EQUALITY DEFERRED: THE BATTLE FOR MARRIAGE AND ADOPTION RIGHTS FOR INDIA'S LGBTQ COMMUNITY

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ABSTRACT

This paper examines the unfinished trajectory of LGBTQ rights in India following the decriminalisation of consensual same-sex relations in *Navtej Singh Johar v. Union of India* (2018), with particular focus on the continued denial of marriage and adoption rights. While *Navtej* marked a constitutional watershed by affirming sexual orientation as intrinsic to dignity, liberty, and equality under Articles 14, 15, 19, and 21, the subsequent decision in *Supriyo v. Union of India* (2023) reveals the limits of judicial willingness to translate these principles into full legal recognition of queer relationships. The Supreme Court's refusal to recognise same-sex marriage, grounded in the assertion that there is no fundamental right to marry and that such reform lies within Parliament's domain, has effectively deferred substantive equality for LGBTQ persons. The paper critically analyses this judicial deference by interrogating Indian marriage statutes, particularly the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954, demonstrating that neither statute expressly mandates heterosexuality as an essential condition for marriage. It argues that the Court's reluctance stems less from statutory text and more from institutional restraint, thereby narrowing the transformative potential of constitutional interpretation. Drawing on comparative constitutional developments and scholarly critiques, the article situates *Supriyo* within a broader debate on the judiciary's role in advancing minority rights. Further, the paper explores adoption rights as a logical extension of marriage equality, highlighting how current adoption frameworks under the Juvenile Justice Act and CARA Regulations indirectly discriminate against same-sex couples by privileging legally married heterosexual families. It contends that exclusion undermines both constitutional equality and child welfare, especially in light of India's growing number of orphaned and abandoned children. By integrating legal analysis with

historical and cultural evidence of sexual diversity in India, the article challenges the narrative that homosexuality is alien to Indian society. Ultimately, it argues that meaningful equality for LGBTQ persons requires inclusive family law reform that aligns constitutional values of dignity, autonomy, and substantive equality with lived social realities, moving beyond colonial legacies and legislative inertia.

Key Words: - *Judiciary, Legal Education, Access to Justice, Judicial Reform, Constitutional Governance.*

INTRODUCTION

In September 2018, the Supreme Court of India delivered one of the most transformative constitutional decisions of the century by reading down *Section 377 of the Indian Penal Code*[1], thereby decriminalising consensual same-sex relations between adults. The judgment in *Navtej Singh Johar v. Union of India* unanimously held that the prohibition of consensual homosexual conduct was "irrational, indefensible and manifestly arbitrary" and violated Articles 14, 15, 19 and 21 of the Constitution[2]. In doing so, the Court recognised that sexual orientation is an intrinsic element of personal liberty and dignity protected under the Constitution, reversing the earlier ruling in *Suresh Kumar Koushal v. Naz Foundation,* where the criminality of Section 377 had been upheld, where the Court held that Section 377 defined carnal intercourse "against the order of nature" and did not suffer from constitutional infirmity on its face. It hadbeen reasoned that the LGBT community constituted a minuscule fraction of the population, and the petitioners had failed to present sufficient evidence of discrimination by the State.

Yet even as the legal recognition of adult private homosexual conduct marked a constitutional milestone, the next frontier, full legal recognition of same-sex relationships, marriage and adoption rights, remains unfinished. The most significant case to confront this question is *Supriyo v. Union of India*, a consolidated Supreme Court challenge in which same-sex couples sought statutory recognition of marriage and associated family rights under existing Indian laws.

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[1]Indian Penal Code, 1860, (Act No. 45 of 1860) s 377

[2]The Constitution of India, 1950, Arts. 14, 15, 19 & 21

SUPREME COURT'S INITIAL REFUSAL TO RECOGNISE SAME-SEX MARRIAGE

In *Supriyo v. Union of India*, a five-judge Constitution Bench delivered its verdict on October 17, 2023, addressing whether same-sex couples have a right to marry under Indian law. Although the petitions sought recognition under the *Special Marriage Act, 1954*, the *Hindu Marriage Act, 1955*, and other marriage statutes, the Supreme Court held that there is nofundamental right to marry under the Constitution, whether for heterosexual or same-sex couples, and that statutory recognition of marriage is a matter for Parliament rather than the judiciary.

The majority observed that while the Constitution protects individual rights of intimacy, choice of partner, and private relationships, it does *not* automatically translate into a fundamental right to marriage. The Bench expressed the view that extending marriage rights to same-sex couples would require legislative reform, as the institution of marriage and its associated legal consequences are codified by statute.

This refusal rested on two primary contentions: that existing statutes do not explicitly contemplate same-sex unions, and that judicial reinterpretation to create new legal forms of marriage would amount to legislation, a domain reserved for Parliament. In doing so, the Court deferred full recognition of marriage rights to a future legislative process, a decision that has drawn both criticism and sustained legal debate.

