Rewriting *Supriyo*: Unpacking India's Marriage Equality Judgment

Jwalika Balaji
Vidhi Centre for Legal Policy

Mandar Prakhar
Vidhi Centre for Legal Policy

Abstract

This article reimagines *Supriyo v Union of India*, a constitutional judgment rendered by the Supreme Court of India in 2023 that denied the legal recognition of same-sex marriages. The rewritten judgment uses a critical queer lens and recognizes the right to marry as a constitutional guarantee grounded in dignity, autonomy, and equality. It rejects the heteronormative exclusions of the Special Marriage Act 1954 and foregrounds the lived experiences of queer couples. It illustrates how queer relationships can subvert patriarchal norms through consent-based relational models. Simultaneously, it proposes a nomination-based approach to delink legal benefits from marital status, enabling legal protection for diverse kinships. In doing so, the rewritten judgment queers marriage both structurally and substantively, while also ensuring legal recognition for non-marital forms of intimacy and care.

Keywords: marriage equality; Indian Constitution; critical queer theory; anti-discrimination.

[A] INTRODUCTION

On 17 October 2023, the five-judge Constitution Bench of the Supreme Court of India pronounced its verdict in the case of *Supriyo and Others v Union of India* (2023). The petitioners had challenged the constitutional validity of the Special Marriage Act 1954 (SMA) which only permits heterosexual marriages. They had asked the Court to read the SMA in a way that allows for queer marriage as well. The Constitution Bench upheld the validity of the SMA and held that there was no fundamental right to marry that could be located within the jurisprudence of the Constitutional Court. Thus, the Supreme Court denied the legal recognition of same-sex

* The authors are grateful to both Professor Kunal Ambasta from the National Law School of India University, Bangalore, and the Supriyo Team from the Vidhi Centre for Legal Policy for their thoughtful engagement with the ideas in this piece.

or queer couples (terms used interchangeably in the judgment) within the institution of marriage.

The verdict was an exceedingly disappointing moment in the trajectory of queer rights in India. The road to rights for queer persons in India has been a long and arduous one. The Delhi High Court decriminalized consensual same-sex sexual activity, within section 377 of the erstwhile Indian Penal Code 1860 (*Naz Foundation v NCT of Delhi* 2009), only as late as 2009. This decision was unfortunately reversed by the Supreme Court in 2013 (*Suresh Kumar Koushal v Naz Foundation* 2014). Finally, in 2018, a five-Judge Constitution Bench re-heard the challenge to section 377 and authoritatively decriminalized it (*Navtej Singh Johar v Union of India* 2018). Since then, some High Courts have sporadically recognized the right of queer couples to live together and have protected them from violence and harassment by their natal families (*S Sushma v Commissioner of Police 2021; Rohit Sagar v State of Uttarakhand* 2021). However, the Supreme Court in *Supriyo* failed to take this reasoning to the logical conclusion of positively recognizing such relationships in law.

Specifically on issues concerning trans persons, the Supreme Court has expressed more readiness in upholding and recognizing their fundamental rights. In 2014, a Division Bench of the Supreme Court rendered a remarkably progressive decision in *NALSA v Union of India* (2014), where they recognized the fundamental right to self-identify one's gender and recognized gender identity as a protected ground within the equality guarantee in the Constitution. In 2019, the Madras High Court held that the term "bride" within the Hindu Marriage Act 1955 should be read to include transwomen as well (*Arunkumar v The Inspector General of Registration* 2019). This was affirmed by the Supreme Court in *Supriyo v Union of India*, where it recognized the rights of trans persons to enter into "heterosexual marriages" (Bhat J, paragraph 119).

In this article, we imagine ourselves as deciding *Supriyo v Union of India* in 2025 along with the rest of the original judges, that is, as rendering a dissenting opinion in the judgment. Therefore, we rely on the scholarly literature produced even as recently as in the last two years which is relevant to this legal matter. The verdict dealt with a broad range of issues, including adoption; however, in our rewritten judgment, we address the limited question of marriage equality, both from a legal as well as a philosophical point of view.

We adopt a critical queer perspective. An ideological position towards marriage frames it as normatively good or bad, whereas a critical queer perspective evaluates how ideas, norms, and subjectivities are

constructed and navigated (Fischel 2019). This approach enables the rewritten judgment to examine marriage, law, and queer subjectivity not in normative binaries, but as discursive practices that govern, discipline, and unevenly enable access. This perspective is especially valuable for reimagining marriage as a constitutional right shaped by queer values and alternative regimes like nomination.

Although we differ from the majority opinion in *Supriyo v Union of India* by upholding the right of queer people to legally marry, we do not merely facilitate the entry of queer people into the institution of marriage. Rather, through our opinion, we hope to offer one way of "queering" marriage itself, by showing how enfolding queer relationships within a legal institution has the radical power to subvert the basic hetero-patriarchal norms of the institution. Within the scope of the article, we are unable to comprehensively engage with the existing debates on "queering marriage", although we will point readers to the same.

The judgment follows a blended approach, drawing upon the Court's style of reasoning and structure, along with our own language to reflect the urgency and lived realities of queer communities. We deviate from norms of judgment writing where those norms are seen as compromising particular queer values. Notably, we have used the term "queer" more expansively than the Court has, to encompass a wider spectrum of identities, relationships, and kinships that otherwise remain invisible in the dominant discourse. Further, there is a growing trend in Indian court judgments of citing and discussing academic literature. In our rewritten judgment, however, we engage with literature more comprehensively than courts normally do.

