
CHALLENGING HETERONORMATIVITY: A COMPARATIVE CONSTITUTIONAL ANALYSIS OF LGBTQ+ MARRIAGE EQUALITY AND FAMILY LAW REFORM IN INDIA

Shivam Shukla, LLM (WBNUJS), UGC-NET-JRF

Adrija Majumdar, LLM (WBNUJS), SLS-Pune (B.A.LLB)

ABSTRACT

The paper will look at the changing legal status of LGBTQ + persons in India with reference to marriage equality and its implications on Indian family law. It is based on recent jurisprudence (especially Navtej Singh Johar and NALSA) and examines the Supreme Court decision of October 2023 (Supriyo v. The review petitions that are still pending and the Union of India). The paper contextualizes these developments in the Indian constitutional setup (Articles 14, 15, 21, etc.) and secular family laws (e.g. the Special Marriage Act). A comparative analysis of jurisdictions such as the United States shows how judicial and legislative treatment of same-sex marriage has transformed family law and parentage rights in other jurisdictions. This doctrinal study, based on case law and the literature, takes into account the international human rights standards (e.g. ICCPR, UDHR) and socio-legal research on the concept of relational equality. The paper cites enforcement challenges which include discriminative personal laws, prohibitive adoption/surrogacy policies, and stigma. It claims that the legalization of same-sex unions (marriage or civil equivalent) may trigger changes in adoption, assisted reproduction, and guardianship, and thus, “transform” Indian family law to be more inclusive. The conclusion provides policy suggestions to amend Indian law and reform legislation and institutions to ensure consistency with constitutional equality guarantees and human rights principles.

Keywords: LGBTQ+, same-sex marriage, family law, India, constitutional law, adoption, surrogacy, comparative law, human rights.

Introduction

The situation with LGBTQ+ rights in India has been changing dramatically within the last ten years. In 2018, the Supreme Court decriminalized consensual homosexual acts and explicitly acknowledged the LGBTQ+ Indians as equal constitutional citizens. Such landmark ruling (*Navtej Singh Johar v. Union of India*) created room to make additional claims of equality. Activists have since made many petitions to have same-sex relationships be recognized by law, culminating in the consolidated *Supriyo a.k.a. Supriya Chakraborty v. Cases Union of India* (2023)¹. The cases, before a five-judge Constitutional Bench, questioned the non-inclusion of same-sex couples in the marriage laws of India (including the Special Marriage Act, 1954) and other laws (foreign marriages, citizenship, adoption). However, in its October 2023 ruling, the Court refused to give marriage rights to same-sex couples, saying that “the authority to grant marriage rights to same-sex couples is vested in Parliament, not the court”. However, the Court emphasized that LGBTQ+ individuals have the right to live without discrimination and should have equal access to goods, services, and fundamental rights. This judgment puts India in a legal dilemma: on the one hand, the dignity of LGBTQ + is recognized constitutionally (as in *Navtej Johar*² and *supra v. Union of India*³ show), but statutory family law continues to define marriage as strictly a union between a man and a woman. Conversely, by early 2023 thirty-two nations have legalized marriage equality or had it ruled by the courts. In such jurisdictions (e.g. the United States following *Obergefell* The extension of marriage to same-sex couples (*Hodges* (2015))), provoked a wave of changes in parentage, adoption, inheritance, and welfare law. By leaving the issue of same-sex marriage to Parliament, the Supreme Court of India has indicated that some action is required on the part of the legislature.⁴ This paper examines the legal and constitutional framework of LGBTQ + family rights in India and the possibility of the Indian family law changing through marriage equality. It poses the question: How are the constitutional guarantees of India (Articles 14, 15, 21, etc.) and personal statutes that are currently governing the LGBTQ+ relations? What were the arguments and norms presented by the *Supriyo* petitioners and what was the Court response? What is the comparison between the Indian experience and other jurisdictions? Specifically, what can be learned about the U.S. and U.K., where the same-sex marriage and family laws have developed? Lastly, what are the key

¹ *Supriyo @ Supriya Chakraborty & Anr. v. Union of India*, Writ Petition (Civil) No. 1011 of 2022, 2023 INSC 920 (India).

² *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

³ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 (India).

⁴ Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 Harv. L. Rev. 1185 (2016).

obstacles, both legal and social, to the enforcement of LGBTQ+ rights in India, and what policy changes should be made to guarantee substantive equality?

In order to answer these questions, the paper carries out a doctrinal and comparative analysis. It looks at major Indian cases (e.g. Johar, NALSA, Shakti Vahini), constitutional provisions, and recent laws (e.g. the Surrogacy Regulation Act 2021, Assisted Reproductive Technology Act 2021, CARA regulations 2022) that regulate family rights. It also relies on international human rights instruments (e.g. ICCPR) and academic writings on the concept of relational equality. The objective is to determine whether and how marriage equality claims may serve as a catalyst to wider family law reform in India.

This introduction has prepared the ground by explaining the problem and context. The working hypothesis is described next, and then the research methodology is described. An overview of the literature is then used to place the study in the context of existing scholarly discussions. The subsequent chapters are detailed and include the legal framework of LGBTQ+ rights in India, jurisprudence of marriage and family rights, comparative analysis with other jurisdictions and lastly, the social issues of LGBTQ+ people. The conclusion summarizes the results and provides policy recommendations to lead India to complete legal equality of LGBTQ + families.

Hypothesis

The present paper works on the assumption that the legalization of same-sex relationships (either in the form of marriage or some other institution) can become a revolutionary tool of the Indian family law. Specifically, it argues that not only would the provision of marriage equality to LGBTQ+ persons vindicate their dignity and equality under Articles 14, 15 and 21 of the Constitution, but it would also exert pressure to reform other aspects of family law (including adoption, guardianship, and assisted reproduction) that are currently closed to them⁵. In this way, marriage equality is regarded as a goal in itself and a tool to reach the greater inclusiveness in the Indian family law.