Critics argue that the Supreme Court's refusal in *Supriyo v. Union of India* to recognise marriage rights for same-sex couples reflects an overly cautious and deferential judicial philosophy that undermines constitutional guarantees of substantive equality. Professor Ryan Thoreson in *Dignity Deferred: Supriyo v. Union of India and LGBTQ Rights*contends that by treating marriage as solely a legislative domain, the Court missed an opportunity to interpret constitutional values of dignity and equality expansively, as other jurisdictions have done in recognising LGBTQ marriage rights. For instance, in Canada, the Supreme Court and provincial courts played a role in the legal evolution leading to the nation's *Civil Marriage Act (2005)*, which opened civil marriage to same-sex couples on equality grounds. Additionally, Ruth Vanita's book *Love's Rite: Same-Sex Marriage in India and the West*[3]emphasised how denying

[3] Ruth Vanita, *Love's Rite: Same-Sex Marriage in India and the West* (Palgrave Macmillan 2005)

recognition perpetuates exclusion despite constitutional principles of equality, arguing that such deference sustains historic discrimination against queer relationships.

MARRIAGE LAWS IN INDIA: WHAT THE STATUTES ACTUALLY SAY

Contrary to the assumption that Indian marriage laws presuppose heterosexuality as an immutable element, a close reading reveals that neither the *Hindu Marriage Act, 1955,* nor the *Special Marriage Act, 1954,* expressly restricts marriage only to heterosexual couples.

Section 5 of the Hindu Marriage Act outlines the conditions for marriage. It requires that the parties must be Hindus, free from certain degrees of relationship, capable of giving valid consent, of age (bridegroom at least 21, bride at least 18), and of sound mind. It does not contain an explicit textual condition stating that the union must be between a man and a woman. The focus of the statutory conditions is on consent, capacity, age and prohibited relationship, without reference to sexual orientation. This statutory neutrality leaves room for constitutional interpretation that could accommodate same-sex unions, but courts in *Supriyo* treated the absence of explicit permissive language as a barrier to judicial recognition.

In a similar vein, Section 4 of the Special Marriage Act, which enables civil marriages across religions, mandates conditions such as age eligibility, mental capacity, and absence of a living spouse, but also does not expressly rule out same-sex couples. Even though gendered terms appear in age requirements, the essence of the provision is consent and eligibility, not inherently heterosexual exclusivity. This has been a central contention in legal commentary, arguing that the Acts can, and should, be read in a gender-neutral manner to include all couples.

Satchit Bhogle argues that both the HMA and the SMA are capable of being interpreted as they stand to permit same-sex marriage, because the statutory language does not expressly prohibit unions between two persons of the same gender; rather, the conditions focus on consent, capacity, and eligibility, opening space for constitutional and purposive interpretation. Kushala Simha critically analyses how the Hindu Marriage Act is interpreted and contends that exclusion of same-sex and transgender couples from marital recognition is not compelled by text but by conventional reading habits; the paper calls for a re-interpretation that aligns statutory language with constitutional guarantees of equality and dignity.

In a sociology-law article, Gomes examines the Special Marriage Act's secular and progressive framework, emphasising that the SMA's enabling text ("any two persons") supports an inclusive reading where gender and sexual orientation are not substantive legal limits on marriage eligibility.In a BRICS Law Journal article, Debarati Chowdhuryexamines the interpretation of "gender"-loaded terminology in the HMA and related laws, demonstrating how legal reform or interpretive adjustments can de-gender statutory terms such as "husband" and "wife" without disrupting the broader legal framework.

Paras Sharma's analysis highlights litigation strategies asserting that the HMA and SMA's references to adults entering into marriage do not by necessary implication enforce heterosexual exclusivity, and that the absence of express restriction means the statutes should be interpreted under the Constitution's equality norms. Taken together, this body of work supports the conclusion that the existing statutory framework is not inherently heteronormative in text and can be read in a gender-neutral manner to accommodate marriage equality, aligning statutory interpretation with constitutional principles of equality, dignity, and non-discrimination.

HISTORIC AND CULTURAL EVIDENCE OF SEXUAL DIVERSITY IN INDIA

A recurrent socio-political argument against same-sex relationships in India posits homosexuality as a "Western import" alien to Indian civilisation. However, extensive cultural and literary sources contradict this narrative and demonstrate that sexual diversity has been part of Indian history long before colonial intervention.

In *Khajuraho*, the celebrated medieval temple complex, stone carvings depict erotic scenes, including same sex embraces among women and intimate representations between men. Scholars generally interpret these as evidence of a societal awareness of sexual expression beyond strictly heterosexual norms.

