LGBT+ Rights Claiming for Marriage Equality and the Possibilities of Transforming Indian Family Law

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I. Introduction

The Indian Supreme Court in its landmark decision in *Navtej Singh Johar v. Union of India*[1] decriminalized homosexuality in 2018 and recognized the equal constitutional citizenship of LGBT+ Indians.[2] Since then, at least nine different petitions before two High Courts seeking recognition of marriage equality under India's secular and Hindu marriage law have been filed. This has made analyzing the engagement between LGBT+ rights and Indian family law necessary. Family law, which comprises both secular and religion-based personal laws, has seen perennial debates about personal laws being subject to claims of gender equality and the desirability of a uniform civil code to replace existing family laws.

At the same time, critics have argued that traditional approaches to LGBT+ equality may ignore how problematic existing family law institutions are and have stressed the need to think beyond legal inclusion to recognize diverse families.[3] These arguments are not unique to India. Claiming LGBT+ rights within existing family law institutions, such as the recognition of same-sex marriage, has divided LGBT+ activists the world over. The commonly advanced argument is that assimilation into existing patriarchal social institutions disregards radical transformational possibilities. Critics, therefore, argue that such assimilation prioritizes existing family institutions such as marriage and the nuclear, biological family, that have had a long history of being oppressive to women, over alternative family arrangements such as non-marital relationships. However, family law scholars in other jurisdictions[4] have challenged this premise and have shown how family law can potentially be transformed through LGBT+ rights

[1] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).
[2] I use LGBT+ as an umbrella term to refer to the diversity of identities and the broader effort for rights claiming by gender and sexual minorities. However, I recognize that I largely deal with sexual orientation. This is also because issues of transgender family law are generally distinct. For instance, existing law recognizes customary succession practices amongst transgender communities, see Mayur Suresh, *Possession is 9/10th of the Body*, in LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW 378 (Alok Gupta and Arvind Narrain eds., 2011).
[3] Saptarshi Mandal, *Redefining the Same-Sex Marriage Question*, THE INDIA FORUM (2021) https://www.theindiaforum.in/article/redefining-same-sex-marriage (last visited 28 November 2021).
[4] Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016); Douglas NeJaime, *Before Marriage: The Unexplored History of Non-Marital Recognition and Its Relationship to Marriage*, 102 CAL. L. REV. (2014); Courtney G Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425 (2017); Macarena Saez, *Transforming Family Law Through Same-Sex Marriage: Lessons From (And to) the Western World*, 25 DUKE J. COMP. INTL. L., (2014); for literature tracing the interaction of LGBT+ law reform and family law, see SAME SEX RELATIONSHIPS AND BEYOND: GENDER MATTERS IN THE EU (Katherina Boele-Woelki and Angelika Fuchs eds., 3rd edn., 2017); for literature speculating the impact of recognition of same-sex marriage, see Nan D. Hunter, *Introduction: The Future Impact of Same-Sex Marriage: More Questions than Answers*, 100 GEO. L.J. 1855 (2012).

claims. They have identified parenthood and non-marital relationships as key sites of transformation.

While we still await an authoritative judicial pronouncement on marriage equality in India, I argue that recognizing same-sex marriage may positively impact existing family laws in India by expanding recognition of diverse families. India may therefore mimic dynamics in jurisdiction such as the United States, where the recognition of marriage equality has bolstered constitutional arguments for recognizing non-traditional forms of parenthood and non-marital relationships. Moreover, LGBT+ rights may offer a new entry point for reforms in family law which has been consumed by questions of the clash between religious personal laws and gender equality claims.

I analyze the potential interaction of LGBT+ claims to marriage equality with the law on parenthood. I specifically focus on personal liberty and equality-based claims and their impact on secular and Hindu family law of parenthood for my analysis. This is because both sets of laws affect the majority of India's population (with Hindu law also applying to anyone who does not identify as a Muslim, Christian, Parsi, or Jew). Further, due to a high degree of interconnectedness, even if individuals opt into secular law their religion-based personal laws continue to remain relevant. The choice of parenthood stems from its focus as a site of transformation in other jurisdictions which have seen LGBT+ rights claiming in family law.

I argue that the recognition of LGBT+ family equality and a right to legal recognition of intimate relationships is likely to progressively expand Indian parenthood laws. Such an impact is likely to be visible in laws on guardianship, assisted reproduction and adoption and may benefit diverse different-sex families, single parents, and persons in non-marital relationships.

My objective, however, is not to crystal gaze the future of LGBT+ rights or family law in India. I am conscious that the realization of rights remains contingent on various factors including social and political realities. Instead, it is to contribute a different perspective to debates on LGBT+ family reform. By demonstrating that marriage-equality for same-sex couples can potentially transform other aspects of family law, I want to go beyond the binary of assimilation versus transformation that dominates current thinking on LGBT+ rights. This is not to suggest that marriage equality is the ultimate piece in the puzzle of LGBT+ empowerment. Rather it is

to highlight why it remains an important endeavor among a range of objectives and can have positive consequences for everyone.

I am also conscious that comparative approaches to family law may have certain pitfalls. Family law is heavily influenced by national and sometimes even sub-national realties. My use of a comparative approach in this paper is therefore neither to borrow foreign doctrine nor to engage in theorization about social change and LGBT+ rights.[5] Instead my more modest use of comparative approaches is to see how trajectories of legal change and proliferation of new concepts in other jurisdictions forces us to ask similar questions about the potential for legal change in Indian family law.

Part II of this paper analyzes scholarship on the interaction of LGBT+ rights and family law in foreign jurisdictions, especially the United States. It argues that scholars have observed a positive dynamic between LGBT+ claims to marriage equality and the gradual expansion of family laws such as parenthood to include diverse families. Part III looks at India and argues how current debates on family law reform are in a stasis due to perennial controversies about a uniform code, while LGBT+ voices have cautioned against marriage equality and have preferred the recognition of diverse or non-normative families. I argue that dynamics in other jurisdictions, give us a new way of thinking about how LGBT+ rights claiming for marriage equality may be an entry point for family law reform and may progressively expand the recognition of diverse families. To show how this can happen Part IV constructs equality and personal liberty-based arguments for marriage equality based on key advances in the gender and sexuality jurisprudence of the Indian Supreme Court. Part V applies the arguments constructed in Part IV to the law of parenthood, specifically guardianship, assisted reproductive technologies, and adoption, to argue that marriage equality may have positive consequences for diverse different sex families, single parents and persons in non-marital relationships.

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[5] A number of influential scholars have written on this issue, see generally Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW 437, 437 (Robert Wintemute and Mads Andenæs eds., 2001); WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002); YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES (2002).

II. Comparative Perspective on Interaction Between LGBT+ Rights and Family Law

While India awaits developments on LGBT+ family law, many jurisdictions elsewhere have had considerable experience with LGBT+ rights claiming in family law. As of November 2021, thirty countries have recognized marriage equality either through legislation or judicial decisions.[6] Some of these jurisdictions have also witnessed subsequent litigation and legislative reform towards recognition of adoption rights as well as parental rights linked to procreation through assisted reproductive techniques.[7] In some jurisdictions, like the United States the history of parental recognition even precedes marriage equality.[8]

In literature on comparative family law, the impact of such rights claiming on family law at large remains relatively under-studied.[9] This is because scholars and advocates often just focus on the claims of LGBT+ persons, without taking the next step of how such claims may interact with existing family law. Such interaction is however inevitable since LGBT+ family law is not autonomous but places itself within existing family law.

Legal scholar Macarena Saez writing about comparative family law argues that the judicial recognition of marriage equality claims through the linking of the rights to dignity, autonomy and equality in different national courts opens possibilities of transforming existing family law.[10] She contrasts focus on individual rights-based arguments (seen in jurisdiction such as Canada, South Africa, Mexico, Brazil, Portugal, Spain and Columbia) with emphasis on the centrality of marriage in the law (seen in the United States).[11]

For instance, the South African constitutional court in *Minister of Home Affairs v. Fourie*[12] instead of entrenching a constitutional right to marry focused on the equal recognition of different kinds of relationships thus linking dignity to equality. While courts in the United

[6] Marriage Equality around the World, Human Rights Campaign https://www.hrc.org/resources/marriage-equality-around-the-world (last visited 28 November 2021).
[7] See SAME SEX RELATIONSHIPS AND BEYOND: GENDER MATTERS IN THE EU (Katherina Boele-Woelki and Angelika Fuchs eds., 3rd edn., 2017).
[8] See NeJaime, Marriage Equality, *supra* note 4; Erez Aloni, *First Comes Marriage, Then Comes Baby, Then Comes What Exactly?* 15:1 NATIONAL TAIWAN NATIONAL TAIWAN U L REV 49 (2020).
[9] For instance, see Jens M. Scherpe, *Comparative Family Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann and Reinhard Zimmermann eds., 2nd edn., 2019).
[10] Saez, *supra* note 4, at 129.
[11] Saez, *supa* note 4, at 129.
[12] Ministry of Home Affairs v. Fourie, ZACC 19, 2006 (1) SA 524 (CC) (Constitutional Court of South Africa).

