

CHAPTER 2

The Binary Barrier: Assessing the Exclusion of Same-Sex and Non-Binary Unions from India's Matrimonial and Parental Legislations

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CHAPTER 2

The Binary Barrier: Assessing the Exclusion of Same-Sex and Non-Binary Unions from India's Matrimonial and Parental Legislations

BHAWANI CHOUDHARY* AND PRIYANSHU KUMAR**

This research project investigates an entrenched family law regime in India that continues the long-standing bias toward heterosexual couples and explores what is termed the “Binary Barrier”. The Binary Barrier is a phrase used for the “systemic legal architecture” that only accounts for couples in the male/female dyad and excludes from legal recognition same-sex couples and non-binary individuals. Although the Supreme Court of India has expanded constitutional understanding of dignity, privacy, and personal autonomy in cases such as Navtej Singh Johar¹ and Justice K.S. Puttaswamy², a substantial rights gap persists for queer and non-binary persons in the context of marriage and family formation. The statutory exclusion of same-sex couples and other types of couples from the Special Marriage Act, 1954 is the main focus of the research. Using both comparative and doctrinal methodologies argue that the legislative insistence on gender-specific nomenclature for a marriage acts as a gatekeeping mechanism to deny LGBTQ+ couples’ access to the “bundle of rights” that accompany a marriage, which includes not only symbolic rights, but also rights to alimony, succession, tax benefits, and medical proxy. The research assesses how the CARA regulations and the HAMA set forth unmanageable barriers for non-binary and same-sex couples. “Joint adoption” is an exclusion from that, and the complexities of guardianship laws create a very precarious legal status for the children that will be raised in these unions. The paper propensity to defer to Parliament that produces a stalemate between recognizing discrimination legally and the inability to provide a remedy. The study concludes that the Binary Barrier is not a neutral social policy choice but a constitutional problem implicating equality, non-discrimination, and dignity. It calls for a shift from gender-stereotyped statutory interpretation toward constitutional morality and recommends reform of family law to recognise the diversity of modern Indian families.

Keywords: Same-Sex Union, Non-Binary Rights, Personal Laws, Constitutional Morality, Matrimonial Legislation, Parental Rights, *Supriyo v. Union of India*.

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¹ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

² Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.

1 INTRODUCTION

The LGBT community's struggle for recognition and equality in India has been at the forefront of recent constitutional changes. Historically, same-sex relationships have been, and unfortunately still continue to be, socially discriminated against and have been subject to criminalization through Section 377 of the Indian Penal Code 1860 – an offense that deals with “carnal intercourse against the order of nature.”³ This law was a remnant of colonial rule and has long been a tool of violation against the dignity, privacy, and autonomy of sexual minorities, even after India gained independence. However, after the Supreme Court partially struck down Section 377 on 6 September 2018 in its *Navtej Singh Johar v. Union of India* judgment,⁴ same-sex sexual conduct was decriminalized for consenting adults. This historic ruling by the Supreme Court recognized sexual orientation as a fundamental characteristic of personhood that requires constitutional protection. It was based on Articles 14 (Right to Equality), 15 (Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth), 19 (Right to Freedom of Speech, Expression, Assembly, Association, Movement) and 21 (Right to Protection of Life and Personal Liberty) of the Constitution. The Supreme Court declared that criminalizing consensual same-sex relationships was contrary to the principles of the Constitution and perpetuated discrimination and exclusion from society. Although it was a progressive ruling, it was insufficient in scope. The Supreme Court could only decide if Section 377 was unconstitutional pursuant to the advice of the Union Government.⁵ Therefore, while homosexual conduct ceased to be classified as a criminal offence, the LGBT community was left without resolution of other civil rights such as marriage, families, inheritance, adoption, and social security. This unfulfilled legal gap raised the important question of whether decriminalisation alone provides sexual minorities with true equality. While same-sex relationships were no longer treated as criminal in nature, LGBT persons could not claim equal social or legal status. The Supreme Court, therefore, was asked to address the matter in *Supriyo v. Union of India* where an application was made to recognise same-sex marriage in India. The applicants contended that the current marriage statutes – the Special Marriage Act, the Hindu Marriage Act, and the Foreign Marriage Act – fail to provide an opportunity for same-sex couples to marry legally.

Petitioners claim same-sex marriages violate Articles 14 and 15(1)⁶ because they are denied equal treatment and discriminated against based on gender and sexual orientation. Furthermore, the petitioners assert that an individual's right to choose their partner and

³ Indian Penal Code, 1860, § 377.