We recognize the tangible weight of this judgment on queer lives. It is a shame that the Supreme Court of India has failed to provide a judicial remedy for not only those who wish to get married, but also those who wish to legally share their lives with their partners, loved ones, and other forms of kin unrelated through blood or marital ties.

We hope that our opinion can provide a queer lens to examine this issue legally and also offer a way to incorporate lived experiences into the law.

[B] IN THE SUPREME COURT OF INDIA

Writ Petition (Civil) No 1011 of 2022, Writ Petition (Civil) No 93 of 2023, Transferred Case (Civil) Nos 5 of 2023, 8 of 2023, 9 of 2023, 11 of 2023, 12 of 2023, Writ Petition (Civil) Nos 1020 of 2022, 1105 of 2022, 1141 of 2022, 1142 of 2022, 1150 of 2022, 159 of 2023, 129 of 2023, 260 of 2023, Transferred Case (Civil) No 6 of 2023, Writ Petition (Civil) No 319 of 2023, Transferred Case (Civil) Nos 7 of 2023, 10 of 2023, 13 of 2023 and Writ Petition (Civil) No 478 of 2023

Decided On: 30 July 2025

Appellants: Supriyo @ Supriya Chakraborty & Anr

vs

Respondent: Union of India (UOI) and Ors

Hon'ble Judges/Coram: Bhat, J, Narasimha, J, Kohli, J, Kaul, J, Chandrachud, CJI, Anonymous, J.

Supriyo@ Supriya Chakraborty & Anr vs Union of India

JUDGMENT

ANONYMOUS, J (for themself)

1. At the very outset, I acknowledge the uncertainty stemming from the varying judicial opinions surrounding the constitutional question we are faced with. However, I view this opportunity as a manifestation of interpretative judicial diversity. It is in this spirit of plurivocalism that I pen this opinion with due reverence to the Constitution of India.

2. My learned sibling judge, Justice Narasimha, in his opinion, has very succinctly distilled the constitutional questions that lie central to this matter.

a. The status of right to marry for LGBTQ+ couples in India under the Special Marriage Act 1954 (SMA); and

b. The consequent remedy that should ensue.

3. Having deliberated on both these issues, I now list out my conclusions which will be supplemented with reasoning thereafter:

i) I respectfully disagree with my sibling judges on their view about the right to marry as a fundamental right. I firmly view the right to marry as a constitutional right, within the contours of the constitutional guarantee of autonomy and liberty. In the same breadth, denying this

right to non-heterosexual couples is constitutionally impermissible. Firstly, it fails the intelligible differentia and rational nexus test under Article 14 and secondly, it infringes the non-discrimination principle enshrined under Article 15 of the Constitution.

ii) I hold that marriage is not merely a form of social recognition but a site of various legal entitlements and privileges. To deprive non-heterosexual couples of these rights is a tragic betrayal to the ever evolving and transformative promise of the constitutional safeguard. In this opinion, I am not examining the question of adoption and shall confine my discussion solely to the right to marry.

iii) I agree with my sibling Justice Kaul, that the SMA in its current formulation is violative of the Constitution. Since Justice Kaul has elaborately analysed this infirmity, I shall refrain from going into details and will only supplement his reasoning by examining the notice regime.

iv) I analyse the dynamic nature of marriage and present a response to abolitionist voices within the queer community. Marriage need not be a fixed patriarchal monolith, and queer partners already disrupt it through *maitri karar* (a traditional contract agreement, often used between queer people who are not married/cannot be married) (Sanyal 2025), and live-in contracts that insist on constitutional values such as revocable consent, shared care, and the freedom to exit. Legal recognition of these practices could resignify marriage from within rather than merely slotting queer couples into an unchanged, heteronormative script.

v) Finally, I direct the government to consider the disaggregation of rights and benefits associated with marriage from the status of marriage. A statutory nomination regime—modelled on existing EPF, NPS and insurance forms—would let any adult name dependents for pensions, healthcare, tenancy succession and more, whether married or not. This dual-track approach keeps marriage as an expressive option while extending tangible, instrumental protections to single individuals, polycules, friends-as-family, and even kinships such as *hijra gharanas*, thus avoiding the problem of privileging one relational form over all others.

4. In my opinion, there's no more compelling foundation to this opinion than the poignant reflection of this Court in *Navtej Singh Johar v Union of India*:

> "*History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution.*" (2018: paragraph 644)

5. These words are not rhetorics but as my sibling Judge, Justice Kaul rightly suggests, they are an opportunity to acknowledge the ordeals faced by the LGBTQ+ community owing to systematic injustice and casts a "*collective duty upon all constitutional institutions to take affirmative steps to remedy the discrimination*" (J Kaul, paragraph 19). While the opinions penned down by my other sibling judges diverge from this promise, this persuades me to pen down my own opinion.

[C] THE RIGHT TO MARRY IS A FUNDAMENTAL RIGHT

6. I first address the question of a constitutionally protected right to marry. In the *Shafin Jahan v Asokan KM*, this court categorically observed that the Constitution embodies autonomy and liberty as core tenets, which further informs an individual's right to autonomously decide on issues affecting their identity and personhood (2018: paragraph 19). This premise solidified the conclusion that a person has the liberty to marry a partner of their choosing (2018: paragraphs 54, 55, 77). "The right to marry a partner of choice" is thus protected under Article 21 (*Shafin Jahan v Asokan* KM 2018: paragraph 77; *Lata Singh v State of Uttar Pradesh* 2006: paragraph 17; *Shakti Vahini v Union of India* 2018: paragraph 44).