States in cases such as *United States v. Windsor*[13] (Saez is writing before the United States Supreme Court's marriage equality decision in *Obergefell v. Hodges*[14]) have linked dignity to the status of marriage. Saez argues that approaches like those followed in South Africa which emphasize liberty and equality by focusing on the equality of relationships rather than the centrality of marriage, allow for the legal recognition of differently constructed families that decenter marriage, including families based on non-marital relationships.[15]

Saez's analysis however does not account for how rights-based arguments may interact with specific family law concepts. American legal scholars such as Douglas NeJaime, Courtney Joslin, and Courtney Cahill in their writings, by relying on both the histories of non-normative relationship recognition in family law and the transformative potential of marriage equality arguments, have shown how LGBT+ rights-claiming has impacted and can impact family law in the future. They identify non-marital relationships and parenthood as two key sites of change.

NeJaime's history of LGBT+ advocacy in California shows how marital rights claiming proceeded on a history of non-marital recognition where LGBT+ rights advocate used marital norms to argue for greater non-marital recognition.[16] This in turn influenced a shift in the legal understanding of marriage from being based on sex and biological procreation to being characterized by companionship and mutual rights and obligations.[17]

While NeJaime relies on history, Joslin imagines the future doctrinal possibilities of America's marriage equality jurisprudence through decisions such as *Obergefell*. She argues that the recognition of same-sex marriage based on autonomy (derived from both equal protection and due process clauses of the American Constitution), dignity and the recognition of the idea of dynamic constitutionalism[18] can contribute to the potential recognition of a so-called right to non-marriage.[19] Such a right could be potentially used to challenge restrictions on the

[13] United States v. Windsor, 570 U.S. 744 (Supreme Court of the United States).
[14] Obergefell v. Hodges, 576 U.S. 644 (Supreme Court of the United States).
[15] Saez, *supra* note 4, at 129.
[16] NeJaime, Before Marriage, *supra* note 4.
[17] NeJaime, Before Marriage, *supra* note 4.
[18] According to Joslin, dynamic constitutionalism views the "constitution as a dynamic doctrine that evolves to reflect legal, cultural, and social developments." Joslin, *supra* note 4, at 454.
[19] Joslin, *supra* note 4, at 447-455.

recognition of mutual property related claims of cohabitees and parental rights of persons in non-marital relationships.[20]

In the context of parenthood writing about the implications of marriage equality, NeJaime argues how marriage equality has shifted the understanding of parentage from being based on biology, gender, and marital status to prioritizing intentional and functional relationships.[21] In the context of marital relationships, he shows how the marital presumption, which assumes that the husband of a biological mother is the father of the child, when applied to same-sex couples, is transformed from being based on a fiction of biological fact to being based on the intent to parent and functioning as a parent.[22] This is because in the context of same-sex couples a fiction of biological relationship may simply not make sense. Moreover, marriage equality decisions also signal sexual orientation equality in family law that requires the recognition of equal parental rights of same-sex couples akin to their different sex counterparts.

The equality of LGBT+ families have implications for assisted reproductive techniques which is often necessary for same-sex family formation.[23] Fully recognizing family-based LGBT+ equality may therefore lead to greater recognition of and ease of access to such reproductive techniques and surrogacy services. Such recognition is also likely to benefit non-LGBT+ families such as single parent and different-sex families. Greater recognition of assisted reproductive techniques is also like to expand the recognition of functional parents due to the presence of a non-biological parent.[24] This may have consequences for non-biological parents in other contexts as well. Therefore, by pushing for parental recognition based on intent and function, same-sex families, "destabilize norms that constrict familial possibilities for all families, both in and out of marriage".[25]

Similarly, Cahill makes doctrinal arguments about how *Obergefell's* acknowledgement of the realities of LGBT+ parenthood, its protection of choices concerning family formation and the recognition of sexual orientation equality in family law disrupts existing arguments for reproductive regulation.[26] She thus argues that the logic of *Obergefell* may lead to the

[20] Joslin, *supra* note 4, at 481-488.
[21] NeJaime, Marriage Equality and the New Parenthood, *supra* note 4.
[22] NeJaime, Marriage Equality and the New Parenthood, *supra* note 4, at 1242.
[23] NeJaime, Marriage Equality and the New Parenthood, *supra* note 4, at 1254-1255.
[24] NeJaime, Marriage Equality and the New Parenthood, *supra* note 4, at 1254-1255.
[25] NeJaime, Marriage Equality and the New Parenthood, *supra* note 4, at 1265.
[26] Courtney Cahill, *Obergefell and the New Reproduction*, MINNESOTA LAW REVIEW HEADNOTES 37, 6 (2016).

recognition of a fundamental right to procreate, the recognition of parity between sexual and alternative reproduction and displacement of the privileged position that sex often occupies in legal regulation.[27]

Comparative scholarship on the interaction of LGBT+ rights claiming and family law therefore shows a clear dynamic of positive interaction between the legal recognition of LGBT+ families and a progressive recognition of non-normative relationships. Therefore, recognition of marriage equality in the law often opens pathways for greater recognition of family relationships outside the heteronormative family unit.

These pathways take the form of rights-based arguments, often based on claims of liberty, equality, and dignity, which can be applied to extend legal protections to a diversity of family relationships. Moreover, the recognition of familial rights of same-sex couples due to the very nature of their relationship, which is not based on sexual reproduction, also leads to greater flexibility in legal norms around how families are structured. This benefits both single persons who may wish to be parents or different sex couples in non-marital relationships who may wish to start families. It can also lead to the recognition of more complex family configurations such as the recognition of roles played by functional parents or non-marital biological parents in multi-parent families.

Such a positive dynamic questions critical scholarship which argues that inclusion into existing family law privileges marriage at the cost of the recognition of non-normative family forms.[28] This leads to assimilation rather than the recognition of the diverse relationships that LGBT+ people may otherwise inhabit. Centering marriage in the law also links all benefits to it rather than acknowledging how dependency may work in different relationships.[29] Legal scholars such as Katherine Franke[30] and Melissa Murray[31] have also questioned the rhetoric around same-sex marriage and have argued that claims to same-sex marriage delegitimize and even do harm to diverse family forms such as single parents and non-marital parenthood. However, as

[27] *Id.*, at 7-12.
[28] See generally NANCY POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008).
[29] Nancy Polikoff, *Ending Marriage as we know it*, HOFSTRA LAW REVIEW: VOL. 32: ISS. 1, ARTICLE 9 (2003).
[30] Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006).
[31] Melissa Murray, *What's So New about the New Illegitimacy*, AMERICAN UNIVERSITY JOURNAL OF GENDER SOCIAL POLICY AND LAW 20, NO. 3, 387-346 (2012).

writings be NeJaime, Joslin and Cahill show, many of these concerns have not played out as anticipated and marriage equality may in fact lead to the greater recognition of unconventional families in the future.

III. The Stasis in Indian Family Law and LGBT+ Critiques of Marriage Equality

A. Family Law in India: The Persisting Personal Law-Uniform Civil Code Bind

India's complex family law framework comprises both secular family law and religious identity-based, but State-enforced, family laws (called personal laws). Personal laws provide different frameworks for India's major religious communities, the Hindus, Muslims, Christians, and Parsis. These laws comprise both statutory law and uncodified personal laws and include customary law.[32] Individuals can usually opt into secular laws. For instance, heterosexual couples who do not want to be regulated by their personal law can opt for solemnization of marriage under the secular Special Marriage Act, 1954 (SMA). Importantly, such secular laws provide a possible path for relationship recognition to inter-religious couples. However, none of these frameworks operate in isolation, and religious and secular family laws remain highly "interconnected."[33] This means that no secular law provides for a comprehensive code regulating all aspects of family law and even families who opt into secular law are inevitably governed by a combination of personal and secular laws.

Existing writing on Indian family law primarily focuses on gender equality and the possibility of testing India's religion-based family law framework through rights-based claims grounded in the Indian Constitution.[34] The origin of this controversy can be traced back to the High Court of Bombay's 1950s decision in *State of Bombay v. Narasu Appa Mali*[35] which has been interpreted to insulate personal laws from constitutional scrutiny. Over time, however, courts have taken a more interventionist attitude towards scrutinizing personal laws against claims of gender equality.[36] In recent years, Nariman's J., opinion in the Supreme Court's decision in *Shayara Bano v. Union of India*,[37] where the court invalidated the practice of *triple talaq* (divorce) in Muslim Personal Law, has adequately clarified that statutory or codified personal

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[32] For a detailed description of Indian family law and its associated complexities see, Akshat Agarwal, *Marriage Equality in India: Thinking Beyond Challenges to Secular Marriage Law*, INDIAN LAW REVIEW, Part III (2021).
[33] *Id*., at Part V.
[34] For general overview of literature see, Tanja Herklotz, *Law, religion and gender equality: literature on the Indian personal law system from a women's rights perspective*, INDIAN LAW REVIEW, 1:3, 250-268 (2017).
[35] State of Bombay v. Narasu Appa Mali, AIR 1962 Bom 84 (High Court of Bombay).
[36] Flavia Agnes, *Personal Laws*, in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Pratap Bhanu Mehta *et al* eds., 2016).
[37] Shayara Bano v. Union of India, (2017) 9 SCC 1 (Supreme Court of India).

law (as opposed to uncodified personal law) are subject to constitutional scrutiny. Since large parts of Indian family law have now been codified a considerable part of the law is therefore amenable to constitutional challenges.