Classical Indian epics also contain stories that suggest acknowledgment of diverse sexual and gender expressions. The *Valmiki Ramayana* recounts episodes where *Rakshasa* women are described in intimate physical contact with other women, and it narrates the tale of King Dilip's two queens being divinely instructed to conceive a child together, a narrative that culminates in the birth of *Bhagiratha*. The *Mahabharata* includes the account of *Shikhandini* (later *Shikhandi*), who undergoes a gender transformation, and whose role is central to the defeat of the warrior

Bhishma. These stories illustrate that non-normative gender identities and relational dynamics existed in classical Indian narratives.

Among the *Puranas*, myths such as Vishnu's avatar as Mohini, a female form, and the resulting union with *Shiva* leading to the birth of *Ayyappa* indicate fluidity in divine gender representations. Texts like the *Narada Purana* include references to behaviours that mirror later colonial constructs, such as "unnatural offences" (terms later echoed in Section 377), which presuppose their existence in social practice. The *Kamasutra* of Vatsyayana, composed around the 4th century CE, dedicates the Ninth Chapter to sexual acts including oral sex, homosexuality, and mentions of *tritiya prakriti* (third nature), reflecting recognition of gender non-conforming identities in classical Indian literature.

Even texts like the *Manusmriti*, which prescribe penalties for homosexual conduct, implicitly affirm that such conduct was socially known and addressed in ancient legal thought. The fact that punitive measures were articulated presupposes the conduct's presence. Taken together, these historical and literary sources undercut the misconception that sexual diversity is a recent or "foreign" phenomenon in Indian tradition.

ADOPTION RIGHTS AND THE LOGICAL EXTENSION OF MARRIAGE EQUALITY

Once marriage rights are recognised, the issue of adoption rights for same-sex couples logically follows. Under current Indian adoption frameworks, primarily the *Juvenile Justice (Care and Protection of Children) Act, 2015* and the *Central Adoption Resource Authority (CARA) Regulations*, adoption eligibility favours married couples with stable marital relationships and single individuals. The way CARA eligibility is structured has, in practice, disadvantaged same-sex couples who lack formal legal spousal status because their relationships are not recognised under marriage law.

In *Supriyo v. Union of India*, the Supreme Court upheld these existing adoption norms, maintaining the requirement of marital stability for couples. The majority held that, as with marriage, legislative reform is necessary to redefine adoption eligibility for queer couples, and refused to recognise unmarried same-sex couples as a class for joint adoption. Dissenting opinions in the case, however, argued that exclusion based on marital status, and by extension

sexual orientation, constitutes indirect discrimination under Articles 14 and 15[4], and that parental fitness should be determined by capacity to care rather than orientation.

One of the most contested points in the adoption debate is the invocation of "best interest of the child." Critics of expanding adoption rights argue that there is insufficient evidence that same-sex couples can provide environments as beneficial as those of heterosexual couples. However, substantial research internationally, and common-sense considerations of child welfare realities in India, show that children fare well when raised in stable, supportive families regardless of the parents' sexual orientation. The number of orphan and homeless children was 4,521 in 2020-21 and 5,106 in 2021-22, rose to 5,663 in 2022-23, according to the data shared by the Women and Child Development Minister Smriti Irani in Rajya Sabha, and it is only increasing manifold every year. The real social harm arises when such children remain unadopted due to restrictive eligibility criteria, especially when the number of abandoned, orphaned and vulnerable children in the country is so high. Expanding adoption eligibility to include legally recognised LGBTQ couples would not only fulfil fundamental rights but also serve pressing child welfare needs.

It is also important to note that if marriage equality is recognised and same-sex unions are incorporated within the definition of "stable marital relationship" as required by CARA, the purported conflict between adoption regulation and marriage law disappears entirely. LGBTQ couples would meet the eligibility criteria for joint adoption without any need for special exemptions, aligning family law recognition with child welfare policy.

Beyond domestic constitutional principles, India's adoption and family law regime must be interpreted in light of international human rights obligations to children. India is a State Party to the United Nations Convention on the Rights of the Child (CRC), which requires that in all actions concerning children, the best interests of the child shall be a primary consideration (Article 3) and that children are entitled to alternative care, including adoption when required, under competent state procedures (Article 21).

This international framework places a legal obligation on the Indian state not to resist recognising whatever caregiving relationships best fulfil children's developmental needs. Given that the CRC's child-focused standard displaces discriminatory criteria based on marital status or

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[4]The Constitution of India, 1950, Arts. 14 & 15

stigmatised family forms, adoption eligibility should prioritise parental capacity and child welfare over narrow formal classifications.

