond heteronormative relationships at the centre involves philosophical questions of the ontological status of marriage itself. There exist two opposed philosophical arguments, they are –

4.5.4.1 **Essentialist Position**

The essentialist position is that marriage has some defining, determinate characteristics, without which it ceases to be marriage. In this view, the male-female couple is an essential and not a contingent element in marriage. It is found in writings like the Manusmriti and resonates in recent debate according to which homosexual relationships, while perhaps deservedly granted legal status, are to be distinguished from "*marriage*."

John Finnis in natural law argument provides a sophisticated philosophical base for the essentialist position regarding marriage. Marriage is, according to John Finnis, a type of friendship or human association that is characterized by a comprehensive union of biological, emotional, dispositional, and spiritual that is achieved and embodied through reproductive-type acts that are intrinsically ordered to procreation.[252] He further claims that marriage is fundamentally ordered towards the basic human good of procreation and the comprehensive formation of children. Therefore, the existence of the form of male-female complementarity essential to its defining end is not simply traditional but rather a constituent of that purpose. The natural law argument suggests that even if non-heteronormative relationships are characterized by genuine friendship and mutual commitment, they will nonetheless not achieve the comprehensive unity achieved in marriage because they lack the biological complementarity required for reproductive-type acts. From this perspective, extending the term "marriage" to also be applicable to non-heteronormative unions does not indicate an expansion of an already existing category. Instead, it alters the meaning of that term, creating a conceptual muddle regarding the nature of the institution itself. From his perspective, while it is true that not all heterosexual marriages achieve procreation, the definition of marriage exists in the essential ordering of the event towards the basic human good rather than in its actual completeness or achievement of this good, and that makes marriage an

[252] John Finnis, 'Marriage: A Basic and Exigent Good' in John Finnis, Human Rights and Common Good: Collected Essays Volume III 319, 322-325 (OUP, 2011).

entirely different form of comprehensive union not available to non-heteronormative partners.[253]

4.5.4.2 **Constructivist Position**

However, constructivist theory stresses marriage as a historically variable social institution that has changed immensely in its evolution throughout history. It highlights the diversity of marriage practice over history, e.g., women's legal status in marriage, tolerance of inter-caste and inter-religious marriage, and movement away from arranged to unions by choice.[254]

From this point of view, the heteronormativity of marriage is not an essential characteristic but a historical fluke to be written as social mores and constitutional values.

4.6. **Conclusion**

This chapter has discussed the institution of marriage as socio-legal in India, how and why it evolved from religious and customary roots to modern statutory definitions. The discussion identifies that marriage in India has traditionally been thought of as heteronormatively defined over different religious traditions and legal systems. The heteronormativity is not merely coincidental but is even profoundly entrenched in the definitional nature of marriage as one finds in Indian law today.

The rich package of rights reserved to heterosexual married couples—ranging from inheritance and support to adoption, tax subsidization, medical decisionmaking, and innumerable other topics—partially explains the extensive material and dignitary interests at stake in refusing legal status to non-heteronormative relationships. Denial of legal status to such relations creates a "separate and unequal" system that poses fundamental constitutional issues of equality, dignity, and personal liberty. The defiance for expanding marriage beyond heteronormative marriages occurs on several different planes—textual-statutory constraints, issues of legislative intent, socio-cultural embeddedness, and philosophical concerns regarding the fundamental character of

[253] John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations* 42 American Journal of Jurisprudence, (1997) https://www.princeton.edu/~anscombe/articles/finnismarriage.pdf (last visited: 30.05.2025).
[254] STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 23-45 (Viking 2005).

marriage. Whereas such resistance has varying degrees of persuasive gravity, they necessarily need to be weighed against constitutional protections for equality, dignity, and self-determination and not as a self-authenticating justification.

As India goes on its constitutional path towards even more acknowledgement of dignity and equality of all manner of lives, whether or not legal recognition is available to non-heteronormative relations is an issue that arises not as a periphery but as a core test of constitutional ideals. Here the analysis suggests that although marriage as defined in Indian law is still explicitly heteronormative, this construction operates in tension with developing constitutional ideals about equality, dignity, and individual autonomy. The evolution of marriage in history illustrates that the institution has never been static but has constantly evolved according to shifting social values and constitutional requirements. From tolerating inter-caste and inter-religious marriages to accommodating divorce and equalisation of spousal rights, Indian marriage has made a significant shift while still performing its vital social role as a mode of close relationship and family building.

As India proceeds to confront such difficult questions, it is necessary for it to find an equilibrium of respect for diverse religious and cultural practices and uncompromising adherence to constitutional values of equality, dignity, and personal freedom. This need not be presented as a radical dichotomy of tradition vs. equality but may instead seek syncretic solutions that honor the constitutional freedoms of all citizens and yet acknowledge the diversity of Indian society.

CHAPTER 5

A STUDY OF ALTERNATIVE LEGAL PATHWAYS FOR NON-HETERONORMATIVE UNIONS IN INDIA'S EVOLVING LEGAL LANDSCAPE

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5.1 Introduction

The last chapter analysed the institution of "*marriage*" in India, which has been historically and conceptually anchored in heterosexual union, the purpose of marriage, several theories of marriage, religious and customary understanding, all similar in their focus on the union of men and women. Analysis of India's matrimonial law unveiled the use of gendered terms in the Hindu Marriage Act 1955, the Indian Christian Marriage Act 1872, the Parsi Marriage and Divorce Act 1936, and the Muslim Personal Law (Shariat) Application Act 1937, who all provides marriage as the union of male and female. The omnipresent statutory regime in India consisting of more than 40 central and state legislations marked by "*marriage*," "*husband*," "*wife*," and "*spouse*" reveals the working impossibility of across-the-board legislative reform to include non-heteronormative marriage without fundamental restructuring of India's overall family law system. The constitutional recognition expounded in Supriya Chakraborty[255] has established what constitutional theorists identify as an "*implementation gap*"—a juridical terrain between constitutional duty and legislative practice.[256] The gap arises when constitutional courts enunciate rights to which existing systems of legislation are incapable of adopting without radical change, resulting in the demand for creative legal solutions that goes on similar level with traditional norm.

The Supreme Court's judgement of constitutional protection of non-heteronormative couples under Articles 14, 15, 19, and 21 has leave the domain to the state to grant legal recognition to non-heteronormative couples while granting them right to relationship. Still, the existing statutory framework of marriage law in India is not structurally competent to meet this constitutional right without radical legislative transformation.

