

When Discrimination is Not Enough

Akshat Agarwal

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The Supreme Court, India's apex constitutional court, recently delivered its disappointing decision in [Supriyo Chakraborty v Union India](#) (*Supriyo*), rejecting marriage equality in Indian law. The much-awaited decision was heard by a constitution bench (five judges) of the Supreme Court and dealt with [far-reaching questions of both Indian constitutional law and family law](#). The decision is characteristic of the Indian Supreme Court's ongoing phase of great deference to the executive and legislative branches but also marks a sharp and worrying break from the court's otherwise progressive jurisprudence on issues of gender and sexuality.

The petitioners, which included many LGBTQ+ couples and individuals, had challenged India's secular marriage law, the Special Marriage Act, and asserted a right to marry in Indian constitutional law. Their arguments were built on concepts of liberty, privacy, dignity, and equality, which are well-developed in the jurisprudence of the court. They had asked the court to declare the secular marriage law, which only recognized heterosexual marriage, unconstitutional and, as a remedy, had asked the court to re-interpret it to allow for LGBTQ+ marriages.

During the hearings, the respondents, primarily the Government of India, but also other intervenors such as religious organizations, opposed such recognition. They primarily argued that the Indian Constitution did not recognize a right to marry. The complexity of Indian family laws, which comprises both secular and religious identity-based personal laws, meant that any remedy locating LGBTQ+ marriage in just secular law was unworkable, and, if at all desirable, the parliament, and not the court, was institutionally better suited to grant marriage equality.

No Right to Marry, but a Government-Appointed Committee

All five judges unanimously rejected a right to marry in Indian constitutional law. They all held that marriage was, at best, a statutory right, and constitutional rights could not create a new social institution like same-sex marriage. The court also unanimously rejected challenges to the Special Marriage Act. They, however, did hold that transgender persons who were in heterosexual relationships could marry under existing family laws in keeping with their gender identities. Beyond these issues, the court split (3-2) on all other aspects of the judgement. The majority rejected the challenge to the marriage law based on both an equality analysis and in recognition of its institutional limitations, but the minority largely focused on institutional limitations alone. While the minority, perhaps in a bid to assuage the feelings of India's LGBTQ+ community, sought the recognition of a right to civil unions and recognized joint adoption for LGBTQ+ couples, the majority disagreed and ruled against both.

All the judges of the court, however, did stress that compared to heterosexual couples, LGBTQ+ couples were indeed discriminated against in relation to several marriage-linked material benefits, such as pensions, access to financial instruments, healthcare decision-making, gratuity, etc. The majority even admitted that they were empathetic to LGBTQ+ couples' feelings of being left out. In this context, the court welcomed the suggestion of the Solicitor General of India during the hearings that a committee at the highest levels of the Central Executive would be set up to study issues faced by such couples and suggest appropriate solutions. However, the majority did not express any view on how such a committee should approach issues of relationship recognition.

A Jurisprudence of Inconsistency and Forgetting

In the past, I [have extensively argued](#) how locating marriage equality in India's secular marriage law alone is problematic. This is because family laws in India, both secular and religious personal laws, remain inherently interconnected. Thus, secular marriage law remains intimately connected to personal law for various aspects of the law, such as inheritance, parenthood, and property. Therefore, approaches to marriage equality that do not account for family law in its entirety are bound to be inadequate. This is also compounded by the general granularity of family law, where marital recognition remains linked to several other laws, including criminal law, which in India remains binaried and not gender neutral. Moreover, Indian family law often treats women and men differently, for instance, through differential ages of consent for marriage, thereby making judicial re-interpretive exercises difficult. The court's frank admission that it could not possibly re-interpret hundreds of statutes and at the same time decide difficult questions of policy, such as retaining gendered provisions, is therefore not surprising.

However, what is indeed surprising is the court's refusal to declare rights. The Indian Supreme Court, especially when it comes to rights issues, is generally not a minimalist court. In fact, one of its key achievements has been its storied jurisprudence on positive rights, including several procedural and remedial innovations. Most recently, through its gender and sexual jurisprudence, the court stressed several progressive concepts, such as the equal constitutional citizenship of LGBTQ+ Indians, transformative constitutionalism, and the triumph of the morality of a liberal constitution over hidebound social morality. Many of these concepts are intrinsically counter-majoritarian and aimed at protecting minorities who may otherwise not have a sufficient voice in political processes.