7. This constitutional understanding can further be supplemented by this Court's notable pronouncement in In *Re: Indian Woman says Gang-raped on Orders of Village Court published in Business & Financial News* 2014, where the Court affirmed the State's duty-bound obligation to protect the fundamental rights of choice in marriage to its citizens (2014: paragraph 16). This affirmation makes it abundantly clear that the right to marry a partner of choice is not a negative right, but also positively obligates the State to secure conditions necessary for the meaningful fructification of the right.

8. However, this constitutional understanding in this case, has been exclusively extended to heterosexual individuals, excluding LGBTQ+ individuals from its remit. This denial of equivalent entitlements to non-heterosexual couples creates a distinction between two classes (heterosexual and non-heterosexual). Such classification is not

permissible under Article 14 unless it satisfies a two-fold test: *firstly*, the classification of groups must be based on intelligible differentia and, *secondly*, the differentia must have a rational nexus with the object sought to be achieved (*Dipak Sibal v Punjab University* 1989: paragraph 9; *Navtej Singh Johar v Union of India* 2018: paragraphs 408 & 637.2).

9. The difference between the two classes in the current case is based on the ground of sexual orientation, which was recognized as a protected ground of discrimination under Article 15 of the Constitution. This Court in *Navtej Singh Johar v Union of India* held that "the natural or innate sexual orientation of a person cannot be a ground for discrimination." (2018: 637.3). Thus, the exclusivity surrounding the treatment of the right to marry, based primarily on allowing one class of persons (heterosexual individuals) to marry fails the intelligible differentia test under Article 14 (John 2011). Further, the differentiation between the classes does not have any rational nexus with any legitimate aim of the state. There exists no constitutionally valid object that is sought to be achieved by restricting marriage to "one man, one woman". (Bhogle 2019). The government of India has argued that the object of marriage is procreation by heterosexual partners (CJI Chandrachud, 42). The government of India's submission is not grounded in constitutional values, but instead reflects moral judgments rooted in prevailing social norms. This imposition of social morality has been declared impermissible by this Court. As the then Chief Justice held in *Navtej Singh Johar v Union of Indi*a, "In the garb of social morality, the members of the LGBT community must not be outlawed or given a step-motherly treatment of malefactor by the society" (2018: paragraph 122). Further, this Court has recognized that social repugnance towards non-traditional marriage, does not warrant intervention with individual liberty (*S Khushboo v Kanniammal* 2010: paragraph 46.). Thus, this distinction fails the litmus test of Article 14, owing to the discriminatory distinction rooted in sexual orientation (*Navtej Singh Johar v Union of India* 2018) and gender identity *(NALSA v Union of India* 2014) and thence further violates Article 15. I thus hold that there exists a fundamental right to marry and declare that the terms "husband" and "wife" within the SMA must be read as "spouse", to allow same-sex couples the right to legally marry.

10. Against this backdrop, I now proceed to discuss how my sibling judges have erred in their assessment and articulation in the matter. I will offer rebuttals to two opinions (J Bhat – majority and CJI Chandrachud – minority) as they both discuss the heart of the matter – i.e., the interplay between the judicial recognition of a right and the state intervention to effectuate that right.

The fallacy of the majority opinion: J Bhat and J Kohli

11. Justice Bhat, who penned the majority judgment, denied constitutional recognition of the right to marry on the ground that the marital institution has existed even before the state was conceptualized as an idea, rendering it both external and independent to the state. Thus, he opined that this court could not create a fundamental right to it (J Bhat, paragraphs 45-46). However, this reasoning contradicts the precedents of this very Court on numerous occasions, which recognized rights like travel (*Satwant Singh v Passport Officer* 1967: 57), development (*G Sundarrajan v Union of India* 2013: 184), and clean environment (*RLEK v State of Uttar Pradesh* 1985) as fundamental, despite their pre-state origins (Kalra 2023).

12. The Indian constitutional architecture embodies a golden triangle of Article 14 (right to equality), 19 (right to freedom) and 21 (right to life and personal liberty). While each right embodies a specific foundational virtue, namely, autonomy, liberty and dignity respectively, these rights function in concert to create a normative bedrock for the constitutional discourse on what it means to be a human. These rights enable each individual to have the free will to determine the course of their lives. CJI Chandrachud highlights the necessity to speak of the right to intimacy, informed by the intersection of dignity, autonomy, and privacy before conceptualizing a right to marry. Choosing a life partner is not merely a personal preference, but a defining act of selfhood and identity which emanates from the interplay of these virtues. He further opines that some individuals might choose not to have a partner, however, this must stem from the active exercise of decisional autonomy, not a deprivation of agency (CJI Chandrachud, paragraph 233). In India, where marriage is the only legally sanctioned form of intimacy, to deny access to it is to deny a dignified life, often forcing individuals into secrecy and isolation. The golden triangle thus provides a framework to recognize a right to marry as fundamental, irrespective of sexual orientation.