Confronted with this constitutional requirement and statutory fact, this chapter explores other models of law—civil unions, domestic partnerships, and registered partnerships—through which required legal protection may be extended to non-

[255] Supriyo Chakraborty Case, 2023.
[256] John C. Jeffries Jr., *The Right-Remedy Gap in Constitutional Law*, 87–90 Yale Law Journal (1999).

heteronormative unions in India without undermining the entrenched institutional framework of marriage laws. The primary contention presented is that civil unions and similar alternative models are not the second-best form of legal recognition or constitutional bargain but instead a strategically forward-looking approach to securing substantive equality within the complicated realities of India's pluralistic legal system.[257] This reconceptualisation is necessary because it changes the analytical lens from seeing alternatives as "*less than*" marriage to understanding them as constitutionally equal pathways to protection of rights, which in some contexts may better work to secure legal equality than enforced marriage norms.[258]

This chapter moves beyond a simple descriptive survey, offering a nuanced comparative analysis of international models where alternative legal frameworks have been implemented with varying degrees of success. It examines the United Kingdom's civil partnerships, Germany's Lebenspartnerschaft, France's PACS, Australia's approach to de facto relationship recognition, the United States' pre-Obergefell civil union systems, and South Africa's constitutional mandate. The purpose is not merely to catalogue these frameworks but to provide a substantive analytical foundation for considering how such alternatives might be adapted within India's particular constitutional, legal, and social context while ensuring that the substantive rights and protections associated with marriage remain functionally equivalent.

As Marc Galanter has observed, alternative legal frameworks represent institutional innovation within pluralistic constraint, they develop new legal categories that fulfil constitutional imperatives but do so in a manner that respects the autonomy and integrity of existing institutions.[259] This approach recognises that constitutional equality is not a monolith but may be realised through multiple, context-sensitive pathways. Institutional diversity can enhance rather than undermine the protection of fundamental rights. The central analytical issue is whether these alternative frameworks are constitutionally permissible and whether they achieve functional parity with marriage

[257] Tarunabh Khaitan, Inclusive Pluralism or Majoritarian Nationalism: Article 15, Section 377 and Who We Really Are, Constitutional Law and Philosophy, https://indconlawphil.wordpress.com/2018/07/09/inclusive-pluralism-or-majoritarian-nationalism-article-15-section-377-and-who-we-really-are/ (last accessed: 18.05.2025).
[258] Nancy Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families under the Law*, (Beacon Press, 2008).
[259] Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC'Y REV. 95, 149 (1974).

in safeguarding the dignity, autonomy, and material interests that the Supreme Court has recognised as fundamental to intimate relationships.

The constitutional case for alternative frameworks arises not only from the practical challenges of amending established marriage laws but also from deeper principles of institutional design in diverse democracies. Comparative experience suggests that alternative frameworks often prove more durable and effective than direct amendments to marriage law, especially in societies marked by significant religious or cultural diversity in defining marriage. Jurisdictions that have successfully implemented civil union systems frequently report broader social acceptance and more comprehensive rights protection than those that have directly sought to mandate changes to traditional marriage through legal amendment.

5.2 **Conceptual Foundation of Alternative Legal Frameworks**

5.2.1 **Understanding Alternative Legal Recognition**

The theoretical conception of alternative legal recognition must be given definitional precision to differentiate between different kinds of relationship recognition used indiscriminately interchangeably in both academic literature and policy debates. A "*Civil Union*"[260] is a legally established state of relationship that accords full legal rights and obligations equally akin to marriage but maintains institutional differentiation from traditional marriage frameworks. The defining feature of civil unions is their objective of functional equivalence they seek to accord equivalent legal protections, benefits, and burdens of marriage through commensurate institutional arrangements but not through categorial inclusion within marriage frameworks.[261]

"*Domestic partnerships*" is a narrower variety of recognition that is more traditionally aimed at discrete legal benefits rather than the full scope of relationship recognition.[262] Domestic partnerships also tend to crop up in the workplace or locally and grant benefits like health insurance coverage, hospital visits, or inheritance protection short of establishing the full panoply of legal entitlements attendant upon marriage.[19] The

[260] *Civil Union*, Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/civil_union, (last visited: 18.05.2025).
[261] David L. Chambers, Couples: Marriage, Civil Union, and Domestic Partnership, 281-304 (St. Martin's Press, 2000).
[262] California Code, Family Code - **FAM § 297**, https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=FAM&division=2.5.&title=&part=1.&chapter=&article= (last visited: 18.05.2025).

distinction is vital since domestic partnerships do not necessarily strive for functional equivalence with marriage. It may leave huge gaps in legal protection that might render them constitutionally inadequate on the burdens of equality.

"Registered partnerships" fill this middle ground between domestic partnerships and civil unions, leaning towards providing greater recognition than domestic partnerships with greater freedom and lesser expectation than formal civil unions. The requirement of registration distinguishes these models from voluntaristic relationship recognition, while the lower degree of formality compared to ceremonies for marriage keeps them open to couples most likely subject to bans on usual marriage rituals.[263]

The "*Functional Equivalence*" principle is the constitutional standard for determining whether substitute structures meet equality requirements.[264] Functional equivalence is not the same institutional form or terminology. Still, only that substitute structures ensure the same protection for the essential interests that constitutional law identifies as being central to intimate lives.[265] Such interests are material security through property and inheritance, control over decision-making about medicine and the law, the construction of family by means of adoption and parental rights, and social identification through publicly recognized and respected legal status.[266]

5.2.2 **The Parallel Institution Approach**

The theoretical foundation for parallel institution approaches rests on constitutional law principles regarding institutional pluralism and the accommodation of diversity within unified constitutional frameworks.[267] Rather than viewing institutional separation as inherently problematic, constitutional theory increasingly recognizes that parallel institutions can strengthen overall constitutional protection by providing multiple pathways to rights enjoyment and reducing conflicts between competing constitutional values. The parallel institution approach acknowledges that different groups may have

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[263] Craig W. Christensen, If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage", 66 Fordham L. Rev. 1699 (1998).
[264] Rishika Sahgal, *No Constitutional Right to Same-Sex Marriage in the Cayman Islands*, OHRH, https://ohrh.law.ox.ac.uk/no-constitutional-right-to-same-sex-marriage-in-the-cayman-islands/ (last visited: 18.05.2025).
[265] Lee-ford Tritt, Moving Forward by Looking Back: The Retroactive Application of Obergefell, 2016 WIS. L. REV. 873, 898 (2016).
[266] Christopher J. Collins, *Family Values and Same-Sex Marriage*, 55-65 Philosophy in the Contemporary World, (2009).
[267] Richard C. Schragger, Cities as Constitutional Actors: The Case of Same-Sex Marriage, 21 J.L. & POL. 147 (Spring-Summer 2005).

different needs and preferences regarding institutional structure while maintaining that constitutional equality requires equivalent outcomes rather than identical processes.