⁵ India: Failure to Legalise Same-Sex Marriage a 'Setback' for Human Rights, Amnesty Int'l (Oct. 17, 2023), <https://www.amnesty.org/en/latest/news/2023/10/india-failure-to-legalise-same-sex-marriage-a-setback-for-human-rights/>

Research questions

- i. To what extent do the constitutional guarantees under Articles 14, 15, 19, and 21 of the Indian Constitution support the claim for marriage equality and broader family law rights for LGBTQ+ individuals?
- ii. How has the Indian Supreme Court's decision in *Supriyo v. Union of India* shaped the legal discourse on marriage equality, and what implications does its deference to Parliament have on future LGBTQ+ family law reforms?
- iii. How have jurisdictions like the United States and the United Kingdom implemented marriage equality, and what comparative lessons can India draw from their experiences in transforming related family laws such as adoption, surrogacy, and parentage?
- iv. What legal, institutional, and social barriers hinder the effective realization of family rights for LGBTQ+ persons in India, and how can legislative and policy reforms address these challenges to achieve substantive equality?

Research Methodology

The methodology used in the research is doctrinal and comparative. It will entail the study of primary legal materials (the Constitution of India; laws like the Special Marriage Act, Hindu Marriage Act, Surrogacy (Regulation) Act 2021, ART Act 2021; adoption regulations; and court cases) and secondary sources (scholarly articles, human rights reports, reliable news reports). Constitutional provisions and case law on LGBTQ + and family rights are interpreted through doctrinal legal analysis. The comparative legal analysis is used in the analysis of how other jurisdictions (especially the U.S. and U.K.) have dealt with same-sex marriage and family matters. Normative human rights considerations are also used in the study, such as references to international law (e.g. ICCPR, UDHR) and commentary by organizations (e.g. Amnesty International). Reliable sources are used throughout: judicial texts and law reports, peer-reviewed articles (e.g. Agarwal 2023), and reputable news sources of factual developments (e.g. Pew Research Center, Washington Blade, Amnesty International press). These sources are

referenced by quotations and data to guarantee academic rigor.⁶

Literature Review

There is an increasing literature on the interaction between LGBTQ + rights and family law in India. The article by Douglas NeJaime points out the possibility of marriage equality cases to shed light on the inadequacies of Indian family law in relation to non-heterosexual couples. Agarwal contends that legalizing marriage to same-sex couples may initiate changes in the parentage law such as guardianship, adoption, and assisted reproduction. He places this argument in the context of the so-called relational rights approach advanced by U.S. scholars such as NeJaime (2016), Joslin (2017), and Saez (2015), which views marriage equality as a tool to increase the recognition of various family forms. This is opposed to a more assimilationist perspective that would simply integrate same-sex couples into the current frameworks; Agarwal and others see marriage equality as a catalyst to change the current frameworks to become more inclusive⁷.

Saptarshi Mandal (2021)⁸ also refers to the debate about marriage equality in India as a debate between an assimilationist (minimal change) and a transformative (redefinition of family institutions) approach. According to the literature, American and European LGBT movements used to argue over the so-called access vs. voice strategies: should they seek to be included in the existing institutions (marriage) or should they demand a completely new paradigm? ⁹. Agarwal and others are inclined to the voice/transformation approach, which implies that the pressure on the right to marriage might lead to a wider reconsideration of the legislation on parenthood¹⁰.

The politics of marriage equality in India, including the interaction of religion and personal law, has also been discussed by Indian commentators like Menon and Dubrow. One of the working papers previews that Supriyo will ask how gendered concepts of marriage in personal

⁶ *Indian Supreme Court Continues to Hear Challenges to Marriage Equality Ruling*, Washington Blade, July 25, 2024, <https://www.washingtonblade.com/2024/07/25/indian-supreme-court-continues-to-hear-challenges-to-marriage-equality-ruling/>.

⁷ NeJaime, *supra* note 5, at 1192.

⁸ Saptarshi Mandal, *Assimilation or Transformation? Marriage Equality and the Politics of Family Law in India*, 14 NUJS L. Rev. 1 (2021).

⁹ Macarena Sáez, *Transforming Family Law Through Same-Sex Marriage: Lessons from (and to) the Western World*, 25 Duke J. Comp. & Int'l L. 125 (2015).

¹⁰ Akshat Agarwal, *Marriage Equality and the Law of Parenthood in India*, India Const. L. Rev. Blog (Feb. 2023), <https://www.constitutionallawreview.co.in/blog/marriage-equality-and-the-law-of-parenthood-in-india>.

laws (Hindu, Muslim, etc.) will be harmonized with fundamental rights. But it is only now that Supriyo is being analyzed in detail doctrinally. Law journals and blogs (e.g. Human Rights in Context) have started to draw parallels between Supriyo and Obergefell in the U.S., because the U.S. Supreme Court in 2015 based marriage equality on the 14th Amendment¹¹, whereas the Indian bench focused on the democratic process¹².

The one thing that the existing literature can agree on is that the constitutional guarantee of equality in India (Articles 14, 15, 21) is wide. As an illustration, Navtej Johar believed that sexual orientation discrimination is prohibited by Articles 14, 15, 21, and Article 19(1)(a)¹³. NALSA also provided protection under these Articles to gender identity. After Johar, academics observe that sexual orientation is an indispensable feature of privacy and therefore, it is constitutionally safeguarded. Therefore, it is claimed that there is a solid doctrinal basis of equal family rights. The most important question is how this foundation is relevant to marriage and other statutes.

At the international level, Amnesty International and other human rights organizations have stressed that marriage and family life are fundamental human rights¹⁴. The right to establish a family without discrimination is guaranteed by the Universal Declaration (Art.16) and ICCPR (Art.23,26). Such norms have affected courts such as Obergefell, which defined marriage as a fundamental right that is essential to dignity and equality. The Indian rhetoric also appeals to dignity and freedom. Indicatively, the Madras High Court has recently referred to Navtej Johar, NALSA and Shakti Vahini to reiterate that the right to choose one spouse (therefore to marry) is a part of Article 21 liberty.¹⁵

Overall, the literature suggests (1) the growing international trend of legalizing same-sex marriage, (2) the presence of powerful constitutional principles in India in favor of LGBTQ+ equality, and (3) a strategic argument on whether marriage equality arguments should aim to

¹¹ *Supriyo and Obergefell: A Comparative Analysis of the Marriage Equality Debate in India and the U.S.*, Human Rights in Context (Oct. 2023), <https://www.humanrightsincontext.be/post/supriyo-and-obergefell-a-comparative-analysis-of-the-marriage-equality-debate-in-india-and-the-us>.