A related issue with respect to personal laws is whether they are included within guarantees of religious freedom under Article 25 of the Indian Constitution.[38] Therefore, to avoid the religious objection advocates of same-sex marriage have often only focused on secular marriage law as a vehicle for marriage equality instead of talking about the entirety of family law.[39] It is also for this reason that majority of the judicial challenges seeking marriage equality currently focus on secular marriage law. However, the Supreme Court in several decisions has reiterated that religion-based personal laws, which do not deal with matters of faith but only concern the secular aspects of religion, are not covered by religious freedom guarantees.[40] Therefore, there are no legal reasons for insulating religion-based family law from constitutional scrutiny.

Yet, debates around family law reform remain contested. Much of this is due to political debates around the enactment of potential Uniform Civil Code (UCC). Article 44 of the Directive Principles of State Policy in the Indian Constitution[41] makes the formulation of a UCC a constitutional aspiration. Issues around the UCC have however comes to be used as a tool by the Hindu right to criticize minority communities especially Muslims for discriminatory practices in their uncodified personal laws.[42] In the years after independence while much of the uncodified Hindu personal law was codified as statutory law by the Union Parliament,[43] Muslim personal law[44] has largely remained uncodified.

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[38] Article 25, Constitution of India.

[39] Thomas John, *Liberating Marriage: Same-Sex Unions and the Law in India*, in LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW (Alok Gupta and Arvind Narrain eds., 2011).

[40] John Vallamattom v. Union of India (2003) 6 SCC 611 (Supreme Court of India); Sarla Mudgal v. Union of India (1995) 3 SCC 635 (Supreme Court of India).

[41] Article 44, Constitution of India.

[42] The politicization of the debate has also meant that Indian feminists have reversed their position on the issue, see Aarefa Johari, *Demands for a uniform civil code are back and women's groups continue to oppose it. Here's why*, SCROLL.IN (29 December 2020) https://scroll.in/article/980443/demands-for-a-uniform-civil-code-are-back-and-womens-groups-continue-to-oppose-it-heres-why (last accessed 30 November 2021).

[43] Hindu persona law was codified into legislations such as the Hindu Marriage Act, 1956, Hindu Minority and Guardianship Act, 1956, Hindu Adoption and Maintenance Act, 1956 and the Hindu Succession Act, 1956. Efforts to codify Hindu law, however, had begun pre-independence. For a history of the codification of Hindu law, see ARCHANA PARASHAR, WOMEN AND FAMILY LAW REFORM IN INDIA (1992).

[44] While the Muslim Personal Law (Shariat) Application Act, 1937 made the shariat law applicable to all Indian Muslims, large parts of the law remain uncodified. Only issues of divorce and maintenance have seen codification, see The Dissolution of Muslim Marriages Act, 1939; The Muslim Women (Protection of Rights on Divorce) Act, 1986; and The Muslim Women (Protection of Rights on Marriage) Act, 2019.

However, as scholars like Flavia Agnes have shown such arguments proceed on the false premise that codified Hindu personal law is gender-just.[45] Archana Parashar has argued that the early codification of Hindu law was not animated by concerns of gender equality but was to achieve the goal of nation building and to assert state authority over civil life in a newly independent nation.[46] Therefore aspects of Hindu law, which retain problematic remedies such as the restitution of conjugal rights and do not recognize progressive concepts such as matrimonial property and no-fault divorce, continue to violate the equal rights of women.[47]

Moreover, India's federal structure with both the Union Parliament and State Legislatures enjoying competence over family laws and the asymmetric constitutional guarantees of autonomy in civil matters to certain North-Eastern states are further barriers to a truly uniform law.[48] At the same time, as I have argued earlier, religion-based personal laws remain important markers of individual identity and community difference.[49] This explains why courts are often hesitant to wade into constitutional issues around personal laws and attempts by members of religious communities to challenge their own law are viewed as being more legitimate.[50]

Therefore, discussions around the UCC have come to assume a state of stasis. On the one hand it has become a political tool to browbeat religious minorities and on the other there are very few incentives or roadmaps to secularization of all family law in a manner that secures rights. Even the Law Commission of India in its consultation paper on the UCC concluded that a UCC was "neither necessary nor desirable at this stage".[51] Rather the Law Commission emphasized addressing discriminatory provisions in different personal laws.

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[45] Agnes, *supra* note 36.
[46] Parashar, supra note 43, at 264. For further scholarly work analyzing the trajectories of personal law reform, see NARENDRA SUBRAMANIAM, NATION AND FAMILY: PERSONAL LAW, CULTURAL PLURALISM AND GENDERED CITIZENSHIP IN INDIA (2014); RINA VERMA WILLIAMS, POSTCOLONIAL POLITICS AND PERSONAL LAWS: COLONIAL LEGAL LEGACIES AND THE INDIAN STATE (2006).
[47] See FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA (2001).
[48] Agnes, *supra* note 36.
[49] Agarwal, *supra* note 32. For a contrary view, see FARAH AHMED, RELIGIOUS FREEDOM UNDER THE PERSONAL LAW SYSTEM (2015).
[50] Saptarshi Mandal, *Out of Shah Bano's shadow: Muslim women's rights and the Supreme Court's triple talaq verdict,* 2(1) INDIAN LAW REVIEW 89–107 (2018).
[51] Law Commission of India, Consultation Paper on Reform of Family Law (2018) http://www.lawcommissionofindia.nic. in/reports/CPonReformFamilyLaw.pdf (last 30 November 2021).

In this context, LGBT+ rights claiming, can potentially prove to be a new entry point for reform, that goes beyond the personal law-UCC bind which animates current debates on Indian family law. The Supreme Court's gender and sexuality jurisprudence emphasizes equal constitutional citizenship thereby providing a strong basis for challenging existing family laws.

B. LGBT+ Rights and Indian Family Law

At present at least nine petitions seeking marriage equality are pending before the High Courts of Kerala and Delhi. The petition before the High Court of Kerala has been filed by a same-sex couple seeking recognition of their marriage under the secular SMA.[52] In the High Court of Delhi, four petitions (three filed by a couples and the other by a group of queer individuals) seek recognition under the SMA, one petition seeks recognition of an overseas Indian's same-sex marriage (under US law) under the Foreign Marriage Act, 1968, one petition seeking overseas Indian status for the foreign same-sex spouse of an Indian, and a public interest litigation seeks recognition of same-sex marriage under the Hindu Marriage Act, 1954 (HMA).[53] The High Court of Delhi has clubbed the cases for hearing but final arguments are yet to begin.[54]

The Government of India in its submissions has taken a position against the recognition of same-sex marriage.[55] It argues that existing jurisprudence only recognizes same-sex intimate relationships through the right to privacy which does not include any right to public recognition of marriage.[56] Furthermore, it argues that existing law (including family, civil and criminal laws) as well as India's socio-cultural ethos only recognizes a marriage between a biological man and a biological woman and therefore there is a legitimate state interest in restricting marriage to different-sex couples.[57]

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[52] *Gay couple from Kerala moves HC challenging 'discriminatory' provisions of Special Marriage Act*, SCROLL.IN (28 January 2020) https://scroll.in/latest/951357/gay-couple-from-kerala-moves-hc-challenging-discriminatory-provisions-of-special-marriage-act (last accessed 30 November 2021).
[53] Vivek Diwan *et* al, *Happy Together: Law & Policy Concerns of LGBTQI Persons and Relationships in India*, CENTRE FOR HEALTH EQUITY, LAW & POLICY, 7 (2021); *Delhi High Court asks Centre to respond to plea for live streaming of proceedings on same-sex marriage petitions*, THE TIMES OF INDIA (30 November 2021) https://timesofindia.indiatimes.com/india/delhi-high-court-asks-centre-to-respond-to-plea-for-live-streaming-of-proceedings-on-same-sex-marriage-petitions/articleshow/88003547.cms (last visited 30 November 2021).
[54] *Id*.
[55] Affidavit on file with the author.
[56] Affidavit on file with the author.
[57] Affidavit on file with the author.