The constitutional legitimacy of parallel institution approaches derives from the principle that equality requires equal treatment of equal situations but permits different treatment of different situations when such differences are constitutionally relevant. Applied to relationship recognition, this principle suggests that while non-heteronormative and opposite-sex couples deserve equivalent legal protection, the different social contexts and institutional needs of these relationships may justify different institutional frameworks provided that such frameworks achieve substantive equality in protecting constitutional interests.[268]

5.3 **International Comparative Analysis**

5.3.1.1 **The United Kingdom Model - Civil Partnerships Act**

The United Kingdom's Civil Partnership Act 2004 is the paradigmatic example of what legal scholars refer to as "*institutional parallelism*"—the establishment of legally equivalent structures that accomplish substantive equality through procedural differentiation. This response was not driven by progressive consensus, but by strategic compromise, driven by the Labour government's perception that religious opposition to non-heteronormative marriage was something that could be bypassed, not directly challenged.[269]

5.3.1.2 **Legislative Architecture and Functional Equivalence**

The method of drafting the Act displays advanced constitutional engineering. Instead of reforming current marriage laws, Parliament constructed a completely parallel legal framework that replicated systematically marriage's legal incidents while keeping terminological differentiation. As proven by Humphreys, the 2004[270] Act stipulates that "*civil partners are to be treated by law in the same way as married couples*"[271] in nearly

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[268] Volume 58, David D. Meyer, Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relationships, Pg. 115–134, (The American Journal of Comparative Law 2010).
[269] STEPHEN CRETNEY, SAME SEX RELATIONSHIPS: FROM 'ODIOUS CRIME' TO 'GAY MARRIAGE', 298-315 (Clarendon Law Lectures - Oxford Academic 2006).
[270] Jacqueline Humphreys, "*The Civil Partnership Act 2004, Same-Sex Marriage and the Church of England*," 290 (Ecclesiastical Law Journal 2005).
[271] Commentary on Sections, Civil Partnership Act 2004, LEGISLATION.GOV.UK, https://www.legislation.gov.uk/ukpga/2004/33/notes/division/5/9/27#:~:text=60),will%20apply%20to%20civil%20partners. (last visited: 19.05.2025).

all legal areas such as property rights, insurance law, social security, inheritance, taxation, housing, domestic violence protection, and parental responsibilities.[272]

The legislative strategy utilized entirely cross-referenced extending marriage-based statutory provisions to civil partnerships provides a direct model for India's complicated statutory framework. The systematic method of the Act guaranteed civil partners had equal rights in relation to –

a. Financial relief and property adjustment being replicated on matrimonial ancillary relief jurisdiction under the Matrimonial Causes Act 1973[273]
b. Inheritance and intestacy with bereaved civil partners being placed equally to widows/widowers
c. Taxation by subsequent Finance Act 2005 amendments to implement total parity
d. Immigration and work protections against discrimination
e. Parental obligations such as adoption rights and child support entitlements[274]

This holistic approach to laws achieved what constitutional lawyer Robert Wintemute called "*marriage in all but name*,"[275] showing how more than 160 laws citing marriage or spousal relationships could systematically include new relationship types.

5.3.1.3 **Conceptual Foundations and Constitutional Compatibility**

Humphreys' analysis demonstrates that civil partnerships include nearly all conventional conceptual features conventionally present in English law marriage: voluntary choice, permanence, sexual exclusivity, monogamy, mutual support, and potential child-rearing.[8] The sole distinctive conceptual feature is one of gender make-up between participants—non-heteronormative as compared to opposite-sex partners.

This analysis is being confronted with head-on constitutional challenges based on equality jurisprudence. But the greatest lesson comparative constitutional analysis can take from the UK model is its resolution of the "*separate but equal*" paradox[276] that accompanied earlier civil rights jurisprudence. The subsequent support of civil partnerships by the European Court of Human Rights as meeting tests under Articles 8

[272] Jacqueline Humphrey, at pg. 292-293.
[273] Jacqueline Humphrey, at pg. 292.
[274] Jacqueline Humphrey, at pg. 290-300.
[275] Robert Wintemute and Mads Andenaes (eds), Legal Recognition of Same-Sex Partnerships 677 (Hart 2001).
[276] Compare Brown v. Board of Educ., 347 U.S. 483 (1954).

and 14 created the precedent that institutional segregation isn't discrimination where functional equivalence exists.[277] This advice is highly relevant to India, where the promise of equality in Article 14 would otherwise rule out segregated institutional forms.

5.3.1.4 **Political Economy and Evolutionary Path**

The British experience indicates the political economy of the extension of LGBTQ+ rights. Civil partnerships became widely accepted in society precisely because they did not directly challenge religious opinions regarding marriage but did extend concrete legal protection. Cultural evidence demonstrates instant uptake of civil partnerships as "gay marriages" in the face of official refusals—the "Modern Life Exhibition 2005" provided "wedding" planning facilities, and internet searches on "gay marriage" provided civil partnership providers.[278]

This model facilitated incremental normalization, supporting the *Marriage (Non-heteronormative Couples) Act 2013*. Instead of locating civil partnerships as temporary appeasements, the evolutionary model proposes that other forms can construct social capital toward increased acceptance. Monk and Barker's interdisciplinary research illustrates that progression "from civil partnership to non-heteronormative marriage" indicates increased social acceptance in preference to institutional breakdown.[279]

5.3.2 **France's PACS - Inclusive Alternative Framework**

5.3.2.1 **Conceptual Foundation**

France's Pacte Civil de Solidarité (PACS), established in 1999, is a pioneering shift away from the marriage-scheme model dominant in most international LGBTQ+ rights debates.[280] The law resulted from intensive population surveys confirming the inability of conventional marriage models to accommodate modern French life, where in 1999, one out of every six couples opted for cohabitation over marriage, generating legal shortcomings that PACS was enacted to fill.[281] PACS's application to non-

[277] Schalk & Kopf v. Austria, 53 Eur. Ct. H.R. 20, 2010.
[278] Jacqueline Humphrey, at pg. 289.
[279] Daniel Monk and Nicola Barker (eds), From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections (Routledge, 2015).
[280] Patrick Festy, The 'Civil Solidarity Pact' (PACS) in France: An Impossible Evaluation, 369 Population & Societies 1, 1 (2001).
[281] Id. at 2.

heteronormative and different-sex couples gave rise to what French sociologist Irène Théry calls "*relationship pluralism*"—acceptance of various relationships that serve legitimate social purposes that traditional marriage cannot offer. Such an open model has specific lessons for India, where alternative models can serve larger social purposes than opposition to LGBTQ+ discrimination.[282]

5.3.2.2 **Contractual Framework and Legal Innovation**

The contract basis of PACS expresses a singular French legal culture, prioritising individual liberty and autonomy of contract.[283] In contrast to marriage, which creates uniform legal responsibilities based on heteronormative assumptions, PACS enables couples to tailor their legal status through contractual bargaining, with default protection in matters of property, inheritance, and social security.[284] French lawmakers intentionally established PACS as a contract between two adult individuals "*pour organiser leur vie commune*" (to organise their everyday life), excluding gendered terminology and religious overtones of traditional marriage law.[285] This flexibility can be attractive to Indian couples looking for alternatives to traditional marriage rites but with legal safeguards, especially given India's strong tradition of contract law and diversity of matrimonial practice.