¹² *Supriyo and Obergefell: A Comparative Analysis of the Marriage Equality Debate in India and the U.S.*, Human Rights in Context (Oct. 2023), <https://www.humanrightsincontext.be/post/supriyo-and-obergefell-a-comparative-analysis-of-the-marriage-equality-debate-in-india-and-the-us>

¹³ *Navtej Singh Johar & Ors. v. Union of India*, Writ Petition (Criminal) No. 76 of 2016, AIR 2018 SC 4321, (2018) 10 SCC 1 (India).

¹⁴ Amnesty Int'l, *supra* note 2.

¹⁵ *Madras High Court Says Families Are Possible Outside Marriage*, Washington Blade, June 17, 2025, <https://www.washingtonblade.com/2025/06/17/madras-high-court-says-families-are-possible-outside-marriage/>

fit into the current family law or to transform it. The paper is an extension of these analyses by offering a comprehensive, current analysis of Indian law, by tracking the interaction of Supriyo and related developments with personal law, and by suggesting a way forward.

1. Legal and Constitutional Framework in India

The Constitution of India defines itself as a secular republic, although personal laws of marriage and family are mostly religion-based. Each of the Hindu law, Muslim law, Christian law and Parsi law has its own statutes of marriage, divorce, adoption etc. A secular law, the Special Marriage Act (1954), offers a civil marriage regime, which however is only available to heterosexual couples (it still needs a bride and groom). Indian law does not permit or acknowledge a marriage between two people of the same sex. As a matter of fact, cohabitation by homosexuals was also criminalized even in the past.

1.1 Criminal Law and Privacy: Section 377 of the Indian Penal Code (1860) used to criminalize carnal intercourse against the order of nature. This law had been applied to persecute LGBT individuals. *Naz Foundation v. In Delhi* (2009)¹⁶, the Delhi High Court interpreted 377 down, but the Supreme Court overturned the ban in *Koushal* (2013). Lastly, in *Navtej Singh Johar v. In Union of India* (2018)¹⁷, the Supreme Court by a unanimous decision declared Section 377 (to the extent it criminalized consensual same-sex activity) to be unconstitutional under Articles 14, 15 and 21 of the Constitution. The Court clearly acknowledged the fact that sexuality and sexual orientation are part of personal autonomy and dignity. In the words of Justice Chandrachud, discrimination on the basis of sexual orientation is a highly objectionable act to the democratic spirit of our constitution. Therefore, the criminal prohibition of same-sex conduct in the private sphere has not existed since 2018, and the anti-discrimination provisions of the Constitution extend to the LGBTQ community.

1.2 Constitutional Guarantees: Article 14 provides equality before the law and equal protection of the laws. Article 15(1) outlaws discrimination based on “sex” (among other grounds). The Supreme Court has ruled that sexual orientation is covered by the term sex in Article 15. Article 19(1)(a) provides the right to freedom of expression and thought; Article 19(1)(d) and (e) provide the right to freedom of association; Article 21 provides the right to life and personal liberty, which is interpreted broadly by Indian courts as including privacy, dignity

¹⁶ *Naz Foundation v. Government of NCT of Delhi*, 160 DLT 277 (Del. High Ct. 2009) (India).

¹⁷ *Navtej Singh Johar*, *supra* note 2.

and autonomy. In *Puttaswamy v. Union of India* (2017)¹⁸, it was determined that privacy was inherent to Article 21. Subsequent rulings such as *Shakti Vahini* (2018)¹⁹ and *Shafin Jahan* (2018)²⁰ expounded that the freedom to choose a marriage partner is a core element of liberty under Article 21. Another example is *Shakti Vahini*, which overturned the marriage prohibitions by families on adult women, stating that Article 21 guarantees the right to marry the person of choice²¹. These precedents indicate that any blanket exclusion of adults to marriage may involve Article 21 and Article 14.

1.3 Directive Principles and Duties: The Directive Principles (Article 44) direct India towards Uniform Civil Code, which is an indication of policy objective of common laws to all citizens. Article 51A of the Constitution has a basic obligation to renounce practices that are derogatory to the dignity of women which can arguably be applied to all forms of discrimination including sexual orientation. Although DPSPs cannot be enforced in court, they indicate constitutional values that are inclined towards social reform. There has been no uniform civil code enacted by the legislature and therefore religion-specific laws continue to exist. Remarkably, marriage and divorce are listed in Entry 5 of the Concurrent List, which implies that both the Parliament and the state legislatures have the right to legislate on them. In *Supriyo*, the Solicitor General submitted that, with this arrangement, Parliament is the appropriate place to address marriage equality.

1.4 Family Statutes: According to the existing law, heterosexual couples are the only ones who can get married. As an example, the Hindu Marriage Act 1955 expressly considers a bride and groom (Sections 56). The Special Marriage Act demands that there be a male and female contracting party. The Foreign Marriage Act (1969) also does not permit same-sex individuals. There is no gender-neutral definition of marriage in any statute. Consequently, any same-sex cohabitation is not given any statutory recognition: such partners are not allowed to marry under Indian law, nor can they transform their partnership into marriage through solemnization²².

¹⁸ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

¹⁹ *Shakti Vahini v. Union of India*, (2018) 7 SCC 192 (India).

²⁰ *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368 (India).

²¹ *Ibid.*

²² *Supriyo and Obergefell: A Comparative Analysis of the Marriage Equality Debate in India and the U.S.*, Human Rights in Context (Oct. 2023), <https://www.humanrightsincontext.be/post/supriyo-and-obergefell-a-comparative-analysis-of-the-marriage-equality-debate-in-india-and-the-us>.