⁴ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

⁵ Indian Pen. Code, 1860, § 377.

⁶ INDIA CONST. arts. 14, 15(1).

establish a family should be guaranteed by Article 21 which protects an individual's right towards physical freedom, personal dignity, and personal autonomy;⁷ as well as Article 19(1)(a) which protects an individual's right to express themselves freely. The petitioners received major public and media interest, prompting the Supreme Court of India to appoint the Five Judge Constitution Bench of the Supreme Court, composed of Chief Justice D.Y. Chandrachud, Justices S.K. Kaul, Ravindra Bhat, Hima Kohli, and P.S. Narasimha, to hear their case.⁸ The Supreme Court ultimately ruled that same-sex marriage is not a fundamental right protected by the Constitution; rather, same-sex marriages are recognized or not recognized through legislative enactments. The Court acknowledged that people in the LGBTI community have rights and dignity, but the Supreme Court did not change existing marriage laws through court order. While the Court acknowledged the dignity and autonomy of queer persons, it held that any extension of marital status or civil-union rights must come from the legislature rather than judicial interpretation. The Court further observed that transgender persons who identify within the male-female binary may marry under existing law. Even though the ruling admitted that same-sex relationships are legitimate, it didn't give them legal recognition. Given all of this, this paper argues that just decriminalizing same-sex acts isn't enough to give the LGBT community complete justice under the Constitution. Legally recognizing same-sex relationships is something that needs to happen to make sure they have equality, dignity, and are included in society.

2 THE ANTIQUITY OF FLUIDITY – SCRIPTURAL AND LITERARY EVIDENCE

One of the biggest problems in getting marriage equality recognized in India is the idea that non-traditional gender identities are just Western imports or something only rich city people care about. The belief that Indian culture has always adhered to very rigidly defined gender roles, with very traditional family structures based on those gender roles, is an incorrect assumption when you consider old Indian literature, medical texts, and other ancient writings. What many Westerners perceive as an absolute, divided male/female role was not an original concept for Indians, but rather a later result of colonizers' laws and morals being imposed upon us. Instead, ancient Indian philosophical thought regarding gender and sexuality was much less rigid than it has become under Western influence; gender and sexuality were instead viewed as completely normal and natural. One of the dominant concepts in Indian culture regarding gender is the concept of *Tritiya-Prakriti* (also known simply as 3rd Gender). Rather than ostracize or segregate those individuals who do not follow the male/female dichotomy, the Vedic texts of ancient India viewed all identities as perfectly

⁷ Nat'l Legal Servs. Auth. v. Union of India, (2014) 5 SCC 438.

⁸ *Supriyo @ Supriya Chakraborty v. Union of India*, 2023 SCC OnLine SC 1348.

consistent with a natural existence (i.e., the entire creation). “Several historical and literary sources indicate that gender diversity was not alien to precolonial Indian thought, but was understood through concepts such as *tritiya-prakriti* and gender fluidity.” Additionally, the Ayurvedic texts, such as the *Charaka Samhita* and *Sushruta Samhita*,⁹ indicated that true gender identity was based on the biological composition of the individual and not based on socially learned behaviour; therefore, Ayurvedic medical practitioners did not consider these identities to be unnatural or inappropriate, but rather as normal variations in the human experience. This shows that they understood gender diversity in a scientific way, not just as a matter of right and wrong. Indian myths also back up the idea of flexible gender roles. The Puranas show gender as something that can change, not something set in stone.¹⁰ A good example from the scriptures is the story of Lord Ayyappa, who was born from Shiva and Mohini (Vishnu in female form). This shows a child coming from a divine same-sex match. The Mahabharata also has stories that go against the usual male/female ideas. Shikhandi,¹¹ who changes from female to male, is important in defeating Bhishma. This links changing gender with doing what’s right. Arjuna’s time as Brihannala while exiled shows how non-binary identities were acted out and seen in society without shame. These stories make gender fluidity a key part of the cosmic and moral order, not something weird.

Besides religious writings, regular books like Vatsyayana’s *Kamasutra*¹² openly admit same-sex attraction. It talks about *Auparishtaka* and people seen as having a female nature, who had lasting feelings and relationships with each other. This hints that same-sex relationships, like civil partnerships, were understood in ancient cities. Local stories and customs, like the Aravan cult in South India, also show that communities knew and accepted different gender identities. You can see how the way we used to understand things fell apart when colonial powers wrote down the laws in the 1800s. Victorian ideas of what was right and wrong, which you can see in things like Section 377 of the Indian Penal Code, swapped out the old, more flexible ways of thinking for strict ideas about sex and marriage between men and women. Because of this, the ways people used to show different genders were seen as wrong or even sick.