In the background of these judicial challenges debates around marriage equality have assumed greater urgency.[58] Legal recognition of queer relationships, however, has always animated debates within the LGBT+ rights movement in India. In one of the earliest landmark reports on the status of homosexuality in India, the AIDS *Bhedbhav Virodhi Andolan* expressed the aspirations of India's queer community for relationship recognition, including access to the institution of marriage and parenthood.[59] The report also stressed the need to think beyond conjugality and recognize relationships that are not based on sex to ensure access to State-benefits.[60] Since then both feminist and queer organizations and activists have stressed on both legal inclusion and diverse family recognition that goes beyond marital status or conjugality.[61] They have especially emphasized the need to account for the lived realities of LGBT+ relationships and for the law to address issues such as economic dependency, healthcare decision-making and intimate partner violence.[62]

Academic writing on the interaction of LGBT+ rights and family is however scant. This may be because till recently the focus was largely on decriminalization of same-sex relationships rather than inclusion in existing family laws. Moreover, unlike jurisdictions like the US, no litigation on parental rights of LGBT+ persons have been documented in India. A few trends are, however, notable.

Some scholars make constitutional arguments for familial recognition and especially focus on the secular special marriage law as vehicle for marriage equality.[63] This is also the preferred approach in a majority of the petitions. I have criticized this focus on secular marriage law in the past since it ignores both the interconnectedness of Indian family and the intersectional identities of religious LGBT+ Indians.[64] Mere inclusion into the SMA also disregards larger

[58] Ruth Vanita, *Marriage equality is a constitutional right, do not deny it to same-sex couples*, THE INDIAN EXPRESS (4 November 2020) https://indianexpress.com/article/opinion/columns/marriage-rights-india-same-sex-couples-6929246/ (last visited 30 November 2021); Manuraj Shunmugasundaram, *In India, looking beyond the binary to a spectrum*, THE HINDU (19 June 2021) https://www.thehindu.com/opinion/op-ed/in-india-looking-beyond-the-binary-to-a-spectrum/article34853466.ece (last visited 30 November 2021).
[59] LESS THAN GAY, AIDS BHEDBHAV VIRODHI ANDOLAN (1991).
[60] *Id*.
[61] Diwan, *supra* note 53, at 9-13.
[62] Diksha Sanyal *et al*, '*Family'* in *Queering the Law: Making Indian Laws LGBT+ Inclusive*, VIDHI CENTRE FOR LEGAL POLICY, 32-35 (2019).
[63] John, *supra* note 39; Nayantara Ravichandran, *Legal Recognition of Same-Sex Relationships in India* 5 JOURNAL OF INDIAN LAW AND SOCIETY 95 (2014). Satchit Bhogle, *The Momentum of History: Realising Marriage Equality in India* 12(3–4) NUJS Law Review 1 (2019).
[64] Agarwal, *supra* note 32.

structural issues with the SMA which remains a highly patriarchal law with an outdated vision of marriage.[65]

Another set of scholars have looked at the interplay between the realities of same-sex relationships, conditioned by vulnerabilities, both socio-economic and based on caste and class locations, with the heteropatriarchal institution of marriage.[66] Reports by think tanks and research organizations (including a report co-authored by me) have mapped the various issues and concerns that would arise while considering LGBT+ inclusion in existing family law frameworks.[67] These reports too have stressed diverse family recognition and the need to account for socio-economic vulnerability.[68] They, however, do not go into specific doctrinal implications of the legal recognition of such relationships.

In a recent essay, family law scholar Saptarshi Mandal calls for queer groups to engage with larger questions of Indian family law.[69] He outlines existing issues with marriage law such as the non-recognition of unilateral divorce and other restrictions on individual autonomy which makes mere inclusion problematic.[70] Instead he suggests that issues such as marital status-based discrimination and the non-recognition of rights such as healthcare decision-making in non-marital relationships must be factored in queer conversations about family law reform.[71]

Therefore, both India's LGBT+ movement and many Indian scholars have emphasized diverse family recognition and have cautioned against blind assimilation within marriage in existing family law. The articulation of these concerns is well-intentioned and not without basis. In the Indian context, where family laws remain unequal and largely out-of-step with changing social realities, the prospect of mere inclusion may only at best re-emphasize old inequalities or at

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[65] Akshat Agarwal, *Upgrading India's Special Marriage Law*, VIDHI CENTRE FOR LEGAL BLOG (21 September 2020) https://vidhilegalpolicy.in/blog/upgrading-indias-special-marriage-law/ (last visited 30 November 2021).
[66] Sourav Mandal, *The Politics of Regulating Adult Sexuality through the Institution of Marriage: Reflections on Queer Experiences from India* in MUTINIES FOR EQUALITY: CONTEMPORARY DEVELOPMENTS IN LAW AND GENDER IN INDIA (Tanja Herklotz and Siddharth Peter de Souza eds., 2021); Sayan Bhattacharya, *Reading Queerness: Same-sex marriages in India* in THE POLITICS OF BELONGING IN CONTEMPORARY INDIA: ANXIETY AND INTIMACY (Kaustav Chakraborty ed., 2020).
[67] Sanyal, *supra* note 62; Diwan, *supra* note 53.
[68] Sanyal, *supra* note 62; Diwan, *supra* note 53.
[69] Mandal, *supra* note 3.
[70] Mandal, *supra* note 3. Existing marriage law recognizes remedies such as restitution of conjugal rights which violate the decisional autonomy of individuals, see Saumya Uma, *Wedlock or Wed-lockup? A Case for Abolishing Restitution of Conjugal Rights in India*, INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY, Volume 35 Issue 1 (2021).
[71] Mandal, *supra* note 3.

worst create new ones. However, I will show that there is another way of thinking about LGBT+ right claims. In line with dynamics in comparative family law, the doctrinal force of LGBT+ claims to marriage equality can become a vehicle for transforming aspects of family law for all non-normative families.

IV. Constitutional Arguments for Marriage Equality

In this part, I will construct potential arguments for same-sex marriage recognition based on Indian constitutional law. I speculate that such arguments will fall into two broad heads, 1) arguments based on the personal liberty of individuals and 2) arguments based on equality and anti-discrimination. Before constructing specific arguments, however, I briefly trace key features and concepts in the gender and sexuality of jurisprudence of the Indian Supreme Court.

A. Tracing Constitutional Rights and Concepts

1. Equality and Anti-Discrimination

Article 14 of the Indian Constitution recognizes the right to equality and equal protection of laws,[72] while Article 15 prohibits discrimination against citizens on specific grounds that include sex.[73] Together with other provisions on equality of opportunity in matters of public employment,[74] abolition of untouchability,[75] and abolition of titles[76] they form the equality code of the Indian Constitution and demonstrate the constitutional commitment to an equal society. In recent years the equality provisions have been interpreted broadly with one commentator remarking that they have come to achieve an "highly activist magnitude".[77] Judicial decisions on gender and sexuality have played a key role in this.

(i) Right to Equality

To test the constitutionality of a law under Article 14 both the traditional test of classification as well as the test of manifest arbitrariness have been used.[78] In applying the test of classification, courts, first, ascertain whether there is a reasonable classification based on

[72] Article 14, Constitution of India.
[73] Article 15, Constitution of India. The other specific grounds include religion, caste, race and place of birth.
[74] Article 16, Constitution of India.
[75] Article 17, Constitution of India.
[76] Article 18, Constitution of India.
[77] *M.P. Jain Indian Constitutional Law*, 907 (Justice Chelameswar & Justice Dama Seshadri Naidu eds., 8th edn., 2018).
[78] *Id*.

intelligible differentia and, second, whether the differentia which is the basis of the classification has a rational nexus with the object that the legislation seeks to achieve.[79]

As legal scholar Gauri Pillai argues, the Supreme Court's decriminalization decision in *Navtej* has added new dimensions to both prongs of the old classification test.[80] First, by recognizing the concept of indirect discrimination through the disproportionate impact of facially neutral provisions, the decision furthers the test of classification. Moreover, it allows the use of the language of intelligible differential to test the very classification itself. For instance, Chandrachud J., in *Navtej* questioned the very basis of classification of sexual acts as natural and unnatural and observed that such classification represents the mere heteronormative regulation of sexual acts that fell outside heteronormativity and therefore could not be sustained.[81]

Second, the decision emphasizes constitutional morality in testing the legitimacy of the objective of the legislation. Constitutional morality here contrasts with public or social morality with the court holding that the former always trumps the latter. The court defines constitutional morality as, "the morality that has inherent elements in the constitutional norms and the conscience of the Constitution."[82] The court understood constitutional morality as promoting plural and inclusive values and therefore the criminalization of homosexuality based on majoritarian perception tracing back to Victorian morality and Judeo-Christian values was violative of constitutional morality.[83]

Moreover, apart from the classification test, several judicial decisions have also recognized the test of arbitrariness under Article 14.[84] The most influential exposition of this test was in *Shayara Bano* where Nariman J., defined manifest arbitrariness as, "something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when