The heterosexual relationships are also restricted to parenthood by the secular family laws. Hindu Adoption and Maintenance Act 1956 allows only married couples (and single women) to adopt, and specifically disallows single men to adopt girls. Adoption by married couples or relatives is also envisaged under the Guardians and Wards Act 1890 (the default civil guardianship law), again on the assumption that the parents are of opposite sexes. These rules are tightened by the Central Adoption Resource Authority (CARA) regulations (2022): Regulation 5(3) provides that a child is to be given in adoption only when [a prospective parent couple] have been in a stable two-year marital relationship, which effectively excludes same-sex couples (who cannot marry). Likewise, the Assisted Reproductive Technology (Regulation) Act 2021 refers to a commissioning couple as an infertile married couple.²³ The Surrogacy (Regulation) Act 2021 also stipulates that the intending parents must be a heterosexual married couple. Concisely, the current adoption and reproductive technology legislation restricts parenthood to (heterosexual) marriage.²⁴

1.5 LGBTQ+ Rights Jurisprudence: The Supreme Court has started to extend constitutional rights to LGBT situations. In *NALSA v. Union of India* (2014)²⁵, the Court stated that transgender people are entitled to self-identify their gender (male, female, or third gender) and are covered by Articles 14, 15 and 21. It is stated that sexual orientation is an inborn aspect of privacy and human dignity and overturned discriminatory criminal laws. These rulings create a robust equality base. But neither of them dealt directly with marriage. In the *Navtej Johar* hearings, the petitioners alluded that the constitutional right to dignity and liberty may also imply the right to marry regardless of gender, although *Johar* did not directly decide on the right to marry²⁶. In a later case, *Shafin Jahan* (2018), the Court acknowledged that a citizen is free to marry a person of his/her choice, regardless of religion, but that case concerned an adult Hindu woman marrying a Muslim man; the Court did not address same-sex couples.²⁷

Therefore, prior to *Supriyo*, the Indian jurisprudence places a heavy emphasis on equality and autonomy, but there was no precedent that forced the acknowledgment of same-sex unions.

²³ *Supriyo @ Supriya Chakraborty & Anr. v. Union of India*, Writ Petition (Civil) No. 1011 of 2022 (and related transferred pleas), 2023 INSC 920 (Supreme Court of India Oct. 17, 2023).

²⁴ Tanja Herklotz, *Armed with the Constitution: Feminist Litigation on Indian Family Law*, in *Mutinies for Equality: Contemporary Developments in Law and Gender in India* 115 (Tanja Herklotz & Siddharth Peter de Souza eds., 2021).

²⁵ *NALSA*, *Supra* note 3.

²⁶ Thomas John, *Liberating Marriage: Same-Sex Unions and the Law in India*, in *Law Like Love: Queer Perspectives on Law* 355 (Alok Gupta & Arvind Narrain eds., 2011).

²⁷ *Ibid.*

Dicta by the courts has sometimes recognized the existence of non-traditional relationships and “chosen families”. As an example, in a 2025 case of the Madras High Court, the judges observed that marriage is not the only way to establish a family and acknowledged the existence of the notion of chosen families among LGBTQ individuals. The judges referred to NALSA²⁸, Johar²⁹ and Shakti Vahini³⁰ to reiterate that sexual orientation is an issue of personal liberty under Article 21. They came to the conclusion that in case same-sex marriage is not legally recognized, queer couples still can form a family outside of marriage and should be protected³¹. This is a judicial awareness of LGBTQ realities, and also a tacit acknowledgement that statutory change is required to make these families legal.

Sexual orientation and gender identity are safeguarded in the existing legal system of India through constitutional equality and liberty provisions. However, family law is highly gendered, and LGBTQ individuals are not allowed to marry and enjoy other rights. Laws and policies support heterosexual marriage as a passport to family-formation rights. The Supreme Court has indicated deference to the legislature regarding marriage equality. The rest of this paper investigates how and whether the law should be changed: first, through the arguments and results of the marriage equality litigation; second, through international experience; and third, through how family law (adoption, surrogacy, guardianship) may change along with it.

2. Indian Case Law on Marriage Equality

The marriage equality claims centered on the Supriyo proceedings (2023)³². More than a dozen petitions filed by LGBTQ couples and activists were joined together under names such as Supriyo Chakraborty v. Union of India. Petitioners wanted to get declarations that the exclusion of same-sex couples in the provisions of the Special Marriage Act 1954 (and related laws) is a violation of Articles 14, 15, 19, 21, 25, and the right to equality enshrined in the Preamble. They claimed that it was arbitrary discrimination to deny same-sex couples access to marriage (and the legal benefits it entails). Other petitioners sought redress beyond marriage as such, asking the Court to interpret gender-neutral language into statutes or to confer comparable civil

²⁸ NALSA, *supra* note 3.

²⁹ Navtej Singh Johar, *Supra* note 2.

³⁰ Shakti Vahini, *Supra* note 19.

³¹ *Madras High Court Says Families Are Possible Outside Marriage*, Washington Blade, June 17, 2025, <https://www.washingtonblade.com/2025/06/17/madras-high-court-says-families-are-possible-outside-marriage/>

³² *Supriyo @ Supriya Chakraborty*, *supra* note 1.

union rights.

The arguments were based on the domestic law and international principles. The petitioners counsel referred to Navtej Johar, stating that the LGBTQ relationships should be treated as equal before the law. They relied on Article 21 that guaranteed personal liberty and right to privacy and dignity and argued that the right to choose a life partner is part of liberty. The Court recognized by Shakti Vahini (2018) that the right to choose a spouse was fundamental; petitioners argued that this right should apply to queer spouses under the sex-equality guarantee of the Constitution³³. They also observed that the Universal Declaration of Human Rights (Art.16) and ICCPR (Art.23, Art.26) demand non-discrimination in the family life.

The government argued that marriage is a legislative role. The Solicitor General submitted that marriage and divorce fall under Entry 5 and as such, they are items in the Concurrent List and therefore it is the prerogative of the Parliament to amend laws. He referred to the U.S. parallels (Dobbs v. Jackson, 2022)³⁴ in which Justice Thomas (concurring) had challenged Obergefell³⁵. The SG argued that a broad court-based redefinition of marriage would not only disrupt secular laws, but also a plethora of religious personal laws, violating Article 25 safeguards. He called upon the courts to exercise restraint.

A five-judge bench (Chief Justice R. Bhat writing the majority with Justices Kohli and Narasimha) delivered its judgment in October 2023. The Court acknowledged that the right to equality means that all discrimination against LGBTQ + persons must end. It abolished any criminal sanctions (through the legacy of Johar) against same-sex relations between individuals. It also confirmed that transgender individuals in heterosexual unions are entitled to marry under the current laws. But the Court was categorical that the right to marry is a statutory privilege and not an unenumerated fundamental right under the Constitution. It argued that the legal definition of marriage is a legal institution and equality to same-sex unions should be provided by the law. According to the judgment: “[T]he decision to grant marriage rights to same-sex couples is a matter of Parliament and not the courts”.