13. In this regard, Justice Bhat's denial of marriage equality on the ground that it would require horizontal application and that the State has no obligation to legally recognize queer relationships (J Bhat, paragraphs 62, 67) cannot be sustained. Emanating from the German term "*Drittwirkung*", horizontal applicability has been conceived as the enforcement of human rights against private individuals, not just vertically between the state and its citizens (Hunter-Hennin 2007). This Court on various occasions has already affirmed that autonomy, dignity, and liberty are not only central to the lives of queer persons (*NALSA v Union of India* 2014: paragraph 2; *Navtej Singh Johar v Union of India*

2018: paragraph 255) but also to the institution of marriage (*Independent Thought v Union of India* 2017; *Joseph Shine v Union of India* 2019; *Shilpa Sailesh v Varun Sreenivasan* 2023). Since these values are foundational to both these domains, they inevitably inform the right to marry for queer persons (Bhogle 2019). The guarantees of Articles 14, 19 and 21 thus impose positive obligations on the State to ensure that these rights are not violated even by private actors, as recognized by the Supreme Court itself (*Kaushal Kishor v State of UP* 2023; Bhatia 2015). If these values thus apply in horizontal contexts, then there is no bar in recognizing the right to marry merely on the ground of it requiring horizontal application.

Chief Justice's state intervention paradox: CJI Chandrachud

14. Chief Justice Chandrachud's premise is that because marriage is largely structured through statutes and the benefits attached to it are "non-constitutional", the claim to a fundamental right to marry lacks the pedigree for constitutional elevation (CJI Chandrachud, paragraphs 160-161, 183). That premise is flawed. Many interests are implemented through statute and yet attract constitutional protection. Consider maternity benefits: although the Maternity Benefit Act 1961 is a statutory scheme, the Supreme Court has grounded maternity leave and allied entitlements in constitutional guarantees—treating them as facets of reproductive autonomy, dignity, privacy and equality under Article 21 (and Article 14). In *K Umadevi v State of Tamil Nadu* (2025), the Court set aside a denial of maternity leave for a "third child" under a legislation, reasoning through Article 21 and the jurisprudence on reproductive rights to constitutionalize maternity benefits beyond mere service conditions. By parity of reasoning, the fact that marriage is presently organized and incentivized by legislation cannot be a reason to withhold constitutional protection. If anything, state involvement and structuring of the marital regime warrants heightened constitutional scrutiny to ensure inclusion. Recognizing marriage as a fundamental right would supply precisely the constitutional lens through which to test whether the state's distributive choices comply with equality, dignity and autonomy, instead of insulating a heavily regulated institution from review merely because it is heavily regulated.

Recognizing transgender persons' right to marry

15. I partly concur with both the majority and the minority opinions in the conclusion that transgender persons can marry under the existing

formulation of SMA. However, this holding comes with a caveat, according to my sibling judges. They held that such marital unions would have to be "heterosexual marriages" to warrant validity (CJI Chandrachud, paragraph 277).

16. This partial recognition solidifies the heteronormative construction of marriage and exposes the arbitrary nature of excluding same-sex couples. If a transgender woman may marry a cisgender man but not a cisgender woman (J Bhat, paragraph 149; CJI Chandrachud, paragraph 277), the law creates classifications based solely on the partner's gender rather than any compelling state interest. This differential treatment cannot survive constitutional scrutiny under Articles 14 and 15, as argued previously, as it highlights that both gender and sexual orientation remain the impermissible barrier to marriage equality. Thus, the right of trans persons to marry whomever they wish to, regardless of their partner's gender, is upheld as constitutional.

[D] MARRIAGE: A GATEWAY TO LEGAL PROTECTIONS

17. Having firmly established the fundamental nature of the right to marry, I now proceed to examine how the institution of marriage acts as a conduit to a multitude of entitlements, which in their current form, remain inaccessible to queer citizens excluded from formal recognition under existing matrimonial frameworks. It must be reiterated that marriage is not merely a static institution but is evolving in response to both societal progression as well as transformative constitutional mores (Balaji 2025). This evolving journey is reflected in judicial pronouncements. Courts typically do two things: *one*, they positively influence high-level jurisprudence about liberty, autonomy and dignity within marriage (*Independent Thought v Union of India* 2017; *Joseph Shine v Union of India* 2019; *Shilpa Sailesh v Varun Sreenivasan* 2023). *Two*, in individual cases of vulnerable couples, especially those facing harassment because they have loved outside their caste or religion, the Court has intervened to protect them from harassment and reaffirmed their right to choose a partner of their choice (*Shafin Jahan v Asokan KM* 2018; *Shakti Vahini v Union of India* 2018).

18. The flipside of this is that *first*, the role of courts is limited in influencing the everyday lives of people, and, *second*, the sanctity accorded to marriage, both by courts and society exposes unmarried and cohabiting couples and partners who cannot marry (such as queer persons) to heightened risk and discrimination. The conservative Indian society has ordained

the marital institution, enabling social approval to any action under its remit. This sacrosanct attribution even makes non-married heterosexual couples vulnerable in both the expressive and tangible realm of the relationship. Public displays of affection (Buzz Staff 2025) are frowned upon, and even met with violence (Flock 2018). Unmarried partners are often faced with barriers to cohabitation (Bhattacharya 2022), and they struggle to secure housing or even access basic hospitality services in hotels and other travel-related sites as a couple (Menon 2012; Das 2015). For queer individuals, these issues are compounded further; they are not only deprived of societal legitimacy but also respect and visibility within the public sphere (Sarang 2013; *Rituparna Borah v Union of India* 2020: paragraph 29).