5.3.2.3 **Broad Social Acceptance and Usage Patterns**

PACS's record popularity at more than 200,000 registrations per year, with opposite-sex couple usage rates high—contradicts a prediction that alternative regimes are second-best substitutes for marriage. French demographic studies show PACS being drawn out by couples who crave legal security but without the ritual obligation and social expectation of traditional marriage, with many labelling the framework's focus on mutual assistance rather than conjugal obligation as being especially attractive. Quantitative evidence affirms that 94% of all PACS registrations through 2005 were hetero couples, effectively reappropriating the framework from an LGBTQ+ rights statute to a more general alternative to traditional marriage. This pattern of use

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[282] Ashley Gaylene Trupp Mattson, *French Laïcité and the Popularity of the Pacs: The Relationship Between the Catholic Religion and Heterosexual Civil Unions in France* 48-49 (Brigham Young University, 2009) [(*accessed at https://scholarsarchive.byu.edu/etd/1755*), (last visited: 20.05.2025)].
[283] Cristina Johnston, The PACS and (Post-)Queer Citizenship in Contemporary Republican France, 20 Sexualities 629, 631 (2017).
[284] Ashley Gaylene, at 52-53.
[285] Cristina Johnston, at 632.

establishes that effective alternative frameworks can fulfil genuine social demands while satisfying particular LGBTQ+ recognition demands.[286]

The transposition of the French model into other jurisdictions reveals sophisticated legislative drafting that avoids the complex cross-referencing required by the UK model. Instead of applying marriage-based rights to PACS, the French legal code created separate legal categories with specific safeguards, such as joint taxation after three years, inheritance rights up to one-quarter of the estate, and social security coverage without complete spousal equivalence. It is a model that addresses French legal writers' depiction of "*graduated citizenship*," where various relationships initiate corresponding degrees of legal acknowledgement and protection. The model may be appropriate for India's strongly demarcated personal law system, where blanket extension of marriage provision would initiate conflict with religious law liabilities and customary succession laws.

However, PACS also unmasks the deficiency of contractual responses in recognising relationships. Although less complex than divorce, the framework's breakdown procedures originally accorded inadequate protection to economically less advantaged partners, especially in unilateral breakdown where economic differences between spouses resulted in severe suffering. French legal writers recognised inherent contradictions between individual freedom as the basis for the contractual paradigm and realities of intensive relationships involving economic and emotional dependency. Later reforms enhanced protection for property and spousal support demonstrate how other paradigms must adapt to overcome practical inequities arising in practice.

5.3.2.4 **Religious Accommodation and Secular Framework**

The French experience with religious accommodation is pertinent to India's legal pluralism lessons. PACS operates entirely within secular law, avoiding direct engagement with religious marriage concepts while providing comprehensive legal protections something typical of France's unique tradition of laïcité in keeping religious and civic spheres rigidly separate. Its separation allows religious communities to uphold traditional understandings of marriage but offers all citizens equal legal protection a

[286] Caroline Mécary, The French "Pacte Civil de Solidarité": Precursor of Same-Sex Marriage?, 2 J. FAM. HIST. 34, 38-42 (2009).

balance necessary in India's multi-religious environment.[287] Recent transcontinental comparison with England and Wales proves France's secular model gained stronger social acceptance and wider application than religion-conferring alternatives and even attempted synthesis to replace rigid institutional separation.

5.3.3 Germany's *Lebenspartnerschaft* - Evolution from Alternative to Integration

Germany's Lebenspartnerschaft system, which operated from 2001 to 2017, represents a sophisticated constitutional experiment in incremental equality that offers significant insights into India's approach to LGBTQ+ rights recognition. This alternative framework demonstrated how limited legal recognition can serve as a constitutional laboratory, testing boundaries while building jurisprudential foundations for broader equality.

5.3.3.1 **Constitutional Framework and Initial Design**

The Life Partnership Act (*Lebenspartnerschaftsgesetz*) established a carefully calibrated system that granted non-heteronormative couples' substantial legal recognition while maintaining formal distinctions from marriage. The Act required two persons of the same sex to make mutual declarations before competent authorities that they wished to live in partnership for life, creating a legally binding relationship with specific rights and obligations.[288]

The initial framework deliberately excluded certain privileges, such as joint adoption and pension rights for widows and widowers, reflecting what the Federal Constitutional Court later recognized as an attempt to observe the "*special protection*" the German Constitution provides for marriage and family. This strategic limitation allowed the legislation to pass constitutional scrutiny while establishing a foundation for future expansion.

5.3.3.2 **Judicial Evolution and Constitutional Momentum**

The Federal Constitutional Court's progressive interpretation of life partnerships demonstrates how alternative frameworks can generate their constitutional momentum.

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[287] Farrer & Co LLP, The French PACS and Civil Partnerships in England and Wales: A Comparative Analysis 15-17 (2024).
[288] Louise K. Davidson-Schmich, *Amending Germany's Life Partnership Law: Emerging Attention to Lesbians' Concerns*, 203-210 (University of Michigan Press, 2017).

In a landmark 2002 decision[289], the Court upheld the Act as constitutional, ruling unanimously that the legislative process was valid and determining with only three dissenting votes that registered partnerships could be granted equal rights to those given to married couples.

The Court's reasoning proved crucial for subsequent developments. It determined that the "*specialness*" of constitutional protection for marriage lay not in the quantity of protection but in the obligatory nature of this protection. In contrast, the protection of registered partnerships remained at the Bundestag's discretion. This distinction created space for evolutionary expansion while maintaining constitutional coherence. By 2009, the Federal Constitutional Court had established that functional inequality between life partnerships and marriage violated Article 3 equality guarantee, compelling legislative expansion of partnership rights. Life partners in Germany ultimately enjoyed the same rights concerning pensions and care issues as married persons and could claim tax advantages, achieving near-complete legal equality.[290]

5.3.3.3 **Transition to Marriage Equality and Constitutional Implications**

The transition from life partnerships to full marriage equality in 2017 illuminates both the success and limitations of alternative frameworks. The change occurred rapidly following political developments, with Chancellor Merkel's potential coalition partners pledging they would not join a government that did not commit to legalizing non-heteronormative marriage. The Bundestag passed the marriage equality bill on June 30, 2017, with 393 votes in favour, 226 against, and 4 abstentions. Non-heteronormative marriage became legal on October 1, 2017, simultaneously ending the possibility of entering new life partnerships while preserving existing ones.[291]

5.3.3.4 **Lessons for India's Constitutional Framework**

The German experience has some crucial lessons for India's approach to LGBTQ+ rights. *First*, one can use other structures as constitutional bridges and not terminuses to build social acceptance that opens the way for greater institutional transformation. The life partnership system had legitimized homosexual relations and found them

[289] 1 BvF 1/01, 1 BvF 2/01, July 17, 2002.
[290] 1 BvR 1164/07, July 7, 2009.
[291] *Marriage Equality in Germany: 30 years of fight for Same Sex Marriage*, Lsvd.de (2025), https://www.lsvd.de/de/ct/434-Marriage-Equality-in-Germany-30-years-of-fight-for-Same-Sex-Marriage (last visited: 20.03.2025).

constitutionally compatible with guarantees under basic rights. *Second*, the model of evolution suggests that initial restraint might be politically necessary but constitutionally unsustainable in the longer term. There is a chance that courts can compel expansion of external paradigms to accommodate equality demands, building momentum towards more widespread recognition.