³³ *Shakti Vahini v. Union of India & Others*, Writ Petition (Civil) No. 231 of 2010, AIR 2018 SC 1601, (2018) 7 SCC 192 (Ind.)

³⁴ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ____ (2022).

³⁵ *Supriyo and Obergefell: A Comparative Analysis of the Marriage Equality Debate in India and the U.S.*, Human Rights in Context (Oct. 24, 2023), <https://www.humanrightsincontext.be/post/supriyo-and-obergefell-a-comparative-analysis-of-the-marriage-equality-debate-in-india-and-the-us>

Therefore, the Court refused to state that the refusal to marry queer couples is a violation of Articles 14, 15, or 21. It did not rewrite the Special Marriage Act or any personal laws, or give a direct order legalizing same-sex marriage. Similarly, adoption regulations (including the CARA rule that a marriage must be two years old before adoption) were mostly punted; most affirmed Regulation 5(3) of the CARA Adoption Regulations, which makes joint adoption conditional on a stable marital union, thus leaving the reform of adoption to the legislature as well.³⁶

However, the Supriyo majority did not hesitate to state in principle the equality of LGBTQ. The Court simply said that LGBTQ is not an urban or elite phenomenon but a natural state of human existence. It pointed out that the Constitution requires the quashing of discrimination in civil life (access to services, government programs, etc.). The Court even encouraged Parliament to think of other legal recognitions (like civil unions) that would grant some benefits to the LGBTQ families. These remarks imply judicial compassion to the situation of queer couples, although continuing to leave the purse-string power to legislators.

Not all were in agreement, but no separate opinions have yet been released (at the time of this writing) other than the majority opinion. CJI D.Y. Chandrachud and Justice Krishna Murari were in favor of a wider solution based on equality grounds (as in *Obergefell*),³⁷ and Justice Kaul dissented vehemently in favor of extending marriage rights. Kaul, by reference to comparative constitutional law, contended that refusal to marry reinstates an inhuman stigma of inequality (based on South African jurisprudence).

Overall, Supriyo (2023) is a divided verdict: it affirms the ideal of LGBTQ equality in theory, but it keeps the current state of family laws. In the short term, same-sex marriage is not legally accessible. The ruling, however, paves way to the action of the Parliament; it also establishes the constitutional assumption that sexual orientation is a safeguarded aspect. The subtle position of the Supreme Court was much publicized: “the authority to extend marriage rights... rests with Parliament”. According to one commentator, the top court denied marriage rights,

³⁶ Tanja Herklotz, *Armed with the Constitution: Feminist Litigation on Indian Family Law*, in *Mutinies for Equality: Contemporary Developments in Law and Gender in India* 115 (Tanja Herklotz & Siddharth Peter de Souza eds., 2021).

³⁷ *Supriyo and Obergefell: A Comparative Analysis of the Marriage Equality Debate in India and the U.S.*, Human Rights in Context (Oct. 2023), <https://www.humanrightsincontext.be/post/supriyo-and-obergefell-a-comparative-analysis-of-the-marriage-equality-debate-in-india-and-the-us>

but acknowledged the right of LGBTQ persons to live without discrimination.³⁸

3. International Law and Human Rights

Even though most of them did not base its holding on international law, India is a signatory to international treaties such as the International Covenant on Civil and Political Rights (ICCPR). Articles 23 and 26 (protecting the family and non-discrimination) have been interpreted by the Human Rights Committee (monitoring ICCPR) to forbid discrimination by a state against same-sex couples in family-related issues. Amnesty International regretted in October 2023 that India had missed a historic opportunity by not legalizing same-sex marriage, saying that, “all individuals, irrespective of their sexual orientation or gender identity, must be able to enjoy the full scope of human rights, including the right to marry”. Amnesty called on the government to reform discriminatory laws and pointed out that the right to family life is a human right and it is not discriminatory.

These global standards strengthen the ethical argument of change. They also give interpretive direction: the Constitution of India (Article 51(c)) undertakes international law, and courts frequently refer to international norms in interpreting rights. In *Supriyo*, petitioners had referred to Article 16 (the right to marry) and Article 23 (the right to found a family) and Article 26 (equality before law) of UDHR and ICCPR respectively. The Court recognised that Parliament may well be looking at some form of formalised rights to LGBTQ couples (the SG told the Bench of a proposed parliamentary committee, which Amnesty reported). The fact that there are international obligations does not require the judiciary to create new rights but it highlights the fact that any legal vacuum is inconsistent with modern human rights principles.³⁹

4. Comparative Perspectives: The United States and Beyond

The Indian debate is clarified by the experience of other jurisdictions. The Supreme Court of the United States settled marriage equality in *Obergefell v. Hodges* (2015). *Obergefell* believed that the guarantees of equal protection and due process in the Fourteenth Amendment compel states to license same-sex marriages and to recognize same-sex marriages that were performed in other states. The Court based its argument on the fact that marriage is a right and a

³⁸ *Indian Supreme Court Continues to Hear Challenges to Marriage Equality Ruling*, Washington Blade, July 25, 2024, <https://www.washingtonblade.com/2024/07/25/indian-supreme-court-continues-to-hear-challenges-to-marriage-equality-ruling/>.

³⁹ *Id.*

cornerstone of social order, which cannot be separated with personal dignity. Accordingly, the U.S. Supreme Court in effect stated that denying marriage licenses to same-sex couples was a violation of constitutional equality.

The Obergefell ruling was immediately legal: same-sex marriage was now legal in all fifty states, and all associated benefits (tax, inheritance, adoption, health, etc.) were fully attached. As an example, in the U.S. since 2015, same-sex spouses automatically became parents of the child in case one of the partners was the genetic parent of the child, and they could be jointly adopted in any state. The Obergefell decision was based on a broad definition of the terms liberty and equality, and not on the changes in legislation. Commentators observe that this judicial path is not the same as in India where the Court rejected the path of constitutionalizing marriage as a right.⁴⁰

Conversely, the United Kingdom passed marriage equality in parliament. Same-sex marriage in England and Wales Same-sex marriage was legalized in England and Wales by the Marriage (Same Sex Couples) Act 2013; a corresponding act became law in Scotland in 2014. In both instances, lawmakers directly changed marriage laws to include gay and lesbian couples. Likewise, the UK allowed same-sex couples to adopt together (through the Adoption and Children Act 2002, which came into effect in 2005) and gave them equal rights to inheritance and pensions. The effect is that same-sex couples in the UK now enjoy the same family-law rights as heterosexual couples.

