



# **RECOGNISING THE EQUAL RIGHT TO MARRY FOR LGBTQIA+ PERSONS IN INDIA:**

## **A RIGHT TO PRIVACY PERSPECTIVE**

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**Centre for Communication Governance  
at National Law University Delhi**





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The Centre has had multiple publications over the years including reports on Intermediary Liability in India, a report Mapping the Blockchain Ecosystem in India and Australia, an authored UNDP Guide on Drafting Data Protection Legislation, a book on Privacy and the Indian Supreme Court, Hate Speech Report, and most recently two essay series, one on Democracy in the Shadow of Big and Emerging Tech, and a second on Emerging Trends in Data Governance. The Centre has launched freely accessible online databases - Privacy Law Library (PLL) and High Court Tracker (HCT) to track privacy jurisprudence across the country and more than sixteen jurisdictions across the globe in order to help researchers and other interested stakeholders learn more about privacy regulation and case law. CCG also has an online 'Teaching and Learning Resource' database for sharing research-oriented reading references on information technology law and policy. In recent times, the Centre has also offered courses on AI Law and Policy, Technology and Policy, and first principles of cybersecurity. These databases and courses are designed to help students, professionals, and academicians build capacity and ensure their nuanced engagement with the dynamic space of existing and emerging technology and cyberspace, their implications for the society, and their regulation. Additionally, CCG organises an annual International Summer School in collaboration with the Hans Bredow Institute and the Faculty of Law at the University of Hamburg

in collaboration with the UNESCO Chair on Freedom of Communication at the University of Hamburg, Institute for Technology and Society of Rio de Janeiro (ITS Rio) and the Global Network of Internet and Society Research on contemporary issues of information law and policy.

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## Executive Summary

In 2017, the Supreme Court of India in the landmark case of *K.S Puttaswamy v. Union of India* reaffirmed the right to privacy as a fundamental right within Article 21 (personal liberty) and found across Part III (fundamental rights) of the Indian Constitution. The judgement was crucial in its reading of privacy where it expanded protection of privacy in the private and public spheres of an individual's life. It held that privacy was a foundational element across the spectrum of protected freedoms, including the right to equality, prevention of discrimination, the right to freedom of thought and self-determination and autonomy, dignity, and freedom. It paved the way for the application of the right to privacy to reproductive rights and defining the contours of a relationship.

The Supreme Court of India in *Navtej Singh Johar v. Union of India* decriminalised consensual sexual acts of all kinds between adults of any gender as it violated fundamental rights under the Indian Constitution. *Navtej* relied on the Supreme Court's right to privacy judgement (*K.S. Puttaswamy v. Union of India*) to highlight that privacy is a crucial aspect of dignity and liberty and applies to sexual autonomy and privacy. However, *Navtej* did not extend its rationale to establish that through such autonomy, all individuals, irrespective of gender identity should similarly have access to other related legal rights, specifically the right to marry.

### **Status-quo**

Numerous petitions have been filed before the Supreme Court and various High Courts across the country seeking legal recognition of marriage and associated rights between non-heterosexual individuals. In January 2023, the Supreme Court transferred to itself 9 existing petitions that were before various High Courts, to hear all petitions on this matter together. Subsequently, in March 2023, the Supreme Court referred these petitions to a constitutional bench owing to the significance of the issues raised. These petitions argue that the denial of the right to marry violates fundamental rights under the Constitution and discriminates between heterosexual and non-heterosexual relationships. At the time of publication of this paper, a constitution bench of the Supreme Court was hearing the matters before it on the equal right to marry for the LGBTIQIA+ community.

### **Critique of the right to marry**

The equal right to marry has been advocated for by several activists in the LGBTQIA+ community. There are also many scholars and academics that have observed numerous problems with both marriage as an institution and with extending the current marriage framework to the community. They argue that the community is faced with more immediate challenges such as obtaining employment, safe living environments, and the focus on marriage rights can overshadow these concerns. Additionally, in India, marriage as an institution continues to involve

practices that encourage caste-based hegemony and other patriarchal, sexist conduct that will further marginalise the LGBTQIA+ community. Activists argue that focusing on the right to marry also prioritises monogamy as a form of relating, dismissing other non-heteronormative ways of creating unions, and marriage should not be the only way of affording such unions legal recognition.

Despite these concerns with marriage, it continues to exist as an important instrument to access other rights and, therefore, non-heterosexual relationships should not be excluded from its ambit.

### ***Marriage laws in India and the evolution of the right to marry***

Secular and religion specific laws such as the Special Marriage Act, and other Hindu, Christian and Muslim Acts govern marriage in India. These laws do not explicitly define a marriage to be between a man and a woman. However, language within the statutes use gendered terms such as husband or wife that may be considered indicators.

The right to marry has also not been clearly identified as a fundamental right but its constitutional recognition and advancement has occurred over various judicial decisions. Indian courts have significantly upheld the element of choice within Article 21 – liberty, by establishing that an individual can determine who they wish to marry. In some instances, the courts have even highlighted that it is the state’s duty to protect such choices. Similarly, courts have extended the right to choose when determining an individual’s identity, their role and the contours of a marriage or relationship. For instance, In *Nandakumar & Anr. v. State of Kerala & Ors.*, the Supreme Court observed that live-in relationships outside the context of marriage are legally permissible.

