

A JUDICIAL RESPONSE OF APEX COURT IN RESPECT OF ADOPTION, MARRIAGE AND SUCCESSION OF LGBTQ+ GROUP: WITH SPECIAL REFERENCE TO RIGHTS TO PRIVACY

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ABSTRACT

In 2018, the Indian Supreme Court decriminalized homosexuality and awarded LGBTQ+ Indians full citizenship under the constitution. In Indian courts, several applications for marital equality have now been submitted. Detractors have also underlined the significance of moving beyond legal inclusion to acknowledge varied families, pointing out that conventional approaches to LGBTQ+ equality ignore problematic family law systems. These justifications are not unique to India. LGBTQ+ activists disagree on the best way to exercise their rights within the current family law structures. The typical reaction is that integration into the current patriarchal social institutions precludes the possibility of significant change. LGBTQ+ rights demands have been satisfied. The present article deals with the problems faced by the LGBTQ+ community in the areas of adoption, marriage, and privacy in India.

Keywords: LGBTQ+ Rights, Marriage Equality, Sam-Sex Marriage, Indian Constitutional Law.

Introduction

In its landmark 2018 decision, *Navtej Singh Johar v. Union of India*, the Indian Supreme Court decriminalized homosexuality and recognized the equal constitutional citizenship of LGBTQ+ Indians. This followed on the heels of the court's 2014 decision in *NALSA v. Union of India*, which recognized transgender persons' gender identity rights. Since then, petitions have been filed before several High Courts and the Supreme Court seeking marriage equality under India's secular and Hindu marriage law.

Parallely, critics have argued that traditional approaches to LGBTQ+ equality ignore problematic family law institutions and have stressed the need to think beyond legal inclusion to recognize diverse families.⁵ These arguments are not unique to India. Claiming LGBTQ+ rights within existing family law institutions, such as the recognition of marriage equality, has divided LGBTQ+ activists worldwide. The usual argument is that assimilation into existing patriarchal social institutions disregards radical transformational possibilities. Critics argue that such assimilation prioritizes institutions like marriage and the nuclear, biological family, which have long oppressed women, over alternative family arrangements like non-marital relationships. However, experiences in certain jurisdictions challenge this premise and show how family law can potentially be transformed through LGBTQ+ rights claims. While we still await an authoritative judicial pronouncement on marriage equality in India, I argue that recognizing marriage equality may positively impact family laws of parenthood by generating arguments for expanding recognition of diverse families. I focus on the secular and Hindu family law of marriage and parenthood. Both sets of laws affect a majority of India's population (with Hindu law also applying to anyone who does not identify as a Muslim, Christian, Parsi, or Jew). The choice of parenthood stems from its focus as a site of transformation in other jurisdictions that have seen LGBTQ+ rights claims in family law. I show that achieving marriage equality through the recognition of LGBTQ+ relational rights, including LGBTQ+ family equality and the right to legal recognition of LGBTQ+ relationships, has the potential to progressively

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expand Indian parenthood laws. I specifically show how this is possible in guardianship, assisted reproduction, and adoption laws and may benefit diverse different-sex families, single parents, and persons in non-marital relationships. India can take inspiration from dynamics in jurisdictions like the United States, where the recognition of marriage equality has bolstered constitutional arguments for recognizing nontraditional families. Moreover, LGBT+ rights may offer a new entry point for reforms in Indian family law, which has been consumed by clashes between personal laws and gender equality claims. By relying on experiences in other jurisdictions, I do not intend to either blindly borrow foreign doctrine or theorize about social change and LGBT+ rights. Instead, my far more modest comparative approach aims to use trajectories of legal change and the proliferation of new concepts in other jurisdictions to ask similar questions about the potential for legal change in India.