The two models show that the provision of marriage equality is likely to initiate similar changes in other related laws. States in the U.S. had different journeys even prior to Obergefell: Massachusetts *Goodridge v. Department of Public Health* (2003) was one of the first high-court decisions by a state to legalize same-sex marriage, which was followed by other states either through court decisions or new legislation. In India, however, such state-level litigation on marriage has not been successful, due to the different legal system and religious dynamics. It is worth noting that the neighboring country of Nepal legalized same-sex marriage through a law in 2023, based on the norms of equality. Even the regional peers are progressing as demonstrated by the marriage equality law in Thailand in 2023.

⁴⁰ *Marriage Equality Around the World*, Hum. Rts. Campaign, <https://www.hrc.org/resources/marriage-equality-around-the-world>

In comparison, the U.S and UK cases indicate two important lessons to India. To begin with, the institutionalization of marriage equality (be it judicial or legislative) tends to result in equal treatment in adoption, inheritance, and reproductive assistance, since family law frequently makes these explicitly dependent on marital status. As an example, U.S. federal entitlements (such as Social Security survivors benefits or hospital visitation rights) were made available to same-sex spouses following *Obergefell*⁴¹. The UK also granted all spousal rights to same-sex couples following 2013. Second, the experience of the U.S. (and most other countries) demonstrates that when marriage equality is established, the necessity of additional litigation on the associated matters tends to decrease, as the laws are being altered in advance (e.g. by amending the acts of adoption to be gender-neutral). In comparison, leaving the marriage equality to be determined on a case-by-case basis may leave numerous gaps.

In the case of India, the absence of marriage equality implies that all the areas of family law are left in limbo of LGBTQ individuals. Suppose, hypothetically, that India were to legalize same-sex marriage (through legislation or a future court ruling), pressure to change related laws would be expected to be immediate. As an example, gender-neutral language in the Special Marriage Act would require amendment of taxation, citizenship (OCI/PIO visas to foreign spouses), insurance and pension schemes, etc. Likewise, adoption and surrogacy legislation would probably be questioned: following *Navtej Johar*, petitioners in *Supriyo* had already contended that denying same-sex couples access to adoption infringes the right to family life. In the absence of marriage equality, the Indian experience is not keeping up with the trend of full equality of family rights.⁴²

In this way, the comparative approach implies that the extension of marriage rights by the legislature or the courts may be the catalyst of the wider legal change. It also demonstrates that the arguments such as those that marriage should be left to Parliament do not absolve legislators of the equality imperative; in fact, in most democracies it was the legislatures that led (or followed court decisions) to provide full rights to same-sex couples. The most important lesson to Indian law scholars is that piecemeal tinkering (e.g. limited civil-union regimes) might not be sufficient unless family law is overhauled in a comprehensive manner.

⁴¹ *Supriyo @ Supriya Chakraborty*, *Supra* note 1.

⁴² *Id.*

5. Parenthood, Adoption, and Reproductive Rights

The right to parenting is one of the main points that are used to support marriage equality. In India, the existing regulations practically prevent LGBTQ couples to establish families in a legal way. We have already mentioned the CARA adoption rule that demands two years of stable marriage; the ART Act and Surrogacy Act also permit only married heterosexual couples to have access to fertility treatments. These were not questioned in *Supriyo*, but were pointed out by petitioners as discriminatory⁴³.

What would happen to these laws with an equality regime? In the event that same-sex marriage was recognized, then numerous adoption and parental rights would automatically follow under the current law. As an example, a lesbian couple that was legally married would be able to adopt together as a married couple under HAMA and CARA regulations (provided the two-year requirement). On the same note, a gay married couple could adopt a child once the age of marriage was reached. The existing oddities, e.g. that one lesbian must adopt alone, or that a gay man cannot adopt a girl as a single individual, would be eliminated, because both spouses would be “persons eligible to adopt” under the definitions of the Juvenile Justice Act (which turn on eligibility under CARA rules).

Without marriage equality, there are other reforms that can be envisaged. One suggestion is to expand the eligibility of adoption: amending CARA Regulation 5(3) to permit unmarried or same-sex couples to adopt together. These changes may be done through amendment to the CARA regulations (the welfare ministry) or the Juvenile Justice Act (by Parliament). In fact, the *Supriyo* petitioners claimed that CARA 5(3) is unconstitutional under Article 14, and requested the Court to strike it down⁴⁴. The Court failed to do so, although the matter is still subject to legislative or subsequent judicial intervention. Such litigation was already experienced in the United States: e.g. in *Wood v. The court* permitted two unmarried women to adopt together in *Kemp*, in anticipation of future marriage reforms. In theory, Indian courts might read down adoption laws in the context of Article 21 protection of the right to family life.⁴⁵

⁴³ *Supriyo @ Supriya Chakraborty*, *supra* note 21

⁴⁴ *Id.*

⁴⁵ *Same-Sex Relationships and Beyond: Gender Matters in the EU* (Katherina Boele-Woelki & Angelika Fuchs eds., 3d ed. 2017).

Another disputed field is surrogacy. The 2021 Surrogacy (Regulation) Act limits gestational surrogacy to Indian married couples (Section 4). LGBTQ couples are completely left out. The first way forward is to change the Act to eliminate the marriage requirement or to permit single or same-sex people to be commissioning parents. In fact, the Assisted Reproductive Technology Act already restricts only married couples as commissioning couples⁴⁶. In case the society and law gravitate towards marriage equality, the pressure will increase to treat LGBTQ couples as any other infertile couple. Courts in some jurisdictions have applied parentage laws in a liberal way: in the U.S., several state courts have awarded legal parenthood to a non-biological same-sex spouse under adoption or parentage laws since marriage was legalized.