19. At this juncture, it is imperative to foreground the lived experiences of the queer community, so that the burdens borne in the absence of marriage are not left abstract. The petitions before this Court reveal a consistent pattern: lesbian and gay couples approach law enforcement seeking protection from natal violence, yet their pleas are met with disregard or persecution. In the Rituparna Borah petition (*Rituparna Borah v Union of India* 2020), for instance, the parents of a cisgender woman in a relationship with a transgender man filed a missing persons complaint, alleging abduction. When the couple approached the police, they were met with indifference, verbal abuse, and even exhortations to the father to "discipline" his daughter through violence. Such accounts are not aberrations. Authorities frequently refuse to register complaints, pressurize petitioners to reconcile with their families, or return vulnerable couples to their natal homes in direct contravention of judicial orders that recognize their right to co-habit. In other instances, false criminal complaints, public shaming through posters, and vigilante threats have been deployed to intimidate and isolate queer couples from one another and from society (Shakti Shalini 2023: 23; Centering Familial Violence in the Lives of Queer and Trans Persons in the Marriage Equality Debates 2023). The consequence is stark: without access to marriage, queer couples are left uniquely exposed, denied both social legitimacy and the legal protections that heterosexual couples take for granted (Sanyal 2021).

20. These accounts are not anomalous; they reflect a systemic pattern which thrives on the deprivation of protection. They reflect patterns of violence and marginalization that intensify at the intersections of caste, class, and religion (Semmalar 2020). Queer relationships challenging caste endogamy face compounded violence (Abhyankar 2025). Such intersecting vulnerabilities reinforce the policing of intimate relationships that defy dominant norms.

21. Marriage in its legal form, confers entitlements central to everyday life. When queer individuals are excluded from this institution, they are not merely denied a ceremonial recognition, but they are policed and denied access to the legal protections that any heterosexual couple may take for granted. In light of this evidence, I hold that exclusion from marriage constitutes the State's abdication of its protective obligations toward a population already rendered vulnerable. The Constitution's command that "no person shall be denied the equal protection of the laws" in Article 14 demands that this Court mend precisely such structural deficits. Marriage equality is thus a jurisprudential necessity that completes the trajectory charted by *Navtej*, *Puttaswamy*, *Shafin Jahan* and *Lata Singh*. The extension of marriage rights to queer persons thus serves not only to redress historical exclusion, but to affirm the constitutional guarantee of dignity, autonomy and liberty to all citizens in the site where it matters the most: the intimacy of human relationships.

[E] CHALLENGING THE NOTICE REGIME UNDER THE SPECIAL MARRIAGE ACT 1954

22. Currently, an impediment to safeguarding autonomy among couples desiring to marry is the notice regime under the SMA. I concur with the opinion of my sibling judge, Justice Kaul, on the front that the SMA in its current formulation is violative of the Constitution. I will only provide my supplementary analysis to fortify his reasoning. In particular, I found the notice requirement under the SMA to be an anomalous construct. It formalized the bizarre phenomenon of what can be considered consent *in rem* under the SMA. The Marriage Officer is allowed to conduct an inquiry into the marriage if anyone raises an objection to the marriage (SMA, sections 7, 8, 9). The notice requirement legitimizes consent from the families and communities for the marriage of majors (Bhandare & Karwa 2020). It enables these actors to track down those who wish to have a "love marriage" (Mody 2002). This violates the decisional and sexual autonomy of those wishing to get married (Agarwal 2022) and can expose them to violence and harassment. The SMA was historically designed to bypass caste-endogamous norms, yet this notice regime permits the (often violent) policing of inter-caste and inter-faith couples. It is likely that the same would happen to queer couples as well (Sheikh & Samuel 2024). This is simply not permissible. The autonomy, privacy and dignity of all couples ought to be safeguarded in the law. The notice regime under the SMA is thus held to be unconstitutional.

[F] MARRIAGE EQUALITY CAN RESIGNIFY MARRIAGE WITH QUEER VALUES

The argument of abolitionists

23. In this judgment, I will not just engage with those who are opposed to the idea of marriage equality for conservative and moral reasons, such as the state or certain religious organizations. Rather, I will also engage with the normative position of abolitionists (Warner 1999; Arasu & Thangarajah 2012; Ruskola 2018; Jain 2023). The abolitionist stance lies on a spectrum. To illustrate a couple of positions: i) some urge that we should focus our energies beyond queer marriage to advocate for the recognition of families based on kinship and care; ii) others argue that the institution of marriage is problematic and that queer critics and feminists should be engaging with it primarily on a first-principles basis; iii) a few call for the abolition of marriage altogether as a legal institution, as it goes against the fundamental project of queer politics to decentre heterosexuality and patriarchy.

24. In this judgment, I engage with one standard version of the argument made by abolitionists, which I phrase in this manner: marriage is a problematic institution, and queer lives should not get entangled in this project. Recognition of same-sex marriage may not pose a significant threat to compulsory heterosexuality. Compulsory heterosexuality orders society through a strict enforcement of rigid sex and gender roles, with strictures on the object of desire (Meeks & Stein 2006; Narayan & Gupta 2011; Banerjie 2019). Compulsory heterosexuality propounds the belief that unless explicitly called out otherwise, everyone is heterosexual, and everything is and ought to be heteronormative (Rich 2003). Marriage as an institution in India is argued to be at the root of compulsory heterosexuality, furthering heteronormativity and patriarchal assumptions about gender, sex, sexuality, and sexual ordering (Menon 2005).

25. Currently, Indian marriage statutes construct a four-part "sex-consent matrix" that privileges social control and sexual obligation over meaningful choice (Balaji 2023).

> (1) Absent affirmative consent to marry: under both the Hindu Marriage Act 1955 and SMA, a marriage is presumed valid unless vitiated by fraud, coercion or severe mental incapacity; the law never requires an express, continuing "yes" from the spouses.
>
> (2) Public-notice consent *in rem*: the SMA's 30-day notice, complete with pasted photographs and address details, invites families

and communities to approve or obstruct adult unions, thereby outsourcing state authority to caste, religion and kin (Mody 2002: 223).