In the Supreme Court's marriage equality decision, much of this past is either conveniently forgotten or distinguished away. For instance, in its analysis of the right to marry, the majority does not consider the inter-connectedness of rights such as equality, liberty, and dignity and only treats marriage as a statutory right related to the right to liberty. In its equality analysis of gendered marriage provisions, the majority only relies upon the traditional test of classification and does not even consider sexual orientation discrimination. In the past, in the absence of a law, the Supreme Court has often issued guidelines to realize rights or encouraged the Parliament to enact laws. A similar approach was taken by the South African

Constitutional Court in [*Ministry of Home Affairs v Fourie*](#), where the court had issued a suspended declaration of invalidity to allow Parliament to enact a law. The Indian Supreme Court, however, distinguished away all of this, thus raising questions of possible inconsistencies with its earlier jurisprudence.

It is, of course, hard to speculate about why the court decided the way it did. Some reasons, though, seem more likely than others. First, unlike in the context of the decriminalization of homosexuality in 2018, where the Government of India had deferred to the apex court's decision on the issue, in the marriage equality case, the Government actively opposed recognition. At a time when India's ruling party, the Bharatiya Janta Party (BJP), remains dominant in Indian politics, perhaps the Indian Supreme Court was wary of inter-branch conflict and mindful of its legitimacy. Second, unlike other jurisdictions, Indian family law remains a genuinely complex area of law. In fact, family law has long been consumed by debates over whether religious personal laws can even be subject to constitutional scrutiny. The majority's approach, which views family recognition as preceding State formation and its law, is emblematic of this context of Indian family law. Third, even though the court goes to great lengths to admit discrimination and express its empathy for India's LGBTQ+ community, the majority often indirectly admits that its past rights interventions have typically occurred when liberties were seriously threatened. In other words, the majority does not view the lack of marriage recognition as really threatening the rights of LGBTQ+ people. After all, post-decriminalization, they have had the right to be in a relationship, but such relationships do not necessarily need public approval or celebration. In fact, the court compares marriage recognition to a poet asking the State to create a public platform to enable their right to freedom of expression or asking the State to construct roads to enable the right to move freely. With respect, these analogies are unfortunate, and no other reason but prejudice or a fundamental disagreement with the equality of queer families may explain the majority's approach. The court's decision may also be reflective of broader social attitudes towards LGBTQ+ persons in India, where decriminalization only happened in 2018. But it is questionable if rights recognition should be based on social attitudes or the passage of time. As the court admits, marriage remains a key social institution linked to key dignitary and material benefits. This is precisely why non-discriminatory access to marriage remains a fundamental rights issue implicating the equal constitutional citizenship of LGBTQ+ Indians.

Constitutional Interpretation as a Terrain of Contestation

The Supreme Court's rejection of marriage equality may have far-reaching implications for LGBTQ+ rights in India. Having been delivered by a constitution bench of the apex court, it effectively forecloses judicial possibilities for any kind of relationship recognition, whether marriage, parenthood, or civil unions, in the foreseeable future. This is because lower courts are unlikely and, in law, cannot go against the Supreme Court, and re-litigating the issue before the apex court does not seem to be a realistic possibility any time soon. For one, a five-judge bench decision would have to be reconsidered by a bench of higher strength, and constituting such

benches is notoriously difficult given the Supreme Court's heavy, daily workload of non-constitutional appeals and petitions.

More importantly, in refusing to declare rights, the Supreme Court has effectively robbed India's LGBTQ+ community of the language of rights when it comes to the equal recognition of queer families. It is, however, important to remember that even though the Supreme Court's decisions are considered final, the task of constitutional interpretation is not its domain alone. Other branches of the State, such as the executive and the legislature, and most importantly, citizens can and do engage in acts of constitutional interpretation and rights recognition. As debates about the constitutional rights of LGBTQ+ families move from the judicial to the political domain, India's LGBTQ+ community would do well to contest the Supreme Court's decision and its legitimacy and reclaim the language of rights for the greater recognition of queer families.

The majority in *Supriyo* ends its opinion with the caution that "despite being empowered to see the capabilities of the law in its grand and majestic formulation, we must not be led aground because we are blinded, by its glow." Admittedly, the recognition of marriage equality in Indian family law was never going to be easy, and even a positive judicial declaration that recognized rights would have meant a long political struggle to effectively realize these rights. But this reality does not mean that the court's decision in not recognizing rights is fair or aligns with Indian constitutional law. Rather, in its effort to avoid being blinded by the glow of justice, the court may have unwittingly embraced darkness.