5.3.4 **South Africa - Constitutional Mandate Implementation**

5.3.4.1 **Post-Apartheid Progressive Response**

South Africa's path to marriage equality started with its innovative 1996 Constitution, created during the country's transition from apartheid to democracy and the world's first constitution document to unambiguously prohibit discrimination on the grounds of sexual orientation.[292] The progressive actors in the Constitutional Assembly and the National Coalition for Gay and Lesbian Equality made possible the protection of sexual orientation under the law, acknowledging that the new democracy would have to safeguard all oppressed minorities. Section 9[293] of the Constitution enshrined ambitious equality provisions, holding that "*the state may not unfairly discriminate directly or indirectly against anyone*" on a variety of grounds including sexual orientation. Its constitutional promise of equality established a blueprint for the law that distinguished South Africa from other post-apartheid democracies and laid the way for progressive LGBTI+ rights law, which was evidence that drafters appreciated that a country changing from systematic oppression would have to robustly safeguard minority rights.

5.3.4.2 **The Fourie Case**

The constitutional promise of equality was tried and made real by a series of progressive court rulings that gained momentum towards marriage equality. The first breakthrough was in National Coalition for *Gay and Lesbian Equality v Minister of Justice*[294], in which the Constitutional Court ruled the criminalisation of non-heteronormative sexual acts was unconstitutional. This was followed by *Satchwell v President of the Republic of South Africa*[295], in which the spousal benefits were extended to gay judges' non-heteronormative partners. The most landmark case, *Minister of Home Affairs v*

[292] Section 9(3), The Constitution of the Republic of South Africa, 1996
[293] Id.
[294] National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others (CCT11/98) [1998] ZACC 15, (South Africa).
[295] Satchwell v. President of the Republic of South Africa, CCT45/01, (South Africa).

Fourie[296], was the scenario in which Marie Fourie and Cecelia Bonthuys wanted to get married but were refused by the Department of Home Affairs. In this landmark 2005 ruling, the Constitutional Court held unanimously that the denial of access to the institution of marriage by non-heteronormative couples contravened the equality clause of the Constitution and amounted to unfair discrimination. Chief Justice Arthur Chaskalson, in delivering the judgment on behalf of the court, stressed that "*the exclusion of non-heteronormative couples from the benefits and responsibilities of marriage is not a small and tangible harm, but a severe psychological blow*." The court gave Parliament one year to amend the discriminatory law, issuing an explicit mandate to act legislatively without violating the separation of powers. This judicial intervention illustrated how constitutional courts can drive social change when legislatures are unable to safeguard minority rights, the court clearly stating that marriage has both functional and symbolic roles in South African society.

5.3.4.3 **The Civil Union Act**

Parliament's response to the lead of the Constitutional Court traced out the intricate politics of marriage equality bills. The legislative process was controversial, with the ANC government eventually voting for the bill despite mass opposition from religious and traditional groups. *The Civil Union Act of 2006* was a bill that legalized non-heteronormative marriage, with South Africa becoming the fifth nation in the world and the first on the continent to do so. The double nature of the Act gave non-heteronormative couples two choices: marriage or civil union, both legally amounting to the same rights and obligations as heterosexual marriages. The dual approach was aimed at addressing the concerns of religious communities while granting substantive equality. The Act had wide-ranging provisions for adoption rights, inheritance, spousal entitlements, immigration benefits, and medical decision-making rights. Of special import, the Act also made provision for religious freedom safeguards under Section 6[297], whereunder marriage officers might refuse to solemnize non-heteronormative marriages on conscientious, religious, and belief grounds subject to being made to notify the relevant authority of their stance.[298] This concession was essential to facilitating legislative passage. Still, it proved to be operationally problematic since

[296] Minister of Home Affairs v Fourie 2006 (1) SA 524 (CC), (South Africa).
[297] Section 6, Civil Union Act 17 of 2006, (South Africa).
[298] Melanie Judge, Blackmail and Extortion of Black Same-Sex Sexuality: Contemporary Realities Affecting Black Same-Sex Identifying South Africans, 55 Acta Criminologica 65 (2015).

many marriage officers refused at first to solemnize non-heteronormative weddings,[299] resulting in subsequent government action to rectify access.

5.3.4.4 **Lesson for India**

The South African model demonstrates various strategic methods that could guide legislative reform in India. Progressing gradually from constitutional acknowledgement through judicial involvement to all-encompassing legislation supplies a map that regards institutional roles while promoting fairness. Initially, India may craft a measure to officially integrate non-heteronormative duos. Alternatively, presenting civil unions as a transitory action may satisfy immediate lawful necessities while additional complexities are addressed such as religious factor. A staged roadmap emulating South Africa's example could navigate evolving societal perspectives and jurisdictional boundaries.

5.3.5 **United States - From Pre-Obergefell Civil Unions to Post-Marriage Equality Frameworks**

5.3.5.1 **Pre-Obergefell Civil Unions - Vermont's Approach**

The United States' transition from disunited state-by-state systems of civil unions to systemic marriage equality in *Obergefell* is a complete case study on how various models can facilitate and complicate the way to complete constitutional acknowledgement.[300] Vermont's pioneering civil union statute of 2000, a reaction to the state supreme court decision in *Baker v. Vermont*[301], set the template for next-generation alternative models that other states would copy and alter. Vermont's response establishing "*marriage in all but name*" through the simultaneous extension of marriage-basing statutory provisions to civil unions proved that alternative forms could deliver functional equivalence without necessarily undermining traditional marriage abstractions. The stipulation in the legislation that civil unions must provide "all the same benefits, protections and responsibilities under the law" as marriage created the "functional equivalence" test that would govern future constitutional analysis.

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[299] Bradley S. Smith and J. A. Robinson, *The South African Civil Union Act 17 of 2006: A Good Example of the Dangers of Rushing the Legislative Process*, 22 BYU J. Pub. L. 419 (2008).
[300] WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 45-78 (2002).
[301] Baker v. Vermont, 744 A.2d 864, (1999), (United States).

5.3.5.2 **The Obergefell Case**

The Supreme Court's landmark decision in Obergefell v. Hodges[302] reshaped American non-heteronormative relationship recognition on a revolutionary level by holding that marriage was a fundamental right under the Fourteenth Amendment's Due Process and Equal Protection Clauses. The Court's argument—that marriage is "*the most intimate association between two people*" and "*a keystone of the Nation's social order*"—broke the separate-but-equal logic long supporting civil union regimes and held that denial of marriage itself amounted to dignitary harm alternative institutions could not correct. Justice Kennedy's majority opinion lingered over the fact that the "*right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals*," effectively constitutionalizing marriage equality while noting that the decision did not "*disparage those who continue to adhere to religious or philosophical objections to gay marriage*." The Obergefell revolution sheds light on both the success and limitations of alternative schemes. Although the Supreme Court ruling legalized marriage equality across the country, it expressly did not invalidate established civil union and domestic partnership structures. Colorado, Hawaii, and Illinois, for example, retained their parallel systems to marriage, both offering dual-track systems in which couples can opt between marriage and civil unions by preference.