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[79] Jain, *supra* note 77, at 910.
[80] Gauri Pillai, *Naz to Navtej: Navigating Notions of Equality*, 12 NUJS L. REV. 3-4 (2019); For earlier critiques of the classification test, see Catherine A MacKinnon, *Sex equality under the Constitution of India: Problems, prospects, and ''personal laws''*, 4(2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 182, 183 (2006)
[81] Para 28, Per Chandrachud's J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).
[82] Para 118, Per Misra CJI., and Khanwilkar J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).
[83] Pillai, *supra* note 80.
[84] Jain, *supra* note 77.

something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary"[85] This test of arbitrariness was relied upon by judges in *Navtej* as well.[86]

(ii) Right against Gender Identity and Sexual Orientation Discrimination

In interpreting the guarantee against discrimination based on sex, the Supreme Court has read in both gender identity and sexual orientation as part of Article 15. [87] In *National Legal Services Authority* v. *Union of India*,[88] the Supreme Court gave legal recognition to the transgender identity and recognized their fundamental rights. The court further held that sex discrimination included both gender and biological attributes.[89] It reasoned that, "gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character" and therefore discrimination based on sex would also include discrimination on the basis of gender identity.[90]

In *Navtej*, on one hand Chandrachud's J., opinion interpreted sexual orientation discrimination as part of sex discrimination, since sexual orientation discrimination proceeded on the basis of gender and sexual role stereotypes which were ultimately stereotypes of sex, discrimination based on which is prohibited by Article 15(1).[91] The court therefore used the principle of anti-stereotyping to include sexual orientation discrimination within sex discrimination.[92] On the other, Malhotra J., interpreted sexual orientation discrimination as part of sex discrimination on the theory of analogous grounds which protects both immutable status and fundamental choices.[93] She reasoned that existing grounds in Article 15(1) represent either immutable status

[85] Para 55, Per Nariman J., Shayara Bano v. Union of India, (2017) 9 SCC 1(Supreme Court of India).

[86] The four separate opinions in Navtej use the test of arbitrariness but arrive at different reasons to hold why Section 377 was arbitrary, see Pillai, *supra* note 83, at n.13.

[87] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India); National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (Supreme Court of India).

[88] National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (Supreme Court of India).

[89] Para 59, Per Sikri J., National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (Supreme Court of India).

[90] Para 59, Per Sikri J., National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (Supreme Court of India); also see Justice M.B. Lokur, *Transgender Rights and Wrongs* in SEX AND THE SUPREME COURT: HOW THE LAW IS UPHOLDING THE DIGNITY OF THE INDIAN CITIZEN (Saurabh Kirpal ed., 2020).

[91] Akshat Agarwal, "*Asking Searching Questions to Forms and Symbols of Injustice": Indirect Discrimination, Intersectionality and the Principle of Anti-Stereotyping*, IACL-AIDC BLOG (15 September 2018) https://blog-iacl-aidc.org/blog/2018/9/13/asking-searching-questions-to-forms-and-symbols-of-injustice-indirect-discrimination-intersectionality-and-the-principle-of-anti-stereotyping (last visited 30 November 2021).

[92] The principle of anti-stereotyping interpreted as being part of sex-discrimination in Article 15(1), see Anuj Garg v. Hotel Association of India, AIR 2008 SC 663.

[93] Para 15(2), Per Malhotra J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India); For an exposition of this theory, see Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal For All Minorities*, 2 NUJS LAW REVIEW, 419 (2009); John Gardner, *On the Ground of Her Sex (uality)*, 18(2) OXFORD JOURNAL OF LEGAL STUDIES, 167 (1998).

or fundamental choices which are further linked to an individual's autonomy and are intrinsic to their personality. Since sexual orientation is similarly linked to individual autonomy it could be justified as an analogous ground of discrimination through the theory of immutable status and fundamental choices.[94]

2. Personal Liberty

Article 21of the Constitution provides that no person shall be deprived of their life and personal liberty except according to procedure established by law.[95] The provision has been interpreted broadly to encompass several rights. While the Indian Supreme in its early years read Article 21 in a narrow positivistic sense,[96] its approach changed over time culminating in a complete turnaround in *Maneka Gandhi v. Union of India*[97] in the late1970s.[98]

Decisions post-*Maneka* were characterized by a large expansion in the meaning of the right to life and personal liberty which included the recognition of positive obligations on the State.[99] While the focus in the 1980s and 1990s was largely on socio-economic rights, in recent years the Supreme Court has built an impressive jurisprudence focusing on autonomy, privacy and human dignity. This has significant implications for gender and sexuality rights.

(i) Right to Sexual Orientation

In 2017, nine judge-bench of the Supreme Court in *Justice KS Puttaswamy* v. *Union of India*[100] unanimously held that the right to privacy was a stand-alone fundamental right which was guaranteed by Article 21 of the Constitution. Chandrachud J., in his plurality opinion (on behalf of four judges) as well as Kaul J., in his concurrence further held that sexual orientation

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[94] Para 15(2) Per Malhotra J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).

[95] Article 21 of the Constitution of India provides that no person shall be deprives of his life and personal liberty except according to procedure established by law.

[96] In AK Gopalan v. State of Madras, AIR 1950 SC 27, the Supreme Court had interpreted Article 21 narrowly and had held that the provision was not to be read in conjunction with other provisions (such as guarantees of equality and freedom) and did not contain any substantive or procedural. Here the court contrasted Article 21 with the American approach to due process on the argument that the Indian framer has explicitly rejected the American approach since they had not included the words "due process of law" in Article 21. See Jain, *supra* note 77.

[97] Maneka Gandhi v. Union of India, AIR 1978 SC 59; Jain, *supra* note 77, at 1159-1167.

[98] In *Maneka* the Supreme Court held the right to life and personal liberty had to be interpreted in light of other provisions of the Constitution including the right to equality (Article 14) and the right to freedom (Article 19), the term "personal liberty" had to be read expansively, and the deprivation of rights through a procedure established by law could not be arbitrary but had to be fair and reasonable. Jain, *supra* note 77, at 1159-1167.

[99] Such rights include the right to livelihood, right to shelter, right to health etc., see Jain, *supra* note 77, at 1207-1233.

[100] Justice K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (Supreme Court of India).

was part of the natural right to privacy since it was a core aspect of the autonomy and dignity of individuals.[101] In *Navtej*, Chandrachud J., held that sexual minorities enjoyed a right to sexual privacy as part of the fundamental right to privacy, which included the privacy of both private spaces as well as the ability navigate public spaces on their own terms.[102]

(ii) Right to be in a Relationship with a Partner

Moreover, in decisions on inter-caste marriage in *Shakti Vahini v. Union of India*[103] and inter-religious marriage in *Hadiya v. Asokan KM*[104] the Supreme Court has held that individuals have the right to choose a partner as part for the fundamental rights of freedom and personal liberty. In *Navtej*, Chandrachud J., further emphasized that a right to intimacy or the right to choose a partner was based on values of autonomy and self-determination which the Constitution cherishes. The court observed that laws and social institutions must be organized in a manner that do not restrict individuals from entering relationships based on sex or gender and such social institution must provide them with the "institutional recognition to perfect their relationships".[105]

(iii) Right to Human Dignity

Decisions of the Supreme Court have also held that the right to life under Article 21 includes a right to live with human dignity.[106] In both *Puttaswamy* and *Common Cause v. Union of India*,[107] which dealt with the right to die with dignity, the Supreme Court emphasized that the right to live with dignity was close linked to the right to life and liberty. In *Navtej* all the judges recognized that LGBT+ persons enjoyed the right to human dignity. Misra CJI., emphasized that the violation of self-determination and autonomy in the choice of sexual partner was also a violation of dignity,[108] Nariman J., recognized dignity and its link with the value of fraternity, mentioned in the preamble to the Indian Constitution, while both Chandrachud J., and Malhotra J., linked dignity to their analysis of privacy.[109]

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[101] Per Kaul J., Justice K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (Supreme Court of India).
[102] Paras 59 and 62, Per Chandrachud J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).
[103] Shakti Vahini v Union of India, (2018) 7 SCC 192 (Supreme Court of India).
[104] Shafin Jahan v. Asokan KM, (2018_ SCC OnLine SC 343 (Supreme Court of India).
[105] Para 67, Per Chandrachud J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).
[106] Francis Coralie v. Delhi, AIR 1981 SC 746 (Supreme Court of India); P Rathinam v. Union of India, AIR 1994 SC 1844 (Supreme Court of India)
[107] Common Cause v. Union of India, (2018) 5 SCC 1 (Supreme Court of India).
[108] Para 149, Per Misra CJI., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).
[109] Parts F1 and F2, Per Chandrachud J., and Para 16.1, Per Malhotra J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).

