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Introduction

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Preface

The Indian Journal of Legal Affairs and Research is a testament to our unwavering commitment to excellence in legal scholarship. This volume presents a curated selection of articles that reflect the diverse and dynamic nature of legal studies today. Our contributors, ranging from esteemed legal scholars to emerging academics, bring forward a rich tapestry of insights that address critical legal issues and offer novel contributions to the field. We are grateful to our editorial board, reviewers, and authors for their dedication and hard work, which have made this publication possible. It is our hope that this journal will serve as a valuable resource for researchers, practitioners, and policymakers, and will inspire further inquiry and debate within the legal community.

Description

The Indian Journal of Legal Affairs and Research is an academic journal that publishes peer-reviewed articles on a wide range of legal topics. Each issue is designed to provide a platform for legal scholars, practitioners, and students to share their research findings, theoretical explorations, and practical insights. Our journal covers various branches of law, including but not limited to constitutional law, international law, criminal law, commercial law, human rights, and environmental law. We are dedicated to ensuring that the articles published in our journal adhere to the highest standards of academic rigor and contribute meaningfully to the understanding and development of legal theories and practices.

THE CURIOUS CASE OF MARRIAGE EQUALITY AND THE RIGHT TO MARRY: LOOKING AT ARTICLE 21 FROM A QUEER LENS

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ABSTRACT

This paper examines the evolution of queer rights jurisprudence in India through the lens of constitutional morality and the right to marry under Article 21 of the Constitution. It traces the development of judicial reasoning from *Naz Foundation v. Government of NCT of Delhi* and *Navtej Singh Johar v. Union of India* to *Supriyo @ Supriya Chakraborty v. Union of India*, exploring how each decision has shaped and reshaped the boundaries of equality, dignity, and personal liberty. While *Naz* and *Navtej* reflected the courts' willingness to challenge social morality and affirm inclusivity, *Supriyo* represents a retreat from this transformative path. By refusing to recognise marriage equality and deferring the issue to the legislature, the Supreme Court failed to uphold the same standard of constitutional morality that once defined its progressive jurisprudence.

The paper argues that the right to marry must be recognised as an inherent component of Article 21, as it is closely linked to autonomy, dignity, and the right to live with equality before the law. Beyond its symbolic meaning, marriage is a legal institution that grants rights and imposes obligations, forming the basis of family, inheritance, and social legitimacy. Recognising marriage equality, therefore, is not only a matter of constitutional consistency but also an act of affirmative action that seeks to correct structural exclusion. By interpreting marriage as a protected right under Article 21, the judiciary can restore the transformative promise of constitutional morality and affirm that queer citizenship in India is both equal and complete.

INTRODUCTION

"The ghost of Section 377 lives on in spite of the decriminalization of the sexual offence and the recognition of the rights of queer persons…"[1]

D.Y. Chandrachud, in the 2023 judgement on *Supriyo* aptly captures the scenario that is unfolding in India, both socially and judicially. India as it stands today, has made leaps and bounds of progress in terms of affirmative action[2], with the scope of inherent, or rather fundamental rights expanding and contracting as the needs of the society change over time. Even after over 100 amendments, the Constitution of India has stood the test of time for being a dynamic piece of text, while also staying true to the vision that it was created with. Even today, the constitutional assembly debates are referred by the courts of India to pursue the idea of 'justice' as it had been envisioned in the 1940s. Yet, there exists one (of many) anomaly to this idea of affirmative action, which is the protections afforded to the LGBTQIA+ community[3]. The divide between public and private has always been a finnicky one, and it was not until 2009 that the rights of queer people were even brought substantially onto the radar of the courts of India. Even then, the road towards materialising some of the rights that are now formally recognised, has not been easy.

JUDICIAL HISTORY

Looking at the case of *Naz Foundation v. Govt. of NCT Delhi*[4], it stands out as a pinnacle of progressive reading of the Constitution, especially given the emphasis the parties had on public morality and the court's decision to align itself with constitutional morality instead. In 2009, the Delhi High Court received a plea from the Naz Foundation, a non-governmental organization that assists HIV/AIDS patients, contesting the constitutionality of Section 377 of the Indian Penal Code, 1860. The primary source of contention in the provision was the phrase *"carnal intercourse against the order of nature,"* which, when read in conjunction with court interpretation, penalized certain sexual acts between heterosexuals and homosexuals and all sexual acts between the latter, effectively outlawing any kind of sexual intimacy between homosexuals.