Empirical evidence from high-quality international research confirms that the performance and well-being of children raised by same-sex parents are comparable to, and in some cases superior to, those raised by different-sex parents. A major population-level study conducted by Mazrekaj, De Witte & Cabus (2020) using administrative panel data from the Netherlands found that children raised by same-sex parents from birth performed better academically in both primary and secondary education compared to children with different-sex parents. Similarly, research by Jan Kabátek & Francisco Perales (2021) using linked administrative data from the Netherlands shows that children in same-sex-parented families outperform their peers on standardised test scores, high school graduation rates, and college enrolment.

Beyond academic outcomes, studies on behavioural and social adjustment indicate no disadvantage for children with same-sex parents. For example, research comparing children aged 6–16 with same-sex and different-sex parents in the Netherlands found no significant differences in prosocial behaviour, emotional adjustment, hyperactivity, and peer problems. Broad syntheses of the literature similarly conclude that overall well-being indicators, including psychological adjustment and social outcomes, do not differ negatively based on parental sexual orientation.

These findings directly refute claims that same-sex parenting is inherently detrimental to child development. Instead, they demonstrate that children raised in LGBTQ households are as well-adjusted academically and socially as those with heterosexual parents.

Opposition often argues that children in same-sex parent families will face unique difficulties due to societal prejudice. This argument, however, is neither supported by robust evidence nor a sound basis for restricting rights. If legal recognition and social acceptance were withheld whenever society resisted a progressive reform, many harms tolerated in Indian society, such as dowry practices, victim-blaming in sexual assault cases, and other systemic atrocities, would persist unchallenged simply because society was “not accustomed” to change. Legal progress has historically led social change rather than followed it; law serves to protect rights and shape norms, especially when societal prejudices exist.

Therefore, the empirical evidence on child outcomes in same-sex parent families, combined with the imperative to align domestic law with constitutional and international obligations, strongly supports expanding adoption eligibility to include legally recognised LGBTQ couples.

THE COLONIAL LEGACY OF SECTION 377 AND CONTEMPORARY RIGHTS

Section 377 of the Indian Penal Code[5], enacted in 1861 during British rule, criminalised "carnal intercourse against the order of nature" and became the legal basis for the prosecution of consensual same-sex conduct for over a century. The 2018 decision in *Navtej Singh Johar* struck down Sections of Section 377 insofar as they criminalised consensual same-sex relations between adults, emphasising that LGBTQ persons are entitled to dignity and equal protection under the Constitution. This colonial legacy, now dismantled, underscores how imported legal norms shaped historic discrimination; it is a powerful reminder that contemporary Indian law should evolve beyond colonial frameworks that India has itself rejected.

Ironically, the very countries that once exported Section 377, such as the United Kingdom, now legally recognise same-sex marriage and provide broad LGBTQ rights, including adoption, under the *Marriage (Same Sex Couples) Act, 2013*. This contrasts sharply with the current Indian position that continues to defer marriage and adoption equality, revealing how colonial inheritance continues to shape present inequities.

CONCLUSION: TOWARDS INCLUSIVE FAMILY LAW REFORM

The constitutional journey of LGBTQ rights in India reflects a paradox of progress and restraint. While *Navtej Singh Johar v. Union of India* decisively dismantled the criminal stigma surrounding queer intimacy, the Supreme Court's subsequent hesitation in *Supriyo v. Union of India* underscores the limits of judicial willingness to translate decriminalisation into full civic and familial equality. The refusal to recognise same-sex marriage and adoption rights does not negate constitutional morality, but it undeniably postpones its fulfilment.

This deferment is particularly striking given that Indian marriage statutes are not textually irreconcilable with gender-neutral interpretation, and that constitutional jurisprudence has repeatedly affirmed dignity, autonomy, and equality as living principles rather than static

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[5]Indian Penal Code, 1860, (Act No. 45 of 1860) s 377

abstractions. When read alongside India's own cultural and historical acknowledgment of sexual diversity, the argument that marriage equality is alien to Indian society becomes increasingly untenable. The persistence of such claims reveals not constitutional constraint, but socio-political reluctance.

Equally compelling is the adoption debate. Excluding same-sex couples from joint adoption not only perpetuates indirect discrimination but also undermines the "best interests of the child" standard by privileging form over substance. In a country grappling with a growing population of orphaned and vulnerable children, denying capable and willing parents legal recognition serves neither child welfare nor constitutional reason.

Ultimately, equality deferred is equality denied. The Constitution does not merely protect individuals in private spaces; it guarantees equal participation in public institutions, including family and kinship structures. While Parliament may be the appropriate forum for comprehensive reform, constitutional courts have an equally vital role in ensuring that legislative inertia does not hollow out fundamental rights.

The recognition of marriage and adoption rights for LGBTQ persons is not a demand for special treatment, but a claim to equal citizenship. India's constitutional promise will remain incomplete until the right to form a family is extended to all, without distinction, in law and in lived reality.

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