(3) Restitution of conjugal rights: Courts may compel a spouse's return to the marital home, treating cohabitation—and by implication sexual access—as an enforceable duty; lack of desire or incompatibility rarely qualifies as "reasonable excuse" to deny conjugal union (Hindu Marriage Act 1955; SMA)

(4) Sex as a legal prerequisite: non-consummation, impotence or wilful refusal to have intercourse are grounds to annul a marriage (Raj 2014; *The Hindu* 2016; FE News Desk 2022), presuming a permanent entitlement to sex once married (Hindu Marriage Act 1955, section 12; SMA, section 25; Balaji 2025). Together these provisions erase individual autonomy and tether marital legitimacy to heterosexual intercourse (Sanyal & Ghosh 2022), culminating in the marital-rape exception that still exempts forced sex by husbands from criminal sanction.

26. Therefore, one may argue that the idea of marriage is premised on (hetero)sexual subordination and expectation on spouses, especially wives, to not deny sex to their partners. The worry is that mere assimilation of queer people into this institution will not challenge the idea of compulsory heterosexuality and patriarchal scripts.

Challenging the structure of marriage: a reply to the abolitionists

27. It is my belief that marriage is a dynamic institution. It evolves according to changing societies (Reddy 2009: 341). Although it may be several steps behind some progressive social practices and norms, it is certainly not frozen. The structure of marriage and the meaning of marriage is constantly challenged and changed by those who are marginalized by the same in the first place.

28. An assumption that marriage is oppressive and will always be oppressive in the same way forever is an unreasonable conclusion (Sheikh & Samuel 2024). This argument is ignorant of the ways in which reverse-discourse and counter-hegemony operate (Boellstorff 2007: 234). As Boellstorff writes, the question should not be about whether to have queer marriage or not. Rather, it ought to be, "in what ways can our acts from within a system of power do more than sustain or not sustain that system?" (Boellstorff 2007: 234) We must place a premium

on the possibility of subjects transforming systems of power from within in tangible ways. Butler argues that there is no "I" that exists prior to discourse and that the "I" is constituted through discourse (Butler 1993: 18). However, since a norm or identity is upheld and performed through discourse, post-subjection, the subject may be in a position to offer resistance and resignify the norm (Butler 1993). Butler shows this through the resignification of the term "queer". They argue that "queer" can be redeployed, twisted and queered from a prior usage in furtherance of present politics (Butler 1993). There is, however, a caveat that this resignification is already complicit with and cannot be disassociated from its historical constitution. "To recast queer agency in this chain of historicity is thus to avow a set of constraints on the past and the future that mark at once the limits of agency and its most enabling conditions" (Butler 1993: 20).

29. The possibility of resignification thus happens through performance, bringing about unanticipated challenges to the dominant and historical understanding of certain terms and norms (Butler 1993). I believe that such resignification can occur, and is already occurring in India, through not only the rendering of progressive judgments but also the recognition of queer lived realities in law.

Re-signifying marriage through queer lives and values

30. The concept of resistance indicates that dominant norms can be contested, resisted and threatened through reverse-discourse and performativity. The consent-sex matrix can be brought into sharp focus when examining queer relationships through *maitri karar* agreements and live-in relationship agreements between working-class queer people in rural India (Maya Sharma & Indra Pathak Collection Organisational Documents 2023). There is a rich history of archival material on queer lives at the Queer Archive for Memory, Reflection, and Activism in India. The queer couples featured in the "Maya Sharma" collection from the Archive are generally from marginalized backgrounds in and around Gujarat (a prominent state in India), with little to no family support for their relationships. They have created legal affidavits, affirming the consensual nature of the relationship as well as the contours, duties, and rights and responsibilities of the partners, similar to a marital contract. These affidavits serve primarily to protect couples from both the violence of families and society and that of the police. Families routinely file complaints of abduction and kidnapping as well as *habeas corpus* petitions, claiming that their child has been illegally detained by the queer partner (Arasu & Thangarajah 2012: 413; Banerjie 2019). The formal

record of relationships by queer couples, emphasizing their consensual nature, thus served the end of securing their relationship from scrutiny and attack.

31. The institution of marriage, as it predominantly exists currently, has much to learn from these queer couples. In their relationship agreements, they repeatedly and emphatically stress on the presence of consent. They expressly mention that no one has coerced them to be in this relationship with their partner. They have "very carefully" (Maya Sharma & Indra Pathak Collection Organisational Documents 2023) decided to live together, leaving their family and home, willingly and voluntarily. In one case, the couple mentions that they have signed the agreement in sound mind, in a state of complete alertness (ibid). They affirm that they have not been driven away or kidnapped. In some cases, the couples have also commented on how they have left their families and communities willingly. They have also recorded voluntarily renouncing their parents and family with "full pleasure and mutual consent" (ibid).

32. Since this is a relationship based on the consent of parties, they record that they are free to cancel or terminate the relationship in the future (ibid). Some parties also mention that if their family members use any coercion to take them back home, they will not hesitate to take appropriate legal action against them. The parties willingly consent to share all rights and responsibilities with each other, including household labour, medical care, and maintenance (ibid). Since these are clauses which are incorporated into legal documents, they fold back into the law. They reflect a nuanced understanding of consent to the relationship, to obligations within the relationship, and respect for the boundaries of the relationship. If such an idea of consent were to be incorporated into the statutory understanding of marriage as well, it could challenge the foundation of any arranged or forced marriages. It would require that the parties deliberate, introspect, and only then give their informed consent for marriage. This practice of establishing consent prior to the legal recognition of the relationship cements the decisional and sexual autonomy of individuals, prioritizing their rights over the governance mechanisms of family, caste, religion, and community.