LGBT+ Rights and Family Law

While India awaits developments on LGBT+ family law, many jurisdictions have had considerable experience with LGBT+ rights claims in family law. As of January 2023, thirtytwo countries have recognized marriage equality either through legislation or through judicial decisions.⁸ Some of these have also witnessed subsequent litigation and legislative reform towards the recognition of adoption rights and parental rights linked to assisted reproductive techniques. In some jurisdictions, like the US, the history of parental recognition even precedes marriage equality. In comparative law, the impact of such rights claims on family law remains under-studied. Scholars and advocates often focus on LGBT+ rights claims without analyzing how such claims interact with family law. Yet, such interaction is inevitable, since LGBT+ family law is not autonomous but places itself within existing family law. Macarena Saez argues that the judicial recognition of marriage equality claims through the linking of individual rights to dignity, autonomy, and equality opens possibilities of transforming existing family law. For instance, instead of entrenching a constitutional right to marry, the South African constitutional court in *Minister of Home Affairs v. Fourie* focused on the equal recognition of different kinds of relationships, thus linking dignity to equality. Saez argues that such approaches, which emphasize liberty and equality by focusing on the equality of relationships rather than the centrality of marriage, allow for the legal recognition of differently constructed families that decenter marriage, including families based on non-marital relationships. This phenomenon is clearly noticeable in the United States, where the transformative potential of marriage equality arguments has been most visible in the context of parenthood. Douglas NeJaime argues that marriage equality has shifted the understanding of parenthood from being based on biology, gender, and marital status to prioritizing intentional and functional relationships. In the context of same-sex marital relationships, he shows how the marital presumption, which assumes that a husband is the father of his wife's biological child, gets transformed from a fiction of biological fact to being based on intentional and functional principles. This is because, in the context of same-sex couples, the fiction of a biological relationship between the child and each parent is simply not applicable.

However, recent experiences with LGBT+ rights claims show how some of these concerns have not played out as anticipated, and marriage equality may, in fact, lead to the greater recognition of unconventional families. The movement for marriage equality has led to shifts in the understanding of parenthood from being based on blood and marital status to being based on functional and intentional principles. Still, as NeJaime notes, certain concerns with marriage equality, such as how it channels benefits to marital families and furthers the privatization of welfare, do remain relevant.

The Stasis in Indian Family Law and LGBT+ Rights Engagement with Family Law

Existing writing on Indian family law primarily focuses on gender equality and the possibility of testing India's religion-based family law through rights-based claims grounded in the Indian Constitution. This scholarship originates with the High Court of Bombay's decision in *State of Bombay v. Narasu Appa Mali*, which has been interpreted to insulate personal laws from constitutional scrutiny. Over time, however, courts have taken a more interventionist attitude in scrutinizing personal laws against claims for gender equality. However, as Catherine MacKinnon notes, courts are often wary of applying sex equality concepts to family laws and instead try to strain statutory interpretation to reach gender-equal outcomes. There does seem to be judicial consensus on statutory or codified personal laws being subject to constitutional scrutiny. A related issue is whether personal laws are included within guarantees of religious freedom under Article 25 of the Constitution. Thus, to avoid religious objection, advocates have focused on secular marriage law as a vehicle for marriage equality. However, the Supreme Court has reiterated that religion-based personal laws, which do not deal with matters of faith but only concern the secular aspects of religion, are not covered by religious freedom guarantees. Therefore, there are no

legal reasons for insulating religion-based family laws from constitutional scrutiny. Article 44 of the Indian Constitution makes the formulation of a UCC a constitutional aspiration. Issues around the UCC have come to be used as a tool by the Hindu political right to criticize minority communities, especially Muslims, for discriminatory practices in their uncodified personal laws.

In this context, LGBT+ rights claims could be a new entry point for reform that goes beyond the personal law–UCC bind that dominates current debates on Indian family law. This is because, compared to existing norms on sex equality and religious non-discrimination, the Supreme Court's gender and sexuality jurisprudence emphasizing equal constitutional citizenship provides a stronger doctrinal basis for challenging existing family laws.