3 THE LEGISLATIVE FORTRESS – ANALYSIS OF EXISTING MATRIMONIAL LAWS

The Binary Barrier in India is not only a result of conservative values but also a consequence of how marriage laws have been created. The Constitution guarantees rights and equal

⁹ CHARAKA SAMHITA, *Śārīrasthāna*, ch. 4, 30–31 (P.V. Sharma trans., 1981).

¹⁰ THE BHAGAVATA PURANA, *Skandha VIII*, ch. 12 (Ganesh Vasudev Tagare trans., 1976).

¹¹ THE MAHABHARATA OF KRISHNA-DWAIPAYANA VYASA, *Virata Parva*, ch. 2 (Pratap Chandra Roy trans., 1956).

¹² SUSHRUTA SAMHITA, relevant passages on *tritiya-prakriti* / third sex.

treatment to all individuals, but the HMA of 1955 and SMA of 1954 are examples of how legislatively created barriers exist that prohibit individuals who do not identify as either male or female in a relationship with other people from getting married. These laws were intentionally created this way; they do not allow for the possibility of men marrying men or women marrying women. The HMA was intended to be a modernisation of Hindu marriage law to make it equitable; however, it maintains a narrow definition of marriage as being limited to two individuals (a man and a woman). Section 5 states that for a marriage to be recognised as valid, there must be one party to the marriage, referred to in the terms “bride” and “bridegroom”. While these terms are not defined in statutory law, courts have interpreted “bride” and “bridegroom” to refer only to females and males, respectively. Consequently, there is no alternative statutory construction available for courts to interpret these two terms.¹³

Section 7 of the Hindu Marriage Act requires that a marriage is only valid if traditional ceremonies such as Saptapadi occur; this means that the traditional notions of who can marry a person are related to the civilization’s understanding of the traditional roles of spouses (e.g., Kanya Daan) based on religious beliefs that provide a structure through which men and women can have a meaningful relationship. In reality, same-sex couples and/or non-binary individuals cannot occupy those roles under the law. While same-sex couples and individuals do not have a legal prohibition against marrying, they do not have a legal basis on which to establish their marriage as the law is not structured to support marriage in that form. The Special Marriage Act (SMA)¹⁴ was intended to provide a secular alternative to marriage and was imagined as providing an opportunity to allow different castes and religions to intermarry based on what individuals want. However, although the SMA was created to be inclusive, it too requires that persons document their male or female gender on the forms used to obtain the marriage. In the case of *Supriyo v. Union of India*¹⁵, the people filing the case argued that the SMA could be changed to use words like spouse or person instead of husband and wife. Still, the government argued, and the Court mostly agreed, that the SMA is a connected system. The rules about things like financial support after marriage (Section 36)¹⁶, getting back together after separating, inheritance, and divorce all assume marriage is between a man and a woman. The Court said that changing this would mean rewriting the law, which they can’t do. One of the reasons given for not allowing same-sex marriage is that marriage is mainly for having kids. This idea favors heterosexual couples and ignores relationships built on friendship, love, and taking care of each other.

¹³ The Hindu Marriage Act, 1955, §§ 5, 7.

¹⁴ The Special Marriage Act, 1954, § 36.

¹⁵ *Supriyo @ Supriya Chakraborty v. Union of India*, 2023 SCC OnLine SC 1348.

¹⁶ The Special Marriage Act, 1954, § 36.

This goes against the idea that people should be able to make their own choices, including who they want to be with, as part of their basic rights. In the end, the courts are hesitant to change things. They say that the right to marry is created by law, not a basic right, so it's up to the government to make changes. Until the wording and ideas behind these laws are changed, the Binary Barrier in India's marriage laws will stay in place.