The novelty of the case lies in the bold stance of said constitutional morality that the Delhi High

Court took, moving away from a technical approach of asking the state to retrofit or rationalise the classification of protections to reaching into the heart of the issue, which was the inherent inequality and discrimination that lie within Article 377[5]. Throughout this article reference to the approach taken in Naz will be referred repeatedly, for three leading reasons, *firstly,* it was the case that was the initial stepping stone for *Navtej Johar*[6], *NALSA*[7] and even *Supriyo* and the proof of it lies in the fact that even though *Suresh Kumar Koushal*[8] overturned the High Court Judgement, it is still cited and held in regard in all of the cases dealing with queer rights after it. *Secondly, Naz Foundation* did something that *Supriyo* fails to do, recognize the inherent discrimination that exists in laws which are not explicitly making a distinction between heterosexual and queer people and *lastly,* because it engaged with jurisprudence across nations[9], reading the Constitution as it is meant to be read, like a dynamic text that changes with time.

The judicial approach, even though highly criticised in *Koushal,* was beginning to make its way back into the Supreme Court. In the case of *Justice K.S. Puttaswamy v. Union of India*[10], five out of the nine judges made their dissatisfaction with *Koushal* known, holding it at a similar level of 'discordant' in constitutional history as the *ADM Jabalpur Judgement*[11]. Soon after, *Navtej Singh Johar* overturned the enabled criminalisation of Section 377.

The *Navtej Singh Johar* judgement marked the true revival of constitutional morality within the Indian judiciary, bringing back the spirit of inclusiveness that *Naz Foundation* had first kindled. The judgments delivered in *Navtej* offered multiple strands of reasoning, each expanding the meaning of equality and liberty under the Constitution. Justices Misra and Malhotra grounded their reasoning in the view that sexual orientation is natural and immutable, framing it as an inherent aspect of identity. While this biological framing gave judicial recognition to queerness, it also risked reinforcing the idea that only what is "natural" deserves protection[12]. Justice Chandrachud, and to some extent Justice Misra *(In the judgement, he recognises that a narrow definition of identity would restrict personal freedom, particularly when it comes to the constitution. In a similar vein, Justice Chandrachud emphasizes in his portion of the ruling that sexuality is a basic experience that people use to determine the purpose of their life and that restricting it would deprive human liberty of its entire constitutional right),* offered a more fluid understanding, emphasising that sexuality is central to personal autonomy and self-definition. In

recognising that sexual identity could not be confined within rigid binaries, the Court moved away from essentialist understandings and towards a vision of liberty rooted in dignity and choice. This recognition of sexuality as a matter of human experience rather than fixed biology marked a jurisprudential shift that transformed how queerness would be understood in Indian constitutional law.

Equally significant was *Navtej*'s rejection of the idea that queer rights were limited to the realm of private intimacy. The court, much like in the case of *Naz Foundation* took a comparative approach, particularly from the South African Constitutional Court's decision in *National Coalition for Gay and Lesbian Equality*[13], the apex court recognised that Section 377 had far-reaching social consequences. It was not simply about what occurred in private; it was about how the law entrenched stigma, sanctioned harassment, and excluded queer people from public life. Justice Nariman's emphasis on dignity reinforced this, affirming that queer citizens have an equal right to live and love openly. The impact of *Navtej* has since been immense. Within India, it became the foundation for later decisions that protected queer couples in live-in relationships and recognised non-traditional forms of family. Internationally, it entered into dialogue with courts across the Commonwealth, influencing judgments in Botswana[14], Kenya[15], and Singapore[16]. Ultimately, *Navtej Singh Johar* moved Indian equality jurisprudence from a narrow, formal understanding of rights to one centred on dignity, inclusiveness, and constitutional morality.

These two precedents set the basis on which rights for queer communities had to be assessed on. The fact that both the cases extensively engaged with international jurisprudence was a step forward for the courts, in terms of understanding social dynamics and viewing the debate from a pluralistic perspective, rather than solely relying on the social fabric of morality that existed in India at the time. In both the precedents, the courts took a step beyond the black letter of the law, and acknowledged the pervasive roots of discrimination that existed against people of the LGBTQIA+ community, where it went as far as to clarify that even though Section 377 formally did not have a distinction between heterosexual and queer couples, it existed in practice, and was aided by the judicial interpretations of what sex and intimacy meant, as it had always been defined in a heteronormative manner[17].