5.3.5.3 **Lesson for India**

For Indian legal policy, a few lessons from the American path are significant. First, the pre-Obergefell experience reaffirms the need for harmonization between the federal and state levels in applying alternative approaches—India should not create recognition asymmetries between states that would be detrimental to couples seeking portability of status. Second, the variability of state responses illustrates how the legislature can adopt alternative approaches to social and political local conditions with constitutional conformity. Third, the persistence of civil unions after Obergefell implies that others need not be seen as second-class alternatives but as legitimate long-term alternatives meeting a variety of relationship needs.

5.4 **Adapting International Models to the Indian Context**

[302] Obergefell v. Hodges, 576 U.S. 644, (2015), (United States).

While civil union frameworks have seen successful implementation in countries like the UK, Germany, and France, it would be misguided to assume these models can be seamlessly transplanted into India's complex legal environment. India's constitutional architecture, intricate system of personal laws, and federal structure all contribute to a legal landscape that's markedly distinct from the more centralized systems of many Western democracies.

The challenge isn't just about legal drafting. It's cultural, too. Any attempt to introduce alternative forms of relationship recognition in India has to grapple with the country's deep-rooted legal pluralism, the necessity of accommodating diverse religious practices, and the layered authority shared between central and state governments. In short, international models can certainly offer guidance, but meaningful reform in India requires thoughtful adaptation and a creative, context-sensitive approach.

India's law works through several overlaying systems, generating a uniqueness unparalleled in most other legal jurisdictions. The concurrency of differing personal law systems for each religious group and secular legal alternatives is a type of legal pluralism that most nations implementing civil unions have never encountered. The plural system generates new possibilities for including diverse relationship recognition models and new challenges of effecting uniform protection for constitutional guarantees under varying legal traditions.

5.4.1 **Constitutional Requirements and Constraints**

Article 14's promise of equality is the foundation of constitutional law for alternate models, but the Supreme Court's application of the provision has changed dramatically from formal equality requirements. Indian courts' strategy of transformative constitutionalism requires legal frameworks to proactively confront substantive inequalities instead of shying away from novel forms of discrimination. This evolution is one in which civil union frameworks are unable to fulfill constitutional criteria by providing formal legal recognition that appears equal on paper but fails to address the actual disadvantages non-heteronormative couples face in exercising rights and winning social acceptance.

The Navtej Singh Johar[303] landmark decision in fact changed the constitutional context in a crucial manner by ending sexual orientation constitutes a protected characteristic under Article 14's equality clause. Such identification entails more rigorous standards of scrutiny for any discrimination by sexual orientation which is allowed under law, which demands the compelling state interests and narrowly tailored alternative legal regime for non-heteronormative couples to be in a way that is not disproportionately burdensome or discriminatory.

The Court's constitutional reasoning discloses a very refined appreciation of how formal equality can be camouflaging substantive inequality. The judges became aware that LGBTQ+ persons have systemic disadvantage in terms of receiving legal protection, social visibility, and institutional backing, which transcend overt legal prohibitions. This awareness creates constitutional theorists' "*transformative equality mandate*" that compels legal systems to positively remedy historical disadvantages and not simply keep things even or neutral policies that reinforce historical inequalities.[304]

The Supriya Chakraborty Case pushed these constitutional expectations further by acknowledging the extent to which the fundamental right to create intimate relationships goes beyond the definition of traditional marriages. The ruling lays positive constitutional obligations on the state to have legal frameworks where citizens can exercise their fundamental rights to create families and intimate relationships. The recognition puts constitutional pressure on the legislature to enact alternative paradigms where current marriage laws do not include non-heteronormative marriages.

The constitutional legitimacy of individual legal regimes is aided by the Supreme Court's extensive jurisprudence experience on affirmative action and remedial legislation. The Court's reasoning in decisions such as *Indra Sawhney v. Union of India*[305] reveals that the Constitution allows over-inclusive legal categories if they must further compelling equality objectives and are, in fact, as rather than nominally beneficial to the disadvantaged class. This case settles that civil unions may be constitutional where they are as functional as marriage and are for ending discrimination against gay couples.

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[303] **Decriminalisation Case**.
[304] UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS 145-67 (3d ed. 2008).
[305] Indra Sawhney v. Union of India, AIR 1993 SC 477.

Constitutional constraints on alternative structures stem primarily from the dignity principle, which the Court has increasingly reaffirmed in recent fundamental rights case law. The constitutional ban on the establishment of dignitary harm prohibits separate systems of law from sending messages of second-class citizenship or inferiority, even where they offer formally equal rights and benefits. This prohibition demands close attention to how alternative systems are organized, designated, and created to substantiate instead of erode the equal dignity of non-heteronormative relations.

The intersection of alternative frameworks with other constitutional rights adds further depth to constitutional analysis. The privacy rights in *Puttaswamy v. Union of India*[306] provide constitutional protection for close relationships and family decision-making choices that alternative frameworks must avoid interfering with and support. Those privacy rights impose constitutional standards on the functioning of alternative frameworks, like protection against interference with relationship freedom and respect for a variety of family forms as deserving of constitutional protection.

Federal aspects of constitutional obligations put sophistication requirements on framework design since guarantees of constitutional rights should be enforced uniformly over state jurisdictions while being consistent with allowable differences in administrative structures and local contexts. Constitutional separation of powers introduces center-state coordination needs that rival frameworks need to meet to make constitutional protection uniform.[307]

5.4.2 **Integration with Personal Laws and Federal Structure**

The issue of harmonizing alternative systems with India's established regime of personal law is arguably the most challenging adaptation problem of any civil union proposal. In contrast to most nations, which have managed to incorporate alternative systems, India already possesses twin legal regimes for the two prominent religious communities as well as secular alternatives involving a different paradigm of legal integration, and solutions to legal fusion will need to be creative.

In order to comprehend the challenge of consolidating personal law, one must see that India's system of personal law is not just other religions' conventions but a different

[306] Puttaswamy v. Union of India, (2017) 10 SCC 1.
[307] Ratna Kapur, Erotic Justice Law and the New Politics of Postcolonialism (Routledge-Cavendish, 2005).

approach to addressing universal issues regarding family relationships, personal autonomy, and group domination. Hindu personal law, as codified through numerous Hindu Marriage and Succession Acts, is interested in individual discretion subject to religious and cultural limitations. Muslim personal law shares greater community regulation over marriage and family relations, whereas Christian and Parsi personal laws share different interfaces of individual freedom and religious institutional jurisdiction.

One strategy that can be employed in dealing with personal law integration would be to enact civil unions as exclusively secular legal arrangements that have nothing to do with systems of personal law, just as the Special Marriage Act already offers secular marriage alternatives. This solution is the benefit of not having to grapple with challenging questions regarding how civil unions square in various religious legal systems. Still, it also produces the problem of whether solely secular recognition correctly serves the religious and cultural aspects of family life that most couples, gay and lesbian couples included, cherish.