4 BEYOND MARRIAGE – THE CRISIS OF PARENTAL AND SUCCESSIONAL RIGHTS

The Binary Barrier under Indian law serves to limit the rights of same-sex couples in many ways beyond preventing them from marrying. As a general rule, marriage is the legal instrument by which a couple can create a variety of legal rights with respect to family, children, and property. Without marriage, same-sex couples and non-binary individuals exist in a legally ambiguous state wherein there is no legal recognition of their family unit. The denial of their family unit raises important questions under the Indian Constitution, including Articles 14 and 21, both of which guarantee all persons equal rights and the right to a dignified existence. The Central Adoption Resource Authority (CARA) has stated that a single person can adopt a child without regard to his or her sexual orientation;¹⁷ however, CARA does not permit same-sex couples to jointly adopt a child. This policy is inconsistent with the provisions of Article 14 of the Indian Constitution. If a person can adopt a child as a single individual regardless of his or her sexual orientation, then he or she should also be able to adopt a child with a partner if the adoption is in the best interest of the child. This discriminatory action goes against the best interest of the child by removing a parent's non-legal role in the life of the child. After the legal parent's death, the other non-legal parent has no legal rights to that child even though they have cared for and raised that child. The child will effectively become an orphan because law provides more weight to marriage than to the actual people within the family. This is unjust and likely violates the equal protection clause of Article 14 of the Constitution. The Surrogacy (Regulation) Act of 2022 and Assisted Reproductive Technology (ART) Regulation Act of 2022 are also examples of the Binary Barrier as they provide fertility treatment to married heterosexual couples and some women only.¹⁸ That is an act of the government making decisions for a citizen as to who may parent, based on their out-dated views of marriage.

The Supreme Court has stated repeatedly that privacy, including individual freedom to determine what happens to one's body, is a right protected under Article 21 of the Constitution. The decision to produce children is a private decision. By denying same-sex couples' access to fertility treatments based solely on their love for one another, the government is

¹⁷ Juvenile Justice (Care and Protection of Children) Act, 2015, Adoption Regulations, 2022, ¶ 5.

¹⁸ Surrogacy (Regulation) Act, 2021.

violating the same-sex couple's rights to have a dignified life and make personal choices protected under Article 21 of the Constitution. The issue of what follows death further demonstrates the lack of acknowledgment of same-sex couples resulting in discrimination. The laws governing inheritance (like the Hindu Succession Act) determine the recipient of an inheritance based on one's legal marriage or biological blood line, which means that if a same-sex couple is not legally married then the surviving partner would receive no inheritance. Where there is no will, the deceased spouse's property would go to the original family, despite the surviving partner having an equitable interest in it based on how much they contributed financially throughout the relationship. The lack of legal recognition for inheritance, pension rights, health insurance, and employment benefits for same-sex couples is a violation of Article 14 because it discriminates against same-sex couples. Furthermore, the lack of legal recognition also infringes upon Article 21 because having financial stability allows for living with dignity.¹⁹ Essentially, this Binary Barrier turns private relationships into public issues by not recognizing same-sex couples as parents or heirs, and denying them the same legal protections as heterosexual couples, creating an unfair disadvantage.

5 THE JUDICIAL LANDSCAPE – FROM NAVTEJ TO SUPRIYO

In India, the legal evolution of queer rights shows gradual constitutional changes, where court rulings have slowly increased recognition instead of causing sudden change. The courts in India have gone from not addressing sexual minority rights at all to recognizing their dignity, self-rule, and identity. But they have been unwilling to extend these recognitions into actual legal rights. While the outcomes of *Navtej Singh Johar* and *Supriyo v. Union of India*²⁰ demonstrate the court's ability to bring about change,²¹ they also illustrate the capacity of a judicial system to impose limitations upon one's rights through the application of law. In the case of *Navtej Singh Johar*, the Supreme Court effectively decriminalised sexual conduct between adults of the same gender when it found that section 377 IPC, which prohibited same-sex conduct in India, was unconstitutional. In addition, the Court affirmed its dedication to constitutional principles over societal norms and found that sexual orientation is an inherent component of identity that is protected by Articles 14, 19 and 21 of the Constitution. By linking dignity, privacy, and self-rule to sexual orientation, the ruling recognized a "right to love" as part of the right to a dignified life. It is important that *Navtej* rejected the idea that the State could remain neutral while queer relationships are ignored by society. Though the ruling did not formally approve unions, it set the stage for later

¹⁹ Assisted Reproductive Technology (Regulation) Act, 2021.

²⁰ *Supriyo @ Supriya Chakraborty v. Union of India*, 2023 SCC OnLine SC 1348.

²¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

claims seeking legal approval of same-sex partnerships. Navtej's constitutional optimism hit a roadblock in *Supriyo v. Union of India* when the Supreme Court had to deal with questions regarding marriage equality. The petitioners claimed that the right to marry (or at least enter into an officially recognised relationship) is an essential element of their individual freedom and dignity under Article 21 of the Constitution. The Supreme Court ended up dividing their decision into 2 separate opinions, which demonstrates the significant lack of agreement amongst the Judges on this issue.