SUPRIYO AND THE RIGHT TO MARRY

The decision in *Supriyo*, on the other hand, marked a significant regression in the Indian judiciary's engagement with queer rights. Unlike *Naz Foundation* and *Navtej Singh Johar*, where the courts invoked constitutional morality to resist social prejudice, *Supriyo* avoided transformative reasoning altogether. The Supreme Court unanimously held that there was no fundamental right to marry under the Constitution and declined to recognise same-sex marriages, leaving the issue to the legislature. In doing so, the Court distanced itself from the vision of constitutionalism that treats the Constitution as a safeguard against majoritarian morality and instead adopted a restrained, deferential stance that left queer citizens exposed to continued exclusion.

The petitioners had argued that the denial of marriage rights violated Articles 14, 15, 19 and 21, since marriage is not only a deeply personal choice but also a gateway to a range of legal entitlements, including inheritance, adoption, and medical decision-making. Their submissions drew directly from the Court's own precedents, particularly *Navtej*, which had placed dignity and autonomy at the centre of constitutional protection. Yet, the Court refused to extend these principles to the domain of marriage. Writing for the plurality, Justice Chandrachud recognised that queer persons have the right to form intimate relationships, but maintained that marriage is a legal institution governed by statute and therefore beyond the reach of judicial expansion. This reasoning marked a clear departure from the idea of the Constitution as a living and evolving document that must respond to social realities.

By deferring to Parliament, the Court also departed from the principle of constitutional morality that had guided *Naz* and *Navtej*. In those cases, the judiciary had made it clear that when social morality conflicts with fundamental rights, the Constitution must prevail. *Supriyo* inverted this reasoning by treating legislative silence as decisive. Rather than interpreting existing marriage laws in a way that could include same-sex couples, the Court stressed institutional limits and self-restraint. This position, while framed as deference to the separation of powers, effectively enabled the ongoing exclusion of queer couples from the legal framework of marriage. Given the longstanding legislative inaction on this issue, such deference cannot be seen as neutral and must be seen as a withdrawal of the judiciary from its role in protecting minority rights.

In doing so, the Court moved away from the very idea of constitutionalism that defines the Indian constitutional project. Constitutionalism, in its Indian sense, is not just the existence of a constitutional text but the active commitment to ensuring that all exercises of power remain consistent with the protection of individual dignity and equality[18]. Previous judgments had established that rights cannot be denied simply because they offend prevailing social sensibilities, such as *Naz* and *Navtej,* but the same argument can also be extended to *Shafin Jahan v K.M. Asokan*[19]. *Supriyo* reversed this understanding by accepting social and institutional conservatism as legitimate grounds for withholding recognition, which in turn dilutes the judiciary's role as the guardian of constitutional values and significantly narrowes the emancipatory potential of the Constitution.

The Court's refusal to act also starts a dangerous precedent, of being allowed to ignore the tangible inequalities produced by non-recognition, and deferring their responsibility as an authority of checks and balances over the judiciary[20]. Even from a global perspective, the judgment stands in contrast to international trends. Courts in South Africa, Taiwan, and Botswana have drawn upon similar principles of dignity and autonomy to recognise queer unions. *Navtej* itself had influenced several of these decisions, but *Supriyo* broke that trajectory. As scholars Danish Sheikh and Rupali Samuel[21] observe, while *Navtej* expanded the constitutional imagination, *Supriyo* confined it, transforming the recognition of queer rights from a matter of constitutional entitlement into one of legislative discretion.

It is important to note here that the *Supriyo* judgement does not in itself define marriage, nor is a definition found in the Special Marriage Act, 1954 or the Hindu Marriage Act, 1955. Thus, it inherently opens up the question of how were marriage to be characterized if an argument for marriage had to be made. For example, the concept of marriage under Hindu law as *"the marriages are arranged in heaven, but are solemnized on earth"* as marriages are pre-oriented by God[22]. Unfortunately, this definition does not help, or institutionalise the concept of marriage, at least not in a legal sense.