There are also ancillary issues to the legal recognition of LGBTQ parents: laws of inheritance and succession, maintenance rights (Hindu Adoption Act Section 9 provides maintenance by natural parents of adopted child; under a same-sex marriage regime, spouses would replace natural parents in that role), custody and guardianship of children in surrogacy, etc. All this would probably be applied to same-sex spouses in case of marriage equality. This is exactly the thesis of the transforming family law: that challenging marriage, LGBTQ activists point out the insufficiency of the laws concerning it, and this aspect has to be rethought, which is why adoption, guardianship, and even tax and property laws have to be reconsidered.

At present, Indian courts have indirectly suggested that they may extend parenthood. As an illustration, a division bench of the Delhi High Court in a 2021 ruling (Sheela Barse case) observed that a woman can adopt a child even when she is divorced or single, but it added that single men cannot adopt girls. Regarding a lesbian couple, stated that one of the partners could adopt as a single woman, but not jointly. The case demonstrates the present challenge: any single individual is free to apply to adopt on his or her own, but shared rights are prohibited.

Overall, the most direct impact of marriage equality in India on parenthood would be the elimination of the barrier based on marital status. Otherwise, there is piecemeal law reform. Even the Supriyo majority admitted that LGBTQ inclusion would require changes to guardianship, adoption, and surrogacy laws (noting that unmarried individuals and individuals in non-traditional relationships are denied the right to form families)⁴⁷. The complete revolution of the family law will therefore necessitate a legislative or judicial intervention beyond

⁴⁶ *Id.*

⁴⁷ *Id.*

Supriyo. According to scholars, this is a very compelling task: as Agarwal observes, marriage equality litigation has the potential to raise awareness of these silent elements of family law, generating impetus towards more widespread reforms.

6. Challenges in Enforcement and Societal Impact

The legal change is not necessarily enough to ensure equality of LGBTQ individuals; social and administrative issues are threatening. Discrimination and violence are already common to many LGBTQ people in India, and the loopholes in the law may worsen that. As an example, queer people have been harassed by the police, which activists have documented. The case of the Madras High Court in 2025 mentioned above occurred due to the forcible separation of a lesbian couple by the police. The Court criticized the police on their inaction and insensitivity to the complaint of the woman. It observed that the law requires officials to protect every citizen, including LGBTQ individuals. This event highlights the way rights can be compromised on the ground by official bias. In the absence of any anti-discrimination laws in employment, housing or services, LGBTQ individuals have only the general constitutional protections. Those are unevenly implemented.

Socially, there is a mixed feeling about same-sex relationships. A 2023 Pew poll discovered that approximately 53 percent of Indian grown-ups support the legalization of gay and lesbian marriages, whereas 43 percent are against it⁴⁸. This majority support (a little more than in 2019) indicates an increased social acceptability of the idea of marriage equality. But the survey also suggests a substantial minority opposition, usually focused in some age groups, religions or regions. The prejudices at the grassroots level may take the form of harassment, ostracism, or even violence (e.g. same-sex couples have been the victims of honour crimes in India). The conflict between social conservatism and constitutional requirements is a challenge: to some degree, courts and legislators must be cultural leaders.

On the positive front, visibility and advocacy by civil society are on the rise. Pride events have become common in most cities and the NGOs such as the Naz Foundation and People For Change are lobbying actively to change the laws. Following Supriyo, activists demanded a parliamentary bill right away. According to the Amnesty press, the ruling should be the

⁴⁸ Sneha Gubbala & William Miner, *Across Asia, Views of Same-Sex Marriage Vary Widely*, Pew Research Ctr. (Nov. 27, 2023), <https://www.pewresearch.org/short-reads/2023/11/27/across-asia-views-of-same-sex-marriage-vary-widely/>

launching pad to the government to embark on comprehensive review and reform of all laws, policies and practices that discriminate on the basis of sexual orientation, gender identity and intersex status. Indeed, at the Supriyo hearings, the Solicitor General stated that a parliamentary committee would be constituted to examine legal rights of same-sex partners. Such formal recognition is an indication of advocacy influence.

However, the implementation of the rights that are already in place is poor. There is no nationwide anti-discrimination legislation in India, including sexual orientation in employment or education (though there are minor provisions in some states). Transgender persons are entitled to some statutory rights under the Transgender Persons (Protection of Rights) Act 2019, but LGBTQ people in general continue to fight stigma.⁴⁹ Even the Madras High Court itself has observed that a large number of queer Indians live by creating what is called a chosen family, a network of friends or community, because their biological families tend to reject them. The idea of the chosen families is not new to the LGBTQ sociology, yet it is not reflected in the Indian law to a great extent. The Madras case judges encouraged the law to acknowledge that families are not only blood or marriage based, but also of different forms.

Practically, therefore, the effect of legal change will be subject to administrative action. Officials need to be sensitized even when statutes are amended. As an example, in case of the legalization of same-sex marriage, the government agencies (local registrars, courts, adoption authorities, tax offices) would require specific guidelines to enforce the new legislation. The reprimand by the Madras High Court of the police indicates that there is a dire need of judiciary and executive training. Civil servants must be sensitized about the rights established in *Navtej Johar* and *NALSA* to ensure that they do not contribute to stigma.

Lastly, religion is a big factor. Personal laws are based on religious texts and traditions. There are religious leaders who are against marriage equality on the basis of doctrine. Any political initiative is bound to be politically controversial. One path may be a gradual civil law change (such as a gender-neutral provision to the Special Marriage Act) that does not explicitly interfere with religious marriages. Meanwhile, LGBTQ couples tend to use personal arrangements (online registrations, naming a partner as nominee under social security) that are

⁴⁹ *India: Failure to Legalise Same-Sex Marriage a 'Setback' for Human Rights*, Amnesty Int'l (Oct. 17, 2023), <https://www.amnesty.org/en/latest/news/2023/10/india-failure-to-legalise-same-sex-marriage-a-setback-for-human-rights/>

not very secure.

In general, the level of acceptance in society is slowly growing (as polls indicate), but there are still strong taboos. The legal enfranchisement of queer families is likely to hasten a change in social norms as it did in other countries. The example of Ireland or Taiwan demonstrates that after the legalization of same-sex marriage, the opinion of people becomes more positive. In India, court cases and activism are becoming more known through the media. To sum up, the interaction between law and society is complicated: courts and legislatures need not only to formalize equality, but also to eliminate social barriers to the inclusion of LGBTQ.