33. That the relationships can be terminated at the behest of the parties is extremely significant. There are no obligations of sex that inherently flow from the relationship, and the right to terminate the relationship means that the sustenance of the relationship is inherently based on care and consent. A clause such as restitution of conjugal rights would not make sense under such a framework, as any action taken by the

parties to the relationship is not externally imposed or mandated, but performed with willingness. This is not a claim that all queer relationships are perfectly egalitarian and respectful in practice. But the weight of the argument comes from the fact normatively, there is a sincere emphasis on consent—both to the relationship as well as for activities within the relationship. The legal recognition of such a relationship, through *maitri karar* and live-in relationship agreements, means that the normative has the power to take a legal form. Thus, law is capable of acknowledging such a relationship that challenges the hegemony of the consent-sex matrix.

34. By recognizing these practices in the law, queer individuals and couples can offer resistance from within the law and from within the institution of marriage. The examples discussed above can help us think about Boellstorff's provocation on how subjects can act within a system of power to not sustain that system. The Rituparna petition highlights this clearly (*Rituparna Borah v Union of India* 2020). The petition does not ask for mere assimilation of sexual queer couples who will privatize care and raise children. The petition highlights different forms of queer relationships, intimacies, and formation of families which can challenge the heterosexual or heterosexual-like unit envisaged by marriage. If the values underlying the queer relationships are incorporated into the law, read with the recent jurisprudence on autonomy, this may not just enable a challenge in the future of problematic legal provisions, but even of problematic social values currently intrinsic to marriage. It can enable a more expansive recognition of individual autonomy within marriage (contesting existing scripts of sex and sexuality) and relationship autonomy in society (defying social norms to live with one's partner or chosen family).

35. Complementing such a lived reality, queer lives have always played a significant role in advancing constitutional jurisprudence in India. The prohibition of same-sex sexual intercourse in the Victorian section 377 of the Indian Penal Code rendered queer persons criminals and outlaws in their own country. The Delhi High Court's judgment in *Naz Foundation v Union of India* and the Supreme Court's judgment in *Navtej Singh Johar v Union of India* decriminalizing section 377 were both born out of decades-long queer activism and litigation. These judgments developed the concept of "analogous grounds" within equality law. Sexual orientation was recognized as an analogous ground to "sex", which is currently recognized as one prohibited ground of discrimination (among five) in the Constitution. This has positively impacted the architecture of discrimination law in India by allowing Courts to go beyond the list of

grounds, enabling the possibility of wider recognition for more groups in the future.

36. Further, another transformative moment in this trajectory is the Madras High Court's poignant verdict in *Sushma & Seema v Police Commissioner & Ors*, which was a case of natal violence against a young lesbian couple. The High Court ordered that the police close complaints filed by parents or others against consenting queer adults, without subjecting them to harassment. This direction is significant as it establishes the relationship autonomy of queer couples, recognizing their liberty even in the face of judgmental social mores. The judgment mandated sensitization of the police and opening up shelters for queer persons in need of protection and prohibited "conversion therapy" or "attempts to cure" queer persons (2021). Further, the continuing mandamus of the Court culminated in the rollout of a Transgender Policy for the state of Tamil Nadu. It also initiated discussions on the creation of a "deed of familial association" within the state, through which same-sex relationships could potentially be recognized. Reinforcing this inclusive approach, the Madras High Court recently reflected that although precedents like "*Shakti Vahini*, *Asha Ranjan* and *Shafin Jahan* were rendered in the context of inter-caste and inter-religious marriages, the ratio laid down therein would apply with equal force to same sex relationships also" (*M A v Superintendent of Police, Vellore* 2025: paragraph 10) This judgment exemplifies how queer relationships and issues have been used by courts as a vantage point to infuse the values of consent, autonomy, and chosen kin into legal architecture more broadly. This responds positively to the abolitionist argument outlined above, by showing how such infusion can become transformative, affecting both overall jurisprudence and the executive action of the state and the police.

[G] BEYOND MARRIAGE: TOWARD A NOMINATION-BASED REGIME

37. Even as I dissent from the restrictive holding of the *Supriyo* majority, I heed a valid warning against privileging one relational form to the detriment of others. Scholars caution that tying all legal security to marriage super-imposes same-sex unions onto existing caste-class hierarchies and eclipses non-dyadic or celibate care-relationships (Singh & Ramkumar 2024). Marriage, then, has two aspects—one, the expressive aspect which enables those in a marriage to declare their love for one another, and two, the rights associated with it (Scott 2000; Sunstein 2004). Radically queering equality would mean allowing sexual minorities to also access

and legitimize their love and intimacy through legalizing their expression and allowing them to get married and, at the same time, removing the benefits that are associated solely with marriage and disaggregating them. Only if the benefits and rights associated with marriage are separated from it and are disaggregated will the institution of marriage no longer be privileged, and sexual minorities will be benefited.