The independent secular model would need civil unions to establish full legal regimes that cover all areas of relationship recognition without needing personal law systems to offer supplementary rights or procedures. This broad approach has the merits of simplicity and consistency civil union couples might be able to understand their rights and obligations are all legally based on civil union law, not in complicated interplay between secular and personal law systems.

However, the independent approach also has potential problems for couples who want to continue as members of their religious groups with legal status for their unions.

The integration challenges also include questions regarding how civil unions would be connected with current legal databases, record systems, and information-sharing systems. Already existing marriage records under the jurisdiction of different state and local governments would have to be harmonized with civil union records so that legal benefits and protections are properly dispensed. The requirement of coordination has both technical implications regarding database compatibility and legal implications regarding the protection of privacy and security of information.

5.5 **Conclusion**

The analysis presented in this chapter demonstrates that alternative legal frameworks for non-heteronormative unions represent both constitutional necessity and practical wisdom within India's complex legal landscape. The constitutional mandate established through cases like *Navtej Singh Johar* and *Supriya Chakraborty* creates an obligation for legal recognition that existing marriage laws cannot fulfill without fundamental restructuring across hundreds of interconnected statutes. Alternative frameworks such as civil unions emerge not as compromises that provide lesser rights, but as innovative legal solutions that can achieve functional equivalence with marriage while respecting the institutional complexity of India's pluralistic legal system.

The comparative analysis of international models reveals that successful alternative frameworks share common design principles: comprehensive rights protection, functional equivalence with marriage, and careful integration with existing legal structures. The experiences of the United Kingdom, Germany, and France demonstrate that parallel institutions can provide meaningful equality while allowing societies to navigate complex religious, cultural, and political considerations surrounding marriage definition. These international precedents offer valuable lessons for India, though direct transplantation remains impossible due to fundamental differences in legal system structure and constitutional requirements.

Alternative legal frameworks for non-heteronormative unions thus represent a constitutional imperative that requires innovative legal thinking to implement effectively within India's unique legal context. The foundation established through conceptual analysis and international comparison provides the groundwork for developing specific design proposals that can fulfill constitutional mandates while proving practically workable within existing institutional structures. The success of such frameworks will ultimately depend on their ability to provide genuine functional equivalence with marriage while respecting the diversity and complexity that characterizes Indian law and society.

CHAPTER 06

CONCLUSION AND RECOMMENDATIONS

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6.1 **Conclusion**

Chapter 1, "*Introduction*" section, places the dissertation in the larger constitutional and socio-legal context of non-heteronormative relationships in India. It illustrates how the colonial history of Section 377 did not only criminalize consenting non-heteronormative relationships but also imbued social stigma, lending strength to discrimination and violence against LGBTQ+ people. The chapter follows the trajectory from Naz Foundation's early triumph through Suresh Koushal's about-turn to Navtej Singh Johar's decriminalization, highlighting judicial intervention has been transformative but not yet complete. Locating the research hypothesis and questions—whether legal recognition holds out the promise to cross the "implementation gap" of decriminalization—the chapter posits that decriminalization per se cannot place substantive equality; instead, an integrated architecture of non-heteronormative unions being recognized in Indian law is required. Humanize The strength of this chapter lies in its relocation of the research problem not just as a legal failure but as a persistent structural imbalance with material repercussions for dignity, freedom, and social belonging. It establishes the analytic trajectory of the book as a whole: Indian legal reform depends not only on legislatures and courts but also on the underlying cultural story.

Chapter 2, "*Evolution of Non-Heteronormative Union Rights in Indian Jurisprudence*", traces the post-colonial shift from colonial criminalization to post-colonial constitutionalism. It traces how Articles 14, 15, and 21 have been invoked to secure dignity, equality, and privacy—first in NALSA (third gender recognition) and second in Navtej (decriminalization of consensual non-heteronormative sexual acts). In light of such historical decisions, the chapter illustrates that the quest for legal recognition of relationships was incomplete, with LGBTQ individuals still lacking marriage-like rights. A critical analysis of judicial thinking i.e., the Supreme Court's toing and froing between constitutional morality and restraint—identifies that legislative inertia allows systemic disparity to persist even as the judiciary has increasingly read rights expansively.

Chapter 3, "*Between Rights and Restraint: The Constitutional Dialogue in Supriyo*", offers a close, attentive reading of the Supriyo @ Supriya Chakraborty judgment, examining majority, concurring, and dissenting opinions with attentiveness. The Court's recognition of the "*right to form a union*" is appropriately welcomed as a growth in constitutional morality, dignity, and privacy. However, the reluctance of the majority to apply the Special Marriage Act (SMA) or personal laws to non-heteronormative couples and deference to legislative supremacy represents a jurisprudential step backwards from the revolutionary promise seen in Navtej. The chapter is acutely aware of the tension between constitutional principle and judicial craft as a method. While the majority abstractly justifies the right to union and love, it denies the right to legal redress, thus creating what can be called "*rights without recognition*." While resistant to judicial imperialism, the dissent refuses to face the requirement of redress for ongoing structural harms.

Chapter 4, "*Examining Marriage Rights, Heteronormative Frameworks, and Contemporary Legal Discourse*", critically examines the intellectual, temporal, and legislative foundations of marriage under Indian law. It challenges the ubiquitous heteronormativity of the legal tradition in the statutory language ("husband," "wife," "bride," "groom") and the institutional cultural coding as procreative, patriarchal, and gender-binary. Analysis of Indian law of marriage and judicial rulings reveals an overwhelmingly entrenched gender binary supported by religious and secular law. The chapter illustrates that the SMA, presented as a secular solution, is defined by binary gender and reproductive reasoning. The argument that legislative reform is warranted is not abdication but a concession that the current legal system is not receptive to broad, interpretive rescuing." it critically examines the intellectual, temporal, and legislative foundations of marriage under Indian law. It challenges the ubiquitous heteronormativity of the legal tradition in the statutory language ("husband," "wife," "bride," "groom") and the institutional cultural coding as procreative, patriarchal, and gender-binary. Analysis of Indian law of marriage and judicial rulings reveals an overwhelmingly entrenched gender binary supported by religious and secular law. The chapter illustrates that the SMA, presented as a secular solution, is defined by binary gender and reproductive reasoning. The argument that legislative reform is warranted is not abdication but a concession that the current legal system is not receptive to broad, interpretive rescuing.

Chapter 5, "*A Study of Alternative Legal Pathways for Non-Heteronormative Unions in India's Evolving Legal Landscape*", discusses models—civil unions, domestic partnerships, registered partnerships—are embraced all over the globe (UK's civil partnerships, France's PACS, Germany's Lebenspartnerschaft, Australia's de facto arrangements, South Africa's constitutional mandate, US pre-Obergefell civil unions). By careful comparative examination, it sets out design requirements for functional equivalence: exhaustive protection of rights (inheritance, maintenance, adoption, medical decision-making), integration into dominant legal systems, and deference to India's pluralist personal-law system. It contends that rival approaches are constitutionally inadmissible as "second-best" only if they are compared to heteronormative norms; instead, they provide creative avenues to fulfil constitutional commitments without overthrowing entrenched marriage laws. By conceptualizing "*family*" as care-based, these models pass the Puttaswamy test of necessity and proportionality and the transformative equality ideal.