7. Policy Recommendations

On the basis of the above analysis, a number of specific reforms can be suggested to bring the family law of India in line with its constitutional principles and international commitments:

- I. Legalize Marriage Equality or Civil Unions:** The Parliament should revise the Special Marriage Act (and respective personal laws) to permit gender-neutral marriage. In case social or political factors complicate full marriage reform, a statutory civil-union scheme with similar rights must be adopted. The March 2023 report of the Supriyo hearings observed that the Court anticipates that Parliament will deal with this problem⁵⁰. At least, a civil union law (such as those in certain European countries) would grant inheritance, pension and next-of-kin status to same-sex partners.
- II. Eliminate Discrimination in Adoption and Reproductive Laws:** Amend the CARA Adoption Regulations, 7.ART Act and Surrogacy Act to remove marital-status and sex-based restrictions. In particular, permit single people and same-sex couples to jointly apply to adopt, and reinterpret the term commissioning couple in the ART/Surrogacy Acts as gender-neutral. This may be through executive amendment of regulations (CARA) and by Parliament in the case of statutory Acts. This would enforce the recognition of the Supreme Court that LGBTQ families should be granted equal rights to form families.
- III. Anti-Discrimination Legislation:** Pass a broad-based anti-discrimination law that specifically adds sexual orientation and gender identity to the list of protected classes.

⁵⁰ Human Rights in Context, *supra* note 5

Although Articles 1415 are broad guarantees, a law (similar to the U.S. Civil Rights Act or the proposed Equality Bill) would be able to offer redress against harassment in the workplace, education, health care, etc. Without such a law, LGBTQ individuals tend to have no clear means of redress against the daily discrimination.

- IV. Legalize the concept of the Chosen Families:** The legislature can give legal status to non-traditional family structures. As an example, changing the Guardians and Wards Act 1890 so that two consenting adults (married or not) could be joint guardians of each other children, or so that there could be multiple guardianship including extended family, would safeguard children in queer households. At least, it should be made clear that an unmarried parent may appoint any individual as a caregiver. The approval of selected families by the Madras High Court may encourage the enactment of laws that acknowledge that family relationships do not necessarily have to be blood-related or heterosexual marriages.
- V. Sensitization and Training:** The government should sensitize police, judges, bureaucrats, and doctors through training programs about the rights of LGBTQ. The decision in 2025 Madras directly condemned police insensitivity. Other organizations such as the National Legal Services Authority may provide guidelines on how to handle complaints of LGBTQ individuals, so that they are equally protected by the law. LGBTQ issues must be a part of the curriculum of judicial academies.
- VI. Public Education Campaigns:** The state must invest in education campaigns to transform the attitude of the society. This may involve the curriculum in schools on diversity, media campaigns funded by the government to promote constitutional values of equality, and funding of NGOs that support LGBTQ communities. The social environment will be more accommodating to legal reforms by raising awareness.
- VII. Legislative Review:** Parliament should constitute a high powered committee (with wide representation) to review all statutes to ensure there is no discrimination against LGBTQ and recommend amendments as per the invitation of the Court. The committee must seek the opinion of stakeholders (activists, religious leaders, legal scholars). Special laws (succession, domestic violence) and general laws (social security, tax) that presuppose heterosexual marriage should be part of the mandate of this committee.

VIII. Simplify Alternate Dispute Resolution: Until legal changes are enacted, establish temporary solutions to same-sex couples. As an example, permit life partners to file a non-discrimination affidavit, or to sign living-will and partnership agreements with legal standing. States such as Tamil Nadu have tried out the concept of the so-called friendship family cards that allow certain rights to visit the hospital. The current expansion of such accommodations (even at state level) can offer some protection at this time.

These recommendations would fill the gaps in this study. They seek to fulfill the Constitution promise that “the dignity of all shall be respected” (Preamble) and that the State shall “secure the dignity of the individual” (Art. 38(1)). By doing so, India would be joining an increasing international consensus that LGBTQ families should be treated as fully equal under the law.

8. Conclusion

The rights of LGBTQ+ in India are at a crossroad. On the one hand, constitutional jurisprudence has already established that sexual orientation and gender identity are covered by Articles 14, 15 and 21. The dignity, privacy and equality of LGBT people have been given legal status by landmark judgments such as Navtej Johar and NALSA. Conversely, the statutory family law in India has not changed: the laws of marriage, adoption, and reproduction continue to be characterized by the traditional gender norms. This tension is seen in the recent Supriyo decision of the Supreme Court. The Court stated that the discrimination of queer people is unacceptable, but it refused to rewrite the Marriage Act or impose a change in legislation. Therefore, the dream of equality in citizenship is in harmony with the fact of statutory exclusion.

It has been observed comparatively that this gap ought to be dealt with proactively. As other democracies accepted same-sex marriage, they promptly made the required changes in family law to bring all the related rights on a par. In the U.S., as an example, Obergefell opened the path to the equal treatment of same-sex parents in all states. In the UK, equal laws of adoption and succession accompanied the 2013/2014 Acts. India may take a similar path: in the event same-sex unions were legalized (via Parliament or a future court decision) there would be a powerful incentive to change adoption laws, guardianship laws and surrogacy/ART laws.

Nevertheless, until these reforms are implemented, there will be significant difficulties. In the absence of legal recognition, a large number of LGBTQ people will remain in “chosen families” without legal protection, and they will be subject to random discrimination in custody, inheritance, and public benefits. The recent Madras High Court order highlights the fact that, at present, LGBTQ couples are left to fend on their own without formal marriage. Supriyo should not be considered the end of the road by policymakers. Rather, it should listen to its call to action by the legislature.

Overall, the discussion in this paper confirms the hypothesis that marriage equality has the potential to transform the Indian family law. Although the Court is deferential to Parliament, the constitutional promise of equality and the tides of international standards imply that the laws of India will ultimately be forced to change. This will not only need legal arguments, but also the education of the people and political will. A moral and legal basis is provided by the quality of judicial reasoning in support of LGBTQ dignity (establishing that being queer is not a phenomenon of elites. The rest is up to legislators and the society in general to make sure that this foundation is established.