38. If queer persons are merely allowed to get married with no attendant legal changes, it will result in homonormativity (Duggan 2002), ie the assumptions made by the heteronormative institution of marriage will not be contested by queer people and the privatization of certain benefits in themselves will not be questioned. It simply means that more persons will be allowed to enter into the still exclusionary and privileged institution of marriage. Allowing queer people to get married without challenging the fundamental values reflected in marriage laws will result in heterosexuality being considered the norm for marriage and queer people being allowed to access the same as an exception, resulting in "normative hierarchies of intimacy" (Fischel 2019; Singh & Ramkumar 2024). The power relations between straight persons and queer persons and the hetero-queer divide will remain intact because marriage as an institution explicitly rewards heterosexuality. However, if the rights that are now available to marriage are radically redistributed, heterosexuality as the default sexuality will no longer matter as it would not be a qualifying feature to access those rights.

39. The queering of marriage law and the disaggregation of rights will instead hugely benefit not just sexual minorities, but all persons, as they would have multiple options of accessing and redistributing rights and benefits. For example, transgender persons in a Guru-chela system currently do not have the right to define their family under the Transgender Persons (Protection of Rights) Act 2019. This could adversely affect them if the benefit of insurance were still linked to the legal natal or marital definition of family. In the proposed model, the Hijra community or the Guru, who are considered as family by a lot of trans individuals, may be nominated as the receivers of insurance. Hence, the queering of marriage here would mean that the parties who wish to enter into the insurance scheme can have the option of nominating whomever they consider as family, to avail the benefits of the same. The mere reliance on marital status to define the beneficiaries of insurance would thus be eliminated, thus decentring marriage as the primary and privileged site in the "normative hierarchies of intimacy" (Fischel 2019).

40. An implementation of the proposed solution will mean that the various legislations which are based on marriage as a licence will have to be amended. Judges will also have to be made aware of the changing nature of family and the role of marriage. Rewriting the scheme of such legislation is a task whose burden will be placed on the State as it will primarily undertake the role of disaggregating the rights and benefits of marriage through re-imagining and reinventing the law.

41. Indian statutes already recognize voluntary nominations—ie having one's rights and benefits being transferred to a person of one's choice, rather than on the basis of marital status, to one's spouse or natal family. The Employees' Provident Fund subscribers can list any person as a beneficiary of the employment savings, regardless of their relationship with the individual (Employees' Provident Funds and Miscellaneous Provisions Act 1952). Life-insurance and National Pension System forms do the same. Similarly, this logic can be scaled across sectors —by allowing nominees for medical decision-making (Yachu & Ravindran 2025), tenancy succession, accident compensation, etc. I direct the government to strongly consider this model and develop a workable framework for enabling a nominations-based regime for all. The nominations model can be undertaken alongside the recognition of queer marriages (Vidhi Centre for Legal Policy 2024; Mukherjee & Ors 2025). Thus, even if queer couples are allowed to legally marry, there can be a more comprehensive nominations regime put in place for all individuals and couples across the board.

42. A nominations regime honours the constitutional commitment to decisional privacy by also serving citizens who do not marry. Family law in India "continues to centre a binary, heteronormative model" (Goyal & Ors 2025), thereby excluding "non-dyadic relationships, non-conjugal families … and caregiving arrangements between friends" that nevertheless involve "deep financial and emotional inter-dependence" (Goyal & Ors 2025). Further, family law also marginalizes persons with disabilities, who may find the institution of marriage exclusionary not just for themselves but even for distributing rights and benefits to their non-marital caregivers (Ghai 2015: 140; Devassy 2021; Murthy 2024). Allowing every adult to designate a "primary dependant" (or multiple co-dependants) for benefits such as hospital visitation, housing succession and pension commutation would extend legal protection to unmarried elders, caregivers of people with disabilities, polycules and other formations outside the matrimonial frame. Crucially, nominations are revocable at will, embodying the queer insistence on consent as a continuing practice rather than a one-time gateway. They also relieve

the Court from adjudicating private ontology (whether a group is really "marriage-like") and focus instead on distributive justice.

43. Thus, I answer the institutional anxiety: equality need not be a zero-sum game. Marriage equality secures one path; the nominations regime keeps all other paths open, ensuring that constitutional fraternity is not conditioned on subscribing to any single model of intimacy.

[H] CONCLUSIONS AND FINAL ORDER

44. In light of the foregoing analysis, I conclude as follows:

A. The Constitution guarantees the fundamental right to marry a partner of one's choice and obligates the State to create necessary conditions for the meaningful exercise of this right.

B. This right extends to all individuals, regardless of their sex, gender identity, or sexual orientation.

C. The SMA is unconstitutional in its current form and, to correct the constitutional infirmity, it must be read expansively in a gender-neutral manner to allow queer couples the right to marry.

D. The notice requirement under the SMA is held as unconstitutional.

E. The state is directed to institute a comprehensive nominations regime that delinks legal rights and entitlements from marital status alone and further redistributes them across the spectrum of relationships that individuals value and rely upon for support, dignity, and care.

About the authors

Jwalika Balaji *is a Research Fellow at the Vidhi Centre for Legal Policy where she undertakes independent research and assists with legislative drafting for Central and State Governments. Her research areas are gender and sexuality rights, family law, and constitutional equality. She holds a BA, LLB (Hons) from the National Law School of India University, Bangalore, and a Bachelor of Civil Law (LLM equivalent) from the University of Oxford. See her* profile page *for details.*

Email: jwalika.balaji@vidhilegalpolicy.in.

Mandar Prakhar *is an Associate Fellow at the Vidhi Centre for Legal Policy, working on law, technology, and gender studies, while pursuing a BA, LLB (Hons) at the National Law University Odisha.*

Email: mandar.prakhar@vidhilegalpolicy.in.

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