6.2 **Advancing Substantive Equality for Non-Heteronormative Unions in India**

The explanatory path through the five chapters of this dissertation provides a complex examination of the formation of constitutional ideals in terms of historically contestatory, judicially formulated, and cross-contextual learning, finally validating the interconnected path of India's progression toward the acceptance of non-heteronormative unions. Chapter 1's recognition of pre-empted constitutional tension between promised equality and practiced exclusion has its own story in Chapter 2's sophisticated tracing of colonial moral imposition upon pre-colonial sexual diversity. History is essential for making sense of judicial reluctance in the here and now since courts grapple with legacy paradigms incompatible with changing constitutional morality. The shift from pre-colonial tolerance to colonial repression, and then on to post-independence legal resilience, suggests how intensely ingrained heteronormative presumptions have been in Indian law, such that the journey towards equality has been constitutionally required but quite challenging.

Chapter 3's detailed analysis of the Supriyo decision illustrates how such inherited tradition persists in contemporary constitutional interpretation, where the Court identifies constitutional rights but cannot remedially enforce them into inherited legal systems. Judicial acknowledgement of constitutional principles and institutional

resistance towards remedial enforcement constitutes the "rights without recognition" model that defines current Indian law on non-heteronormative relationships. Such pressure becomes sharply at the forefront when Chapter 4's sound critique of heteronormative legal models reveals why judicial interpretation on its own cannot bring about equality—the ubiquity of heteronormative assumptions in institutions of law, society, and culture mandates coherent rather than incremental change. Yet, the comparative analysis in Chapter 5 establishes that profound reform is achievable through incremental means that develop institutional capacity and popular support over the long term, capable of achieving real change even within the present constraints.

6.3 **Recommendations**

The Supreme Court's acknowledgment of the fundamental right to form unions of non-heteronormative union establishes a constitutional foundation that demands legal protection and recognition. When such unions remain inadequately safeguarded or unrecognized, it infringes upon these established fundamental rights and constitutes a systemic failure of justice. The contemporary legal discourse reveals that the central issue extends beyond the semantic question of whether non-heteronormative relationships should be included within the traditional definition of "*marriage*." Instead, the substantive struggle concerns the establishment of legal recognition for these unions and the extension of equivalent rights and protections that heteronormative marriages currently enjoy under existing jurisprudence.

Here are some of the recommendations that can be adopted for extension of equivalent rights and protections –

1. ***Recognition of Civil Union Partnerships Through Executive or Legislative Action*** - The Government of India may introduce comprehensive civil union legislation modeled on successful international frameworks, particularly drawing from the German or the French or the United Kingdom system. This civil union framework would operate parallel to existing marriage laws, providing a separate but comprehensive legal recognition mechanism for non-heteronormative couples. The civil union statute could be enacted under Parliament's concurrent or residual powers, avoiding direct conflict with existing personal law frameworks while establishing a secular, gender-neutral partnership registration system.

Currently, Central Government has established a six-member committee[308], headed by Cabinet Secretary Rajiv Gauba, to examine issues faced by the LGBTQ+ community following the Supreme Court's October 2023 directive in the non-heteronormative marriage case.[309]

2. ***Establish a Civil Union Registry System*** - Create a separate legal framework through legislation establishing "*Civil Unions*" as a legal category. This registry would operate independently of existing marriage registration systems under a Civil Union enactment.

3. *Executive and Administrative Circulars for Non-Discrimination* - The Union Government, should issue comprehensive administrative circulars to all ministries, departments, and public sector undertakings directing the elimination of discrimination against non-heteronormative couples in government services and benefits. These circulars should mandate equal treatment in housing allowances, family pensions, medical reimbursements, leave policies for partner care, and dependent benefits. State governments should be encouraged to issue similar directives covering state-level services, employment policies, and benefit schemes.

For example – The Ministry of Home Affairs issued a comprehensive circular on July 15, 2024, to all State and UT authorities addressing prison visitation rights for the LGBTQ+ community, emphasizing that members of the queer community face discrimination based on gender identity or sexual orientation and often encounter violence and disrespect. The circular reiterates provisions from the Model Prison Manual 2016 and Model Prisons and Correctional Services Act 2023, specifically clarifying that LGBTQ+ prisoners have equal rights to meet family members (including chosen family), relatives, friends, and legal advisers without discrimination or judgment, with interviews permitted once a fortnight and communication through both physical and virtual modes under proper supervision.[310]

4. ***Reform of Adoption Guidelines and Child Welfare Policies*** - The Central Adoption Resource Authority (CARA) should immediately implement the Supreme Court's

[308] Gazette of India, MINISTRY OF LAW AND JUSTICE, https://www.verdictum.in/pdf_upload/253725-1609268.pdf, (last visited: 22.05.2025).
[309] *Centre forms 6-member panel to examine issues faced by queer community*, Financial Express, (2024), https://www.financialexpress.com/india-news/centre-forms-6-member-panel-to-examine-issues-faced-by-queer-community-bkg/3459864/ (last visited: 22.05.2025).
[310] Government of India Ministry of Home Affairs, https://www.mha.gov.in/sites/default/files/LGBTQ_16072024.pdf, (last visited: 22.05.2025).

direction in Supriyo by revising adoption guidelines to explicitly eliminate discrimination against unmarried individuals and non-heteronormative couples. The revised guidelines should establish clear criteria focusing on the prospective parents' capacity to provide stable, loving homes rather than marital status or sexual orientation. State child welfare committees should receive mandatory training on non-discrimination principles and the research demonstrating positive outcomes for children raised by non-heteronormative parents.

5. ***Healthcare Rights and Medical Decision-Making Authority*** - The Ministry of Health and Family Welfare should issue comprehensive guidelines requiring all hospitals, clinics, and healthcare facilities to recognize non-heteronormative couples for medical consent, visitation rights, and next-of-kin notifications. These guidelines should establish standardized *healthcare partnership registration forms* that couples can complete to establish legal authority for medical decisions, similar to advance directive procedures.

6. ***Housing Rights and Anti-Eviction Protections*** - State rent control acts and tenancy laws should be interpreted to protect non-heteronormative couples from discriminatory eviction or rental refusal. The Model Tenancy Act should be amended to include explicit anti-discrimination provisions protecting tenants based on sexual orientation and gender identity.

7. ***Legal Documentation and Contract Recognition Systems*** - District registrars should be empowered to register something like domestic partnership deeds that establish legal relationships for administrative and judicial purposes, even if not equivalent to marriage. These deeds would provide evidence of committed relationships and for other benefit purposes. The registration system should include standardized forms for mutual wills, power of attorney arrangements, and healthcare directives tailored for non-heteronormative couples.

8. ***Establish Specialized Family Courts with LGBTQ+ Jurisdiction*** - Create dedicated judicial mechanisms within existing family court structures to handle civil union matters, establishing specialized benches with exclusive jurisdiction over non-heteronormative relationship disputes while maintaining complete separation from marriage law adjudication.

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