

Marriage Equality at the Doors of the Indian Supreme Court

Akshat Agarwal

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A five-judge bench of the Supreme Court of India [recently heard](#) over 20 petitions seeking marriage equality. Lasting over ten days, India's apex court heard LGBTQ+ couples, activists, the Government of India, and various religious and civil society organizations on topics ranging from whether the Indian Constitution recognizes a right to marry to whether the court or the legislature is best placed to grant such a right, and if the court were to make a positive declaration – what would be the most effective means for granting marriage equality under existing Indian family law. As is evident from the copious amounts of comparative law and foreign judicial decisions cited by both the proponents and opponents of marriage equality during the hearings, Indian courts are not unique in facing these questions. However, the social context of LGBTQ+ rights in India and the current state of Indian family law may profoundly shape the court's final decision.

The significance of a positive declaration cannot be overstated. It would make India only the second country in Asia ([Taiwan](#) recognized marriage equality in 2019, while [Nepalese courts](#) have made moves towards recognition, but marriage equality is still not legal) to recognize LGBTQ+ marriages. As [India becomes](#) the world's most populous country this year, a favorable decision would also mean that an estimated [17.7% of the world's population](#) would come under a marriage equality regime which is more than the cumulative population of the [34 countries](#) that currently recognize such marriages ([17% of the global population](#)).

LGBTQ+ Constitutional Rights in India

The struggle for LGBTQ+ rights in India can be traced back to the 1990s when the [first attempts](#) at legally challenging the criminalization of same-sex relationships were made. In common with countries with a history of British colonialism, India's [penal code criminalized](#) acts “against the order of nature.” After a protracted legal struggle that saw judicial back and forth between provincial High Courts and the Supreme Court, the apex court finally decriminalized homosexuality in its landmark 2018 decision in [Navtej Johar v Union of India](#). This was preceded by another landmark decision in [NALSA v Union of India](#) in 2014, where the court recognized a constitutional right to gender identity, including identifying as third gender or non-binary, and recognized the socio-economic vulnerabilities of India's transgender communities whose presence has a long history in the subcontinent.

These decisions laid strong doctrinal foundations for the constitutional rights of sexual minorities based on principles of liberty, dignity, and equality. *NALSA* and *Navtej* not only recognized discrimination based on gender identity and sexual orientation but also added new dimensions to Indian equality jurisprudence by going

beyond the [traditional test of classification](#). These decisions also recognized sexual orientation and gender identity as fundamental rights employing concepts of liberty and dignity. The court also recognized the equal constitutional citizenship of LGBTQ+ Indians and the necessity for "[constitutional morality](#)," the morality inherent in the norms of the Constitution, to trump social or public morality in such cases. The court's approach in its gender and sexuality cases has been remarkably forward looking and is an interesting contrast to the general [scholarly criticism](#) of the court's recent record of either being too deferential to executive decision-making or not taking up several constitutionally significant cases dealing with politically sensitive topics and civil liberties.

LGBTQ+ Persons and the Law

Compared to the Supreme Court's expansive declarations, the broader process of legal and social inclusion of LGBTQ+ in India has been far more incremental. The court's transgender rights decision did stimulate Parliamentary activity and led to the enactment of the [Transgender Persons \(Protection of Rights\) Act, 2019](#). The legislation laid down procedures for the self-identification of gender identity and created obligations for transgender welfare. Still, it also came under [heavy criticism](#) for requiring medical treatment for a change of gender (to identify as male or female) and for not providing [affirmative action](#). [Other areas of law](#), such as employment law, criminal law, and family law, have not been reformed to either recognize LGBTQ+ identities or their relationships.

Family law, in particular, poses a difficult challenge. Indian family law is a complex and plural framework comprising religious identity-based personal and secular family laws. Thus, India's major religious communities, Hindus, Muslims, Christians, and Parsis, are governed by their respective family laws that deal with everything from marriage to parenthood, including inheritance and specific aspects of property. Certain opt-in secular laws, such as the [Special Marriage Act, 1954](#), enacted to recognize inter-faith marriages, and the [Juvenile Justice Act, 2015](#), which allows for adoption outside personal law, exist as opt-ins, but there is no comprehensive secular framework. Invoking claims of both gender equality and religious freedoms, Indian family law has seen [perennial debates and political controversies](#) about law reform. The choice has often been presented as a binary between an all-encompassing civil code that erases religious identity and the persistence of discriminatory personal laws.

Moreover, unlike jurisdictions like the United States that saw a movement towards the recognition of [LGBT+ parenthood before marriage equality](#), India has not witnessed similar trends. Political and legal controversies around family law reforms have also meant that much of Indian family law remains gendered, with men and women being treated differently. At the same time, [feminists have made compelling arguments](#) for retaining many of these gendered provisions to account for the unique social realities of Indian women.

Petitioners' Arguments and the Government's Response

Given the background of family law in India, it was no surprise that most of the 20 petitions focused on constitutionally challenging the provisions of the secular marriage law, the SMA. At the very outset of the hearings, the court too clarified that it would limit the current hearings only to the SMA. This hesitance on the part of the petitioners and the court comes from a [legal controversy](#) around subjecting religious identity-based personal laws to claims of constitutional rights that trace back to the 1950s. Even though this view is legally suspect, [the political stakes around the issue](#) have usually prevented the apex court from tackling it head-on.