Therefore, the gender and sexuality jurisprudence of the Indian Supreme Court has greatly expanded the equality and personal liberty rights of LGBT+ persons. Additionally, the court has recognized the "equal citizenship claims of LGBT+ Indians."[110] This implies that the LGBT+ community cannot be "discriminated against and they have a right to express themselves through their intimate choices."[111] Chandrachud J., in his opinion links the concept of equal citizenship to "constitutional morality", the norms and values of the Constitution that uphold the liberty, dignity and equality claims of the LGBT+ persons. Therefore, in determining the rights of LGBT+ persons not culture or traditions but values of the Constitution are considered supreme. According to the court, such an approach is not merely about the protection of minorities but concerns the constitutional vision of the kind of country that India wants to be.

The court[112] further justifies this approach in the background of the broader concept of "transformative constitutionalism", the idea that the constitution takes cognizance of inherent social inequalities and seeks to be a "text of governance which promotes true equality".[113] Misra CJI recognized it as the duty of the judicial branch of the State to uphold the principle of transformative constitutionalism and usher change in society.[114] In the context of the LGBT+ community, Chandrachud J., emphasizes that transformative constitutionalism requires courts to question the "prevailing notions about the dominance of sex and genders" and resolve the "polarities of sex and binaries of gender".[115]

B. Constructing Arguments for Marriage Equality

In constructing arguments for marriage equality, I will focus on the marriage provision of secular and the Hindu marriage law. Section 4 of the SMA lays down the conditions for solemnization of marriage. While the language of the provision is neutral, clause (c)

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[110] Para 156, Per Chandrachud J., and Para 97, Per Nariman J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).
[111] Para 145, Per Chandrachud J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).
[112] Part M, Per Chandrachud J., and Part H, Per Misra CJI., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).
[113] Para 153, Per Chandrachud J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).
[114] Para 110, Per Misra CJI., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).
[115] Para 153, Per Chandrachud J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).

specifically refers to "male" and "female" in stipulating the age requirements of marriage.[116] Section 5 of the HMA lays down the conditions of a valid Hindu marriage. Similar to Section 4 of the SMA, while the language of Section 5 is neutral, clause (iii) refers to the "bridegroom" and "groom" in stipulating the age requirements for marriage.[117] It has been argued that same-sex marriage could potentially be construed in these provisions through statutory interpretation by expanding the meaning of the terms "bride" and "bride groom".[118] It is, however, unclear how same-gender couples can be included in such a reading. Moreover, such an interpretation also goes against the broader scheme of the legislation which is clearly meant to recognize marriages in the binary.

Therefore, since existing marriage law only recognizes marriage in the male-female binary, I speculate that courts are likely invalidate existing law on both equality and personal liberty grounds. I build these arguments based on the doctrinal concepts and rights recognized by the Supreme Court in its gender and sexuality jurisprudence.

1. Equality Based Arguments

(i) Exclusion from the family law institution of marriage violates LGBT+ persons' right to equality under Article 14

Existing marriage laws such as the SMA and HMA which exclude same-sex couples from their definition of what constitutes a valid marriage make a classification based on sexual orientation. This is because they only recognize a valid marriage as between persons of the opposite sex and exclude persons of the same sex. For instance, while Ravi can marry Sarita, he cannot enter a valid marriage with Ali.[119] Therefore while the class of heterosexuals are accorded marital recognition, it is denied to non-heterosexuals. This affects persons in the LG BT+ community and their non-heterosexual relationships.

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[116] Section 4, Special Marriage Act, 1954.
[117] Section 5, Hindu Marriage Act, 1956.
[118] Ruth Vanita, *Democratizing Marriage*, in LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW 378 (Alok Gupta and Arvind Narrain eds., 2011); Stelllina Jolly and Ritika Vohra, *Recognition of Foreign Same-Sex Marriage in India*, JOURNAL OF THE INDIAN LAW INSTITUTE 59(3), 302-326 (2017). The Madras High Court has followed such an approach in recognizing the marriage of a transwoman with a man by interpreting "bride" to include transwoman under the Hindu Marriage Act, 1956, see Sreeja v. Inspector General Registration, WP (MD) No 4125 of 2019 (Madras High Court, 22 April 2019). This decision, however, cannot be extended to same-sex relationships since it still operates in the male-female binary.
[119] Assuming the gender associated with the names aligns with the sex-assigned at birth.

According to *Navtej* to pass the test of Article 14, a classification should be based on intelligible differentia. In this case the classification is not based on intelligible differentia since the trait has been considered intrinsic and a core aspect of the identity of the individual.[120] Denial of access to the institution of marriage based on a core trait such as sexual orientation which has also been recognized as a fundamental right as part of the right to life and personal liberty in Article 21 is *prima facie* discriminatory.

Assuming *arguendo* even if the classification is upheld, such a classification should have a rational nexus with the objective of the legislation. In excluding same-sex couples from the ambit of marriage the only legislative objective can be the promotion of heteronormative worldview where procreation between persons of the biological sex is considered the essence of marriage. Another objective could be the promotion of a traditional understanding of marriage as a union between persons of the opposite sex. While the former proceeds on stereotypical views of sex and gender (the only reason persons of the opposite sex marry is to procreate), the latter only accounts for perceived social and historical understandings while disregarding constitutional vision. In *Navtej*, the Supreme Court has emphasized constitutional morality, the underlying values of the Constitution, to determine the legitimacy of a state objective. The equal constitutional citizenship of LGBT+ persons has been recognized as part of constitutional morality by *Navtej.* Therefore, a legislative objective that seeks to exclude LGBT+ persons and disregards constitutional morality and cannot be a valid state objective.

Furthermore, under the arbitrariness test of the equality doctrine, acts done without an adequate determining principle can be held to be manifestly arbitrary. A classification based on sexual orientation that seeks to exclude same-sex relationships from the ambit of marriage proceeds on heteronormative conceptions of society. Such a worldview is not in consonance with the equal citizenship claims of LGBT+ people and therefore violates constitutional morality. Therefore, the denial of access to family law institutions such as marriage to LGBT+ persons is unreasonable and arbitrary.

(ii) The non-recognition of same-sex marriage is discrimination based on sexual orientation and therefore violates Article 15

[120] Para 14.5, Per Malhotra J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).

In *Navtej* the court has interpreted the guarantee against sex discrimination to include the guarantee against sexual orientation-based discrimination. Exclusion of same-sex couples from the institution of marriage is discrimination based on sexual orientation. Sexual orientation is a prohibited ground of discrimination and according to the equal constitutional claims of LGBT+ persons the State can have no interest in excluding them from the institution of marriage. Therefore, the exclusion of same-sex couples from the family law institution of marriage is discrimination based on sexual orientation and will violate Article 15 of the Constitution.

The court is thus likely to find the denial of access to family law institutions such as marriage as a violation of sexual orientation-based equality recognized in Articles 14 and 15 of the Indian Constitution.

2. *Personal Liberty Based Arguments*

(i) Exclusion from the family law institution marriage violates the fundamental right to sexual orientation

The decisions in *Puttaswamy* and *Navtej* have held that the right to sexual orientation is a fundamental right which is part of the right to privacy as part of the fundamental right to life and liberty under Article 21.[121] The non-legal recognition of same-sex marriage discriminates based on sexual orientation and therefore violates Article 21.

(ii) Giving effect to LGBT+ persons rights to be in a relationship based on their autonomy and dignity claims requires their inclusion into family law institutions such as marriage

Supreme Court decisions in *Shakti Vahini, Hadiya* and *Navtej* have held that the right to be in a relationship with a partner based on autonomy and self-determination is part of the fundamental right to privacy. *Navtej* also recognizes LGBT+ persons' right to human dignity due to their equal citizenship claims. LGBT+ persons' right to be in intimate relationships of their choice is thus protected by both values of autonomy and dignity under Article 21.

[121] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India); Justice K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (Supreme Court of India).

Due to its centrality in Indian society, marriage represents one of the most intimate expressions of choosing a partner and being in a relationship. Marriage remains a key a social fact in India. According to the 2001 census 45.6% of the population consisted of married persons (this is a very high number considering that majority of India's population is young).[122] The prevalence of social marriage, the performance of marital ceremonies without legal recognition amongst same-sex couples,[123] underscores both the centrality of marriage and the LGBT+ community's aspiration to get access to the institution of marriage. Moreover, marriage remains a key entry pointy to the creation of familial relationships such as parenthood and various benefits including social welfare, tax, inheritance, and the ability to take healthcare decisions are often linked to marital status.[124]

The legal non-recognition of the relationships of same-sex couples therefore has both expressive and material harms. Exclusion from the institution of marriage in a society that values marriage makes LGBT+ persons relationships less legible and equal. Non-recognition also prevents them from accessing key benefits and legal safeguards that are linked to marriage.