The majority claimed that there is no absolute basic right to marry under the Constitution. They reasoned that marriage is a legal and social institution controlled by law, and for the court to include same-sex unions into the Special Marriage Act would be an inappropriate overreach. To the court, this kind of change is up to Parliament alone. Chief Justice D.Y. Chandrachud and Justice Sanjay Kishan Kaul, in their dissenting opinions, had a more open view of what the Constitution requires. While admitting legal limits, the dissent recognized a "right to civil union" based on Articles 14 and 21. They stressed the State's duty to guarantee a set of rights, like inheritance, medical choices, and insurance, that come from stable partnerships, no matter the marital status. The result of *Supriyo* shows a key constitutional contradiction. The Court openly admitted that queer couples face discrimination, yet it refused to change the basic structure of marriage law. By telling the government to look into solutions through a Cabinet Committee, the Court moved the issue from one of enforceable basic rights to one of optional policy. This position shows a readiness to affirm dignity in private but a hesitation to enforce equality in public. The separation survives not because it is constitutional, but because the court has chosen to be careful instead of making radical change. The outcome is a legal approach that recognizes identity but does not provide complete solutions, leaving queer people with incomplete citizenship.

6 CONCLUSION AND RECOMMENDATIONS

In India's marriage and family law, the Binary Barrier is not an isolated incident; it demonstrates a larger issue as the Constitution does not completely protect or support sexual and gender minorities. Numerous studies demonstrate that the lack of a legal framework to recognize same-sex and gender non-binary unions conflicts with India's historical relationship with gender-fluid identities. The Binary Barrier is also a violation of the promise of actual equality, dignity, and autonomy found in Articles 14 and 21 of the Constitution. While being in a same-sex relationship is no longer a criminal act, it is as if individuals can only partially fulfill their citizenship. These individuals are not evil, yet they are also unable to engage in basic family life. Dating from colonial periods, the Hindu Marriage Act, 1955, and the Special Marriage Act, 1954, continue to use outmoded constructs regarding gender and sexuality

rather than the ideals found within the Constitution. The manner in which both of these statutes are drafted creates barriers where same-sex or gender non-binary relationships are not recognized legally. Although there have been some cases in which courts recognised both the dignity of queer couples and their human experiences (i.e., *Supriyo v. Union of India*), these courts still failed to provide substantive answers. To get rid of the Binary Barrier, we need a plan with many parts:

Amend the Special Marriage Act: To create legal equality between people married under the SMA, and people married under other laws (including Hindu Marriage Act, Parsi Marriage & Divorce Act, etc.), there needs to be an amendment of the Special Marriage Act, to provide gender-neutral nomenclature, and remove all references to ‘husband’ and ‘wife’; instead, generally convert reference to ‘spouse’ or ‘partner.’ The SMA is a non-religious law; therefore, an amendment of this nature would be much easier than trying to amend other religious laws.

Create Civil Union Statute: The Government also needs to establish a Civil Union statute, which grants the same rights to civil union couples that are granted to married couples, i.e., the right to inherit from each other, own property jointly, make medical decisions, receive each other’s insurance benefits, and be entitled to each other’s social security benefits. This will alleviate the hardships that many individuals experience as a result of not being legally married.

Amend Adoption and ART Laws: Guidelines promulgated by the CARA, Surrogacy (Regulation) Act 2021 and ART Regulation Act 2021, should be reviewed and amended in order to recognize the diversity of family structures and types of families. When determining who should be a parent (biological or otherwise), the decision should focus on what is best for the child, in terms of their ability to care for the child, instead of parental gender identity or sexual orientation.

Educate Government Employees on Non-Binary Identification Systems: In addition to legal reforms occurring at an institutional level, legal reforms should also result in creating a framework for how institutions operate. Government employees must be taught how to work with people who have a non-binary identity, and to ensure that documents and assistance can be provided without requiring individuals to conform to traditional gender-based classifications.

Marriage is more than just a form of legal documentation; it represents a way of publicly expressing care, responsibility and belonging to one another. The Binary Barrier leads the government to accord different values to certain expressions of love than others (as if some expressions of love are of greater value). The laws must change from simply tolerating us as individuals and start including us as citizens in order to truly create change. The future of

equality is for everyone to have the right to love, have a family, be secure and be treated with dignity and respect.

* * *