Tracing Constitutional Rights and Concepts

- Equality and Anti-Discrimination** Article 14 of the Indian Constitution recognizes the right to equality, while Article 15 prohibits discrimination on grounds including sex. In recent years these equality provisions have been interpreted broadly, with one commentator remarking that they have achieved a "highly activist magnitude." Judicial decisions on gender and sexuality have played a key role in this. Right to Equality To test the constitutionality of a law under Article 14, courts have used the traditional test of classification and the test of manifest arbitrariness. In applying the test of classification, courts first ascertain whether there is a reasonable classification based on intelligible differentia and, second, ask whether the differentia have a rational nexus with the object that the legislation seeks to achieve. Navtej has added new dimensions to both prongs of the classification test. First, by recognizing the concept of indirect discrimination, the idea that facially neutral provisions can have a disproportionate impact, it furthers the test of classification. Moreover, it allows the use of the language of intelligible differential to test the very classification itself. For instance, Chandrachud, J., in Navtej, questioned the very basis of classification of sexual acts as natural and unnatural and observed that such classification represents mere heteronormative regulation and therefore could not be sustained.
- Right against Sexual Orientation Discrimination** In interpreting the guarantee against sex discrimination, Navtej Johar read sexual orientation as part of Article 15. On one hand, Chandrachud, J., interpreted sexual orientation discrimination as arising out of gender and sex role stereotypes that were ultimately stereotypes of sex. Using the principle of anti-stereotyping, the court therefore included sexual orientation discrimination within sex discrimination. On the other hand, Malhotra, J., interpreted sexual orientation discrimination as part of sex discrimination on the theory of analogous grounds, which protects both immutable status and fundamental choices. She reasoned that existing grounds in Article 15(1) represent either immutable status or fundamental choices that are further linked to an individual's autonomy and intrinsic to their personality. Since sexual orientation is similarly linked to individual autonomy, it could be justified as an analogous ground of discrimination through the theory of immutable status and fundamental choices.
- Personal Liberty Article 21** of the Constitution provides that no person shall be deprived of their life and personal liberty except according to procedures established by law. While the Indian Supreme Court in its early years read Article 21 in a narrow positivistic sense, its approach has changed over time, culminating in a complete turnaround in the late 1970s.

Right to Sexual Orientation In 2017, the Supreme Court in Justice KS Puttaswamy v. Union of India recognized the right to privacy as a stand-alone fundamental right guaranteed by Article 21. Chandrachud, J., in his plurality opinion (on behalf of four judges) and Kaul, J., in his concurrence held that sexual orientation is part of the right to privacy since it is a core aspect of individuals' autonomy and dignity. In Navtej, Chandrachud, J., held that sexual minorities enjoyed a right to sexual privacy as part of the general right to privacy, which included the privacy of private spaces and the ability to navigate public spaces on their own terms.

Right to Recognition of LGBT+ Relationships

The right to legal recognition of LGBT+ relationships can be derived from the concepts of autonomy and dignity. The decisions in Shakti Vahini, Hadiya, and Navtej have held that the right to be in a relationship with a partner based on autonomy and self-determination is part of the fundamental right to privacy. Navtej also recognizes LGBT+ persons' right to human dignity. Linking autonomy to dignity implies that the State should respect such relational choices, and family law frameworks should not

demean the autonomous choices of LGBT+ people and thereby impair their dignity. Combining autonomy and dignity thus creates a principle of legal recognition of LGBT+ persons' intimate relationships and necessitates that family laws should enable LGBT+ people to form families and meet them where they are. Such a right to recognition of LGBT+ relationships based on autonomy and dignity claims under Article 21 requires the inclusion of LGBT+ persons in family law institutions like marriage. Due to its centrality in Indian society, marriage represents one of the most intimate expressions of choosing a partner. Marriage remains a key social fact in India. According to the 2001 census, 45.6% of the population was married (this is a very high number considering that majority of India's population is young). Moreover, marriage remains a key entry point to relationships such as parenthood, and various benefits, including social welfare, tax, inheritance, and the ability to make healthcare decisions are linked to marital status. The prevalence of social marriage and the performance of marital ceremonies without legal recognition amongst LGBT+ couples underscores both the centrality of marriage and the LGBT+ community's aspiration to access it.

Implications for Guardianship

The recognition of marriage equality through LGBT+ family equality would require the recognition of LGBT+ parenthood and claims to the exercise of parental rights by non-heterosexual couples. This is because recognizing equality in familial relationships will extend to horizontal and vertical relationships in family law. Such recognition of LGBT+ couples' parental rights would likely destabilize our understanding of gendered roles in family law and displace the privileged position of sexual procreation in law. This will likely shift the understanding of parenthood from being based on biology or gender to being based on intentional and functional principles. As NeJaime has argued in the American context, such a shift will likely benefit non-marital families as well since it may shift the focus from marital status to how the parental relationship comes into existence. With the recognition of parental rights through LGBT+ relational rights, arguments for similar doctrinal shifts could become much more compelling in India.