Liberty and dignity-based rights have been interpreted by the Indian Supreme Court as imposing a positive obligation on the State for their realization.[125] Marriage is the most significant legal route through which the State recognizes the autonomous choice of intimate partners and accords dignity to such intimate relationships. Solely recognizing LGBT+ persons' right to be in a relationship of their choice without according such a choice the legal recognition of marriage devalues the autonomy and dignity of LGBT+ person's choices and relationships. Therefore, excluding same-sex couples from the legal institution of marriage violates their rights to autonomy and dignity. These rights also impose a positive obligation on the State to include them in the legal institution of marriage due to its centrality in recognizing intimate partner choices. Not doing so disparages LGBT+ persons autonomy and dignity and discriminates against their intimate choices. Meaningfully realizing LGBT+ persons right to

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[122] Office of the Registrar General and Census Commissioner (India), Age Structure and Marital Status (2001) http://censusindia.govin/Census_And_You/age_structure_and_marital_status.aspx (last visited 30 November 2021).

[123] Vanita, *supra* note 118; Shamayita Chakraborty, *Despite social marriage, gay couples still years for legal rights*, TIMES OF INDIA (25 June 2019) https://timesofindia.indiatimes.com/life-style/spotlight/is-gay-marriage-a-reality-in-india/articleshow/69928813. cms (last visited 19 December 2019)

[124] Diwan, *supra* note 53.

[125] The Supreme Court has interpreted a number of socio-economic rights such as the right to food and the right to education which impose positive obligations on the State under Article 21's guarantee of life and personal liberty.

choose a partner based on their autonomy and dignity therefore necessitates the inclusion of their relationships in the institution of marriage.

The court is likely to find that the denial of access to family law institutions such as marriage violates LGBT+ persons' right to sexual orientation and their right to be in a relationship which is based on values of autonomy and dignity. Such non-recognition therefore violates Article 21 of the Constitution.

V. Possibilities of Transforming Parenthood in India

A. Law of Parenthood under Secular and Hindu Law

Issues of parenthood in India are governed by religion-based personal laws. In Indian law a parent, who is presumed to be legally responsible for the welfare of the child and is legally recognized to take decisions on their behalf is called a natural guardian.[126] In contrast, the concept of custody refers to the physical placement of the child and includes the ability to take day-to-day decisions.[127] While all personal laws usually recognize the father as the natural guardian, there is usually a presumption in favor of custody with the mother for younger children.[128] Therefore, while guardianship and custody may often coincide, that may not always be the case.

The religious laws on parenthood are supplemented by the secular Guardian and Wards Act, 1890 (GAWA) which authorizes courts to declare a guardian for minors in situations where there is no living father or mother.[129] Therefore, ordinarily, secular law emphasizes the rights of both the father and mother. However, courts have repeatedly held that in all issues concerning children the principle of best interests of the child is paramount and can even override statutory or personal law.[130]

In Hindu law, under the Hindu Minority and Guardianship Act, 1956 (HMGA) the father is the preferred natural guardian, and the mother is only recognized as a natural guardian "after him".[131] The Supreme Court, in *Githa Hariharan* v. *Reserve Bank of India*,[132] recognizing the

[126] Asha Bajpai, *Custody and Guardianship of Children in India*, FAMILY LAW QUARTERLY 39(2) 441, 443 (2005).
[127] *Id*.
[128] *Id*.
[129] Section 19(b), Guardian and Wards Act, 1890.
[130] Bajpai, *supra* note 126, at 443.
[131] Section 6, Hindu Minority and Guardianship Act, 1956.
[132] Githa Hariharan v. Reserve Bank of India, (1999) 2 SCC 228 (Supreme Court of India).

constitutional principle of sex equality has held that the mother could be the natural guardian of the minor even during the lifetime of the father if the father was absent from the life of the minor. The court therefore stopped short of recognizing the parental rights of the mother on completely equal terms.[133] For illegitimate children, however, Hindu law gives a preference to the mother.[134] Moreover, stepparents are not recognized as natural guardians.[135]

Surrogacy and assisted reproductive technique are not regulated yet, but legislative proposals to regulate both have been on the cards for a few years. This marks a sharp break from the relatively liberal way in which surrogacy regulation had been approached previously.[136] While the recognition of the intending couple as parents of the child has been uncontroversial, many of these regulatory proposals come in the background of documented exploitation of surrogates, especially in international commercial surrogacy arrangements.[137] For instance, the Surrogacy (Regulation) Bill, 2019, only permits surrogacy for heterosexual married couples who are infertile and only allows a close relative to be a surrogate mother.[138] Moreover, the bill bans all forms of commercial surrogacy and only permits altruistic surrogacy i.e. surrogacy without any compensation.[139] Therefore, restrictions on both who can initiate surrogacy and who can be a surrogate as well as the ban on commercial surrogacy aim to address issues of exploitation.

However, the bill has been heavily criticized by feminists since it ignores the realities of surrogacy arrangements and by only allowing altruistic surrogacy devalues the labour of the surrogate mother.[140] Feminists instead suggest that the bill should be permissive of different

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[133] Law Commission of India, Reforms in Guardianship and Custody Laws in India, Report No. 257 (2015) https://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf (last visited 30 November 2021).
[134] Section 6, Hindu Minority and Guardianship Act, 1956.
[135] Section 6, Hindu Minority and Guardianship Act, 1956.
[136] As early as 2005, the Indian Council of Medical Research (ICMR) had issued National Guidelines for Accreditation, Supervision & Regulation of ART Clinics. This was followed by a number of legislative proposals for the regulation of assisted reproductive techniques which before 2016 were largely permissive. See Sneha Banerjee and Prabha Kotiswaran, *Divine Labours, Devalued Work: The Continuing Saga of India's Surrogacy Regulation*, INDIAN LAW REVIEW 5-1, 85-105 (2021).
[137] The ICMR guidelines recognized intending couple as parents. Further see Proviso to Section 7, The Surrogacy (Regulation) Bill, 2019; Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, SIGNS 35(4) 969-992 (2010); Aastha Malhotra and Arshia Roy, *Reconceptualising Parenthood: A Model Regulatory Framework for Assisted Reproduction in India*, 13 NUJS L. REV. 1 (2020).
[138] Section 4, The Surrogacy (Regulation) Bill, 2019.
[139] Section 4, The Surrogacy (Regulation) Bill, 2019.
[140] Banerjee and Kotiswaran, *supra* note 136; Neha Thirani Bagri, *A Controversial Ban on Commercial Surrogacy Could Leave Women in India with even Fewer Choices*, TIME (30 JUNE 2021) https://time.com/6075971/commercial-surrogacy-ban-india/ (last visited 30 November 2021).

surrogacy arrangements while regulating them to protect the rights of the surrogate mother and to prevent economic exploitation.[141] In line with the surrogacy bill, the Assisted Reproductive Technology (Regulation) Bill, 2020 also only envisages an intending heterosexual married couple or a woman as opting for assisted reproductive services.[142]

The Hindu law of adoption, under the Hindu Adoption and Maintenance Act, 1956 (HAMA) allows for adoptions amongst Hindus. The secular Juvenile Justice Act, 2015 (JJA) allows for adoptions irrespective of religion. While the adoption regime under HAMA is relatively liberal and adoptions can be conducted privately in most cases without any involvement of the State, adoptions under the JJA are heavily regulated.[143] Moreover, the JJA is the primary legal vehicle through which orphaned or abandoned children are given up for adoption by the State.[144] Even though both the laws permit single men and women to adopt, when it comes to a couples they only imagine the heterosexual married couple as eligible parents. Furthermore, unlike HAMA, the JJA only allows single men to adopt male children.[145] Legal scholar Sangeetha Sriram has pointed out how the current adoption law excludes same-sex couples, transgender persons and does not recognize second-parent adoption which affects both LGBT+ couples and persons in non-marital relationships.[146]

The existing laws on parenthood, therefore, privileges fathers as well as the heterosexual marital relationship. Exclusion of non-normative relationships occurs at all levels. First, the Hindu law of natural guardianship does not recognize the equal parental rights of the mother by privileging the father in marital relationships. Moreover, it does not recognize equal parental rights in non-marital relationships by privileging the mother as the natural guardian in case of illegitimate children. Second, the proposed regulation of assisted reproductive techniques and surrogacy excludes LGBT+ couples, persons intending to be single parents and persons in non-marital relationships. Third, the laws of adoption neither recognize adoption by either same-sex couples or transgender persons, nor second parent adoptions which adversely affects persons in non-marital relationships. Parenthood in Indian family law thus remains highly exclusionary.

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[141] *Id*.
[142] Sections 2(g) and 2(x), The Assisted Reproductive Technology (Regulation) Bill, 2020.
[143] See Adoption Regulations, 2017.
[144] Section 38, Juvenile Justice (Care and Protection of Children) Act, 2015.
[145] Section 57(4), Juvenile Justice (Care and Protection of Children) Act, 2015.
[146] Sangeetha Sriram, *Revitalizing Adoption Law in India*, INDIAN LAW REVIEW (2020). The Adoption Regulations, 2017 recognize adoption by stepparents but do not recognize second parent adoption.