Instead, for the purposes of this paper, the idea of marriage has to be looked at from a perspective of rights, duties and obligations; it is not merely a religious or social construct, but an institution

that receives protection from the State (through the enactment of Marriage Codes, along with protection from abuse in said marital relations that have been codified in the Criminal Laws of India). This protection also further extends to privileges, a set of enforceable rights such as the right to cohabitation, maintenance and inheritance, all of which are representative of the fact that the State recognises that there exists a difference between marital unions and non-marital unions, on the basis of these rights. Lastly, and perhaps most importantly, this recognition and protection allow for social legitimacy, which in turn is also representative of the liberty and freedom one has under the law of the land. There is an argument to be made here, that the Special Marriages Act, 1954 was introduced purely for this purpose, even if it was protecting inter-religious marriages at the time. As *Rupali*[23] states, the idea behind the Special Marriages Act was also conceived on the basis of autonomy, individuality and liberty, it was supposed to protect couples in a society which had not fully accepted them yet. The question that then remains, is if it was acceptable to use a legislation at the time as a tool of affirmative action.

Marriage, thus becomes not merely symbolic; it is tied to a host of legal protections and social recognitions. By denying same-sex couples' access to marriage, the Court left them without clear rights in matters of inheritance, adoption, medical consent, and property ownership. This omission entrenched a regime of partial citizenship, where queer relationships are accepted in private but remain invisible in public law. The right to marry, at least in the case of queer couples, does not exist as merely a union, but rather an obligation of the State to protect these couples and uphold their rights to inheritance, cohabitation, and against discrimination. In essence, *Supriyo* represents more than a missed opportunity; it is an active retreat from the ideals of constitutional morality and transformative constitutionalism. Where *Naz Foundation* and *Navtej Singh Johar* had challenged entrenched hierarchies and expanded the scope of equality, *Supriyo* restored the authority of social conservatism and legislative inertia. For queer Indians, the decision sent an unambiguous message: their equality and dignity remain contingent on legislative will, not guaranteed by the Constitution itself.

CONCLUSION

The development of queer rights jurisprudence in India tells a story of progress, struggle, and unfinished work. From *Naz Foundation v. Government of NCT of Delhi* to *Navtej Singh Johar v.*

Union of India, the courts had begun to shape a more inclusive idea of equality, one that drew its strength from constitutional morality rather than public opinion. These cases recognised that the Constitution is a living text that must evolve with the society it governs. Yet in *Supriyo @ Supriya Chakraborty v. Union of India* (2023), the Supreme Court pivoted away from this transformative path by holding that there is no fundamental right to marry and leaving the question to Parliament; the Court pulled back from its own earlier vision of the Constitution as a shield against majoritarian prejudice.

If marriage is understood as a legal and constitutional construct, it becomes clear that it is much more than a cultural or religious practice. It is a relationship built on rights, duties and obligations that have real material and social consequences. Marriage gives individuals legal entitlements such as inheritance, adoption, medical decision-making and property rights, while also creating mutual responsibilities of care, respect and financial support. Excluding queer people from this structure denies them access to the same protections and opportunities that heterosexual couples enjoy. It also restricts their ability to fully participate in social and civic life. As scholars have observed, marriage represents reciprocity and equality between partners, and when queer persons are kept outside it, the exclusion reinforces inequality instead of eliminating it.

Seen in this light, the right to marry must be understood as part of the protection guaranteed under Article 21 of the Constitution. The Supreme Court in *Navtej Singh Johar* had already recognised that the right to life and personal liberty includes the freedom to express one's sexuality and form intimate associations. Once that principle is accepted, the right to marry becomes a natural extension of the same autonomy and dignity that the Constitution seeks to protect. To deny queer individuals this right is to deny them the ability to live with equal dignity. As *Naz Foundation* made clear, when public morality comes into conflict with constitutional morality, it is the latter that must prevail, because the Constitution represents the collective conscience of justice and equality.

Recognising marriage as a constitutional right is also an act of affirmative action. It acknowledges that queer people have been systematically excluded from the legal structures that define family and belonging. Extending marriage rights is therefore not only a question of equality but also of

justice. It would allow the law to correct an imbalance that has long existed and ensure that the promise of liberty and equality is not limited to a privileged few.

The Indian Constitution envisions a moral order rooted in inclusiveness, compassion and respect for human dignity. *Naz Foundation* and *Navtej Johar* embodied this spirit, while *Supriyo* faltered in carrying it forward. To stay true to the transformative character of our Constitution, it is essential that the right to marry be read into Article 21. Doing so would affirm that equality and dignity are not matters of legislative grace, but of constitutional guarantee, and that the promise of justice cannot be complete until every individual has the right to live and love freely, with equal recognition under the law.

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