Implications for the regulation of Assisted Reproductive

Techniques and Surrogacy I have argued that the right to legal recognition of LGBT+ relationships based on autonomy and dignity obligates the State to give LGBT+ couples access to marriage. Such an argument can apply to parenthood as well. LGBT+ persons' autonomy claims would include the right to decide to have a child, which is as intimate a choice as being in a relationship. Read along with their dignity claims, this may necessitate State recognition of LGBT+ persons' rights to parenthood. This would include not only the legal recognition of parent-child relationships but also access to assisted reproductive techniques and surrogacy, which remain central to LGBT+ family formation. Such intimate choices would be protected by the right to decisional autonomy as part of the right to privacy recognized by the Supreme Court.

Implications for Adoption

Existing adoption laws exclude same-sex couples and transgender persons from adoption. Like the arguments for a right to access procreative services, recognizing the intimate choice to form a family based on the right to legal recognition of LGBT+ relationships would also require access to adoption services. Such access can also be justified on equality-based arguments. The recognition of the parental rights of LGBT+ persons would also lead to the recognition of parenthood based on intentional and functional principles. This may make arguments for the recognition of second-parent adoption more compelling. Second-parent adoption benefits parents in LGBT+ and different-sex non-marital relationships where one parent does not share a biological or genetic relationship with the child. It allows the non-biological parent to establish a legal relationship with the child. Since the recognition of the parental rights of LGBT+ couples proceed on ideas of a parent-child relationship that transcend sexual reproduction or biology, the legalization of second-parent adoption, in some instances, may be a necessary way for a partner to create a parent-child relationship with their partner's child. A person in a LGBT+ relationship may not be related to their child by blood, but they may still intend to parent their partner's child and may play the role of a parent. The same logic of a functional parent can also extend to non-biological parents in different-sex relationships, thereby justifying the introduction of second-parent adoption.

Conclusion

Remarks LGBT+ rights claims for marriage equality through LGBT+ relational rights could transform the law of parenthood by leading to greater inclusion of diverse different-sex families, single parents, and persons in non-marital relationships. India may thus mimic trends in other jurisdictions that

have seen a positive dynamic between LGBT+ marriage recognition and the progressive expansion of family law on issues like parenthood. LGBT+ rights may also provide a new entry point in thinking about family law reform outside the current Indian family law stasis. In this view, instead of seeing legal recognition as a choice between assimilation and transformation, inclusion may itself become a tool of transformation.

Even though we might call ourselves advance and modern generation but it is disheartening to see the atrocities faced by people belonging to LGBTQ Community at different places and environment. Some of the common problems which they face are:

- According to UNESCO Report of 2018, LGBTQ Children face a lot of bullying in schools, colleges etc. and are also discriminated. This act of bullying and discrimination leaves a permanent scar in their life and it often takes them years to get out of that. (UNESCO Report, 2018)
- If a person declare himself or is found to be belonging to LGBTQ Community then generally a bounty is set for their Secret Honour Killings. Recently, many people have become victim of such honour killings.
- Women suffer the most for belonging to LGBTQ Community as when a woman declare herself as a lesbian or a bisexual, then the family generally suggests them to go for sanctioned corrective rapes in which a woman has sexual intercourse with a man without her will to treat the 'Disease of Homosexuality'.
- LGBTQ People not only face discrimination in schools and colleges but this menace does not end even after the completion of their education, they are also Discriminated while getting jobs as no employer wants to hire a person with a different sexual preference as that idea does not go well with the society and is often questioned by other employees. Thus, they are unable to get better pay jobs and are stuck in the vicious circle of poverty.
- Non-acceptability of LGBTQ is not only prevalent in rural areas but also in urban families as the families in urban areas are more concerned about their status in the society that they tend to forget their duties towards their children and often throw them out of the houses in order to prevent their social status when they find out that their child belong to LGBTQ Community.
- LGBTQ people are often thrown to correction centers where they are administered psychotic drugs as part of 'corrective therapy for Homosexuality'. They get so addicted to these drugs that even after getting out from the torture of correction centers, they find solace in drugs and other psychotropic substances and thereby, become addicted to it.
- People belonging to LGBTQ Community are often Isolated from everyone, which leads them into depression.

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