B. Transforming Parenthood through LGBT+ Rights Claiming

I argue that LGBT+ rights claiming for marriage can potentially open possibilities for making arguments to expand the law on parenthood in India. Such expansion may not only benefit LGBT+ families but also persons in different sex relationships as well as other diverse familial relationships. In Part IVB, I argued that potential marriage equality arguments can be constructed around both equality and personal liberty claims. I will now build on those to demonstrate their implications for the law of parenthood.

A key consequence of the recognition of marriage equality based on sexual orientation equality and the right to legal recognition of relationships based on autonomy and dignity would be the broader recognition of LGBT+ family equality in the law.[147] Such recognition necessarily transcends marriage since it emphasizes both the need for legally respecting the various ways in which LGBT+ people organize and construct their relationship and not excluding them from existing family law institutions. Underlying this idea are the broader concepts of constitutional morality and transformative constitutionalism that view legal regulation based on the gendered binary and associated stereotypes, including the privileging of sexual reproduction, as being inconsistent with the constitution's plural vision. Both the recognition of LGBT+ relational equality and shifts in constitutional understanding of relationships broadens the legal understanding of parenthood.

1. Implications for Guardianship

The recognition of LGBT+ family equality would necessitate the recognition of LGBT+ parenthood and the corresponding claims to the exercise of parental rights by same-sex couples. Such recognition of the parental rights of same-sex couples would likely destabilize our understanding of gendered roles in family law as well as displace the privileged position that sexual procreation enjoys. This is likely to shift the understanding of parenthood from being based on biology or gender to intentional and functional principles of parental recognition. Moreover, as NeJaime has argued in the American context, a shift to intentional and functional parenthood is likely to benefit non-marital families as well as it may shift the focus from marital status to how the parental relationship comes into existence.[148] There is no reason to believe

[147] For the notion of LGBT+ Family Equality in American Law, see NeJaime, Marriage Equality and the New Parenthood, *supra* note 4.
[148] NeJaime, Marriage Equality and the New Parenthood, *supra* note 4, at 1250.

that with the recognition of marriage equality a similar doctrinal shift may not come about in India.

Giving same-sex couples parental recognition, also does away with the logic of privileging the father as a natural guardian in Hindu law. This is because in recognizing the parental rights of same-sex couples, the notion that men and women have gendered parenting roles is inherently rejected. Such gendered roles form the very basis of presuming the father as natural guardian over the rights of the mother. Thus, the recognition of same-sex couples as parents implies the automatic repudiation of any preference among different-sex couples due to the disavowal of the underlying theory.

Moreover, currently children born to persons in non-marital relationship are considered illegitimate in Hindu law with the mother being given a preference as the natural guardian.[149] Recognizing that the essence of a parent-child relationship is not just sexual reproduction, but that such a relationship can also be formed through intentional and functional principles, as it does in the case of same-sex couples, may also change the way children born outside of marriage are viewed. Instead of the marital status of the couple, focus shifts to the intention of the parent or the nature of the relationship the parent shares with the child. Either can become a basis for asserting parental rights and for equal status and involvement in the lives of the child. This can have implication for persons in non-marital relationships who may have a child together and may want to be viewed as parents of the child as well as for unwed biological fathers who may want to take up a larger role in their child's life. This of course does not do away with the concept of illegitimacy in Hindu law, which as has been persuasively argued, [150] should be abolished but weakens the relevance of marital status for determining a parent-child relationship.

2. *Implications for regulation of Assisted Reproductive Techniques and Surrogacy*

I argued that the rights to autonomy and dignity on which the right to be in a relationship with a partner is based obligates the State to give same-sex couples access to family law institutions such as marriage. This is because of the centrality of marriage as a social and legal fact in

[149] For a detailed treatment of illegitimacy in Hindu law, see Ravi Gangal and Ravi Shankar Pandey, *Illegitimacy under Hindu Law: A Case for its Abandonment*, INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY, 00, 1-35 (2021).
[150] *Id*.

organizing people's relationships. Such an approach can be extended to parenthood as well. LGBT+ person's autonomy claims would include the right to make decisions to have a child which is as intimate, if not more, a choice as being in a relationship. Read along with their dignity claims this would necessitate state recognition of their rights to parenthood. This would not only include the legal recognition of the parent-child relationship that same-sex couples seek to establish but also the necessity of access to assisted reproductive techniques and surrogacy services, which remain central to same-sex family formation. Such an argument can also be extended to the intimate choices of single persons and persons in non-marital relationships. Such intimate choices would be protected by the right to decisional autonomy as part of the right to privacy which has been recognized by the Supreme Court as a fundamental right.

Admittedly, the right to privacy is not absolute and the Supreme Court has held that for the right to be validly infringed three conditions should be satisfied viz. the existence of a valid law, that such a law should be in pursuance of a legitimate state aim and that such a law should be proportional, that is there should be rational nexus between the objects and the means adopted to achieve them.[151] In the case of the regulation of procreative services the legitimate state aim is arguably preventing the exploitation of surrogate mothers. It is, however, not at all clear how restricting the eligibility criteria of access to such services serves such an objective.[152]

The exclusion of same-sex couples, single persons and persons in non-marital relationships can also be challenged on equality grounds. Like the exclusion from marriage, the exclusion from access to procreative services rests on a heteronormative worldview where only families formed through coupling in the male-female binary are legitimate. However, for the same reasons that such an objective is not in keeping with the values of the Constitution,[153] in the marriage context, it would not be valid in this context as well. As Kotiswaran and Banerjee argue, there is no normative reason for considering heterosexual couples as more capable of parenting compared to other family formations.[154]

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[151] Part H Conclusions, Per Chandrachud J., Justice K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (Supreme Court of India).
[152] Banerjee and Kotiswaran, *supra* note 136, at 96.
[153] See Part IVA.
[154] Banerjee and Kotiswaran, *supra* note 136, at 94

Therefore, existing legislative proposals which currently exclude same-sex couples, single persons and persons in non-marital relationships would potentially be violative of their rights to autonomy, dignity, and equality under the Indian Constitution.

3. Implications for Adoption

Existing adoption laws exclude same-sex couples and transgender persons from adoption. Like the arguments for a right to access procreative services, recognizing the intimate choice to form a family based on autonomy and dignity claims of LGBT+ persons would also require state-recognition of their access to adoption services. Such access can also be justified on equality-based arguments through LGBT+ family equality in family law.

Moreover, apart from questions of access to adoption, the recognition of the parental rights of LGBT+ persons would also lead to the recognition of parenthood based on intentional and functional principles. This may make arguments for the recognition of second-parent adoption more compelling. Second-parent adoption benefits parents who are bringing up children in both same-sex and different-sex non-marital relationships where one of the parents does not share a biological or genetic relationship with the child. It allows the non-biological parent to establish a legal relationship with the child. This is because of the recognition of same-sex couples as parents proceeds on ideas of a parent-child relationship that goes beyond sexual reproduction or biology. A person in a same-sex relationship may not be related to their child by blood but they still intend to parent the child and may do everything that qualifies them to be a parent of the child. The same logic of a functional parent can also extend to non-biological parents in different sex relationships thereby justifying the introduction of second-parent adoption.[155]

VI. Conclusion

As the movement towards the legal recognition of LGBT+ relationships gathers momentum in India, many have cautioned against marriage equality for being assimilationist and have instead argued in favour of diverse family recognition which is perceived as transforming existing family law. These debates are also taking place in the broader context of Indian family which has faced perennial questions about the constitutionality of religion-based personal laws and the desirability of enacting a uniform civil code.

[155] Currently only step-parent adoption is permitted by the Adoption Regulations, 2017 issued under the JJA.

I argued that LGBT+ rights claiming for marriage equality may potentially transform family law by leading to greater recognition of diverse and non-normative families. India may this mimic trends in other jurisdictions where family law scholars have argued for, as well as observed, a positive dynamic between same-sex marriage recognition and the progressive expansion of family law on issues such as parenthood. Moreover, in the Indian context, LGBT+ rights may provide a new entry point in thinking about family law reform outside of the current family law stasis of the personal law-uniform civil code bind.

I showed how marriage equality may lead to diverse family recognition in family law by, first, constructing arguments for same-sex marriage based on equality and personal liberty grounds and, second, by applying these argument to the law of parenthood, specifically, guardianship, regulation of assisted reproductive techniques, and adoption. For doing this I relied on the doctrinal advances made by the Indian Supreme Court in its jurisprudence on gender and sexuality. The recognition of marriage equality based on LGBT+ family equality and the right to legal recognition of LGBT+ relationships may potentially expand the law of parenthood to include diverse different-sex families, single parents and persons in non-marital relationships.

Discourses on LGBT+ family law often tend to portray legal recognition as a choice between assimilation versus the transformation of existing family law. These concerns are valid but as scholars elsewhere have shown, marriage equality can also become the means of recognition of diverse and non-normative families. On this view, inclusion itself becomes a tool for transformation.