The petitioners' arguments fall into two heads. The first set of arguments primarily focused on constitutional arguments building on the court's prior gender and sexuality jurisprudence. These arguments emphasized the recognition of a fundamental right to marry for LGBTQ+ persons and the fact that the gendered marriage provisions of the SMA discriminate based on sexual orientation and gender identity. In response, the government argued that the previous cases had largely focused on privacy rights which did not necessitate the inclusion of LGBTQ+ relationships in the social institution of marriage. Moreover, it also emphasized that the judiciary was not the right forum for making such a declaration, but due to the significance of the issue, such a determination should be made by Parliament after wide ranging consultations.

The second set of arguments focused on the practicalities of operationalizing marriage equality. Instead of calling for a declaration that the SMA be declared unconstitutional, many of the petitioners stressed on a constitutionally compliant judicial re-interpretation of the legislation to recognize LGBTQ+ marriages. Thus, the petitioners provided various workability models to interpret the SMA's gendered provisions in a gender neutral way. The government opposed such a re-interpretation as amounting to judicial legislation and pointed to the issue's polycentric nature, which was better suited for legislative deliberation.

[As I have argued before](#), locating marriage equality in India's secular marriage law poses several problems. First, solely focusing on secular law ignores the intersectional identities of religious LGBTQ+ Indians. Second, secular law and personal law remain inherently interconnected without a comprehensive secular framework on marriage. This means that even if the SMA is interpreted to recognize LGBTQ+ marriages, personal law remains relevant for other aspects of family law, such as parenthood and inheritance. Thus, merely locating marriage equality in the SMA does not lead to effective inclusion in family law. Third, the SMA remains gendered and proceeds on heterosexual substantive assumptions. For instance, the SMA provides different minimum ages of marriage for men and women and provides marital remedies like the restitution of conjugal rights.

During the proceedings, questions from the judges and concerns raised by the government pointed to many of these issues. While some petitioners attempted to work around them through interpretive strategies, others stressed that recognizing

LGBTQ+ marriage was a constitutional priority for the time being and that other issues could be addressed in the future.

Potential Paths before the Supreme Court and the Limits of Judicial Decisions

Considering the strong doctrinal foundations of LGBTQ+ constitutional rights in India, the constitutional arguments for the recognition of marriage equality are compelling. The Indian Supreme Court's past approach on such issues also means that general separation of powers arguments that limit the scope of judicial review are unlikely to hold the judges back from ruling on the scope of LGBTQ+ rights and the recognition of marriage equality. [I have argued](#) that a potential Supreme Court declaration should be in the broadest possible terms and should account for family law generally rather than focus just on marriage. The court could thus recognize general LGBTQ+ relational rights that include a right to legal recognition of relationships such as marriage and promote the idea of LGBTQ+ family equality. Ruling in this way would not only account for marital relationships, but also cover questions of LGBTQ+ parenthood.

The issue of the most effective remedy, of course, poses much more complex questions. Based on the options discussed during the hearings, the court could pursue one of the following paths:

1. It could agree with petitioners and recognize both a constitutional right to marriage equality and read in such a right in the SMA through judicial re-interpretation of its provisions. If the court does follow this path, considering the granularity of family law issues it would be interesting to see how far it goes in reinterpreting the SMA and related family laws more generally.
2. It could declare constitutional rights but leave the question of implementation to the Parliament. [As I have argued](#), this approach recognizes that comprehensive family law reform questions necessitate legislative deliberation. Constitutional courts in other jurisdictions like South Africa have followed such an approach, where they delayed the implementation of their rulings to allow the Parliament to act in the interim. Under existing Indian law, the court is unlikely to issue a binding directive to Parliament, but it could delay the implementation of its judgement and allow the Parliament to legislate.
3. A third option that the court can consider in combination with the previous option is to issue certain minimum principles and procedures that govern issues of LGBTQ+ family law till the Parliament legislates. While the issuance of comprehensive judicial guidelines may appear surprising to comparative lawyers, the Indian Supreme Court has issued detailed rules in its decisions on [sexual harassment at the workplace](#) and [end-of-life care](#) in the past.
4. Lastly, considering the practical difficulties the court might just stop short of recognizing marriage but might only recognize the associational interests of LGBTQ+ persons, such as civil unions, while stressing the need for greater legal recognition of such marriage-like unions. This might be the lowest hanging fruit in the range of options available to the court.

Ultimately, irrespective of what the court finally does, the case also represents the inherent limits of judicial decisions. While constitutional declarations of rights have enormous legal and expressive value, especially when they concern the rights of minorities whose concerns legislatures are otherwise unlikely to take up, these declarations remain ineffective and weak without eventual active legislative involvement. The sheer granularity of family law implies that any judicial attempt at reinterpreting existing law or issuing guidelines might be less effective without subsequent legislation. Moreover, as the case of abortion in the United States painfully demonstrates, judicial decisions, if not followed by legislative and political consensus, remain weak and are subject to potential overruling. In India, judicial decisions have often stimulated political and legal activity as well as social discourse, which gives cause for optimism. Yet, given the inherent constraints of judicial decision-making, India's LGBTQ+ rights movement would do well to remember that any positive or negative decision may not be the end but only the start of a process of effective inclusion of LGBTQ+ relationships in Indian law.