### ***Right to privacy and the right to marry***

Through judicial precedent courts have established that individuals have the right to determine their relationships and marriages. A landmark judgement of the Supreme Court in *K.S. Puttaswamy v. Union of India* affirmed that the right to privacy is a fundamental right and located it across various freedoms such as self-determination and autonomy, dignity, and equality. The judgement identifies different aspects of the right to privacy that have comprehensively expanded the extent of an individual’s autonomy and areas of application. The Court established that gender identity and sexual orientation are intrinsic to privacy, and it affirms an individual’s decisional autonomy to be able to make these determinations. The court also stated that any discrimination on the basis of these choices offends the dignity of an individual.

*Puttaswamy* set the stage for decisions such as *Shafin Jahan v. K. M. Asokan* and *Navej Singh Johar v. Union of India*. In *Shafin Jahan*, the Court observed that the sexual autonomy of an individual is an ‘insegregable’ facet of individual liberty and the state cannot intrude on decisions of intimacy or choice in partner. *Navej*



similarly held that privacy is crucial to dignity and liberty, which are important aspects that enable an individual to make decisions relating to sexual autonomy and privacy. Relying on *Puttaswamy* and *Shafin Jahan*, the Court in *Navtej* while decriminalising section 377 of the Indian Penal Code, 1860, further recognised that all constitutional rights should be extended to the LGBTQIA+ community. These judicial decisions have since allowed High Courts to recognise non-heterosexual forms of relationships, specifically by offering protection to couples against familial violence.

There is currently no legal recognition of non-heterosexual marriages or unions. Customary marriages between individuals of all genders and sexual orientations have been taking place historically, and have been on the rise since the *Navtej* judgement. The Supreme Court has also begun to question the current concept of a family. They have observed that assuming the structure of a family to be heterosexual in nature ignores that many families may take the form of other kinds of relationships. These judicial decisions have set the tone to infer that the right to marry should be a fundamental right, extending to adults of all gender identities and sexual orientations. Through this recognition of equal marriage rights, other non-heterosexual communities will have access to numerous other rights such as parenthood, inheritance, or adoption.

## 1. Introduction

On September 6, 2018, the Supreme Court of India delivered a landmark judgment in *Navtej Singh Johar v. Union of India* (“**Navtej**”)<sup>1</sup> reading down section 377<sup>2</sup> of the Indian Penal Code, 1860 (“**IPC**”) de-criminalising sex in private between consenting adults of any gender(s), on the grounds that it violated several fundamental rights guaranteed under Part III of the Constitution of India (“**Constitution**”).<sup>3</sup> This was the culmination of a long and hard fought legal battle spanning decades and involving numerous activists, community groups, lawyers, experts across disciplines, and LGBTQIA+ individuals.<sup>4</sup> The Supreme Court’s

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<sup>1</sup> *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321 available online at: <<https://privacylibrary.ccgndud.org/case/navtej-singh-johar-and-ors-vs-union-of-india-uo-i-and-ors?searchuniqueid=920327>>.

<sup>2</sup> Section 377 of the Indian Penal Code 1860, prior to being read down by the Supreme Court stated: “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine.”

<sup>3</sup> Article 14 (right to equality), Article 15 (prohibition against discrimination), Article 19(1)(a) (freedom of expression), and Article 21 (right to life and personal liberty)

<sup>4</sup> The AIDS Bhedbhav Virodhi Andolan filed the first petition before the Delhi High Court in 1994, seeking decriminalisation of S. 377. See P.S. Sahni, “On the third Anniversary of Gay Sex Judgement: ABVA’s tryst with activists, lawyers & judges before, during and after its anti-sodomy law petition was filed,” ABVA, 6 September 2021, <<http://aidsbhedbhavvirodhiandolan.blogspot.com/>>. The eventual

judgement in *Navtej* is part of a catena of judgements articulating the fundamental rights of adult individuals to autonomous decision-making and in this instance, with respect to their choice of partner(s), marriage, where and with whom they wish to reside, and to define all the contours of their interpersonal relationships.

The Supreme Court's judgment in *Navtej* only decriminalised consensual sexual acts of all kinds in private between adults of all genders, but did not explicitly provide enabling legal rights or mechanisms for equal access to certain civil rights or make these rights justiciable. Soon after *Navtej*, LGBTQIA+ community groups, activists, lawyers and individuals in India began advocating for the recognition of civil liberties and specific anti-discrimination law/statutory provisions.<sup>5</sup>

Most recently, in November 2022, two separate petitions were filed before the Supreme Court for legal recognition of marriages between non-heterosexual couples under the Special Marriage Act, 1954 (the “SMA”). The petitioners argue that the language of marriages between ‘male’ and ‘female’ is discriminatory and denies individuals matrimonial benefits.<sup>6</sup> In January 2023, the Supreme Court transferred 9 petitions dealing with the same issues before other High Courts to be heard along with the petitions being considered before itself.<sup>7</sup> The Central Government in its counter-affidavit opposed the pleas in these petitions and submitted that “*non-heterosexual relationships are not comparable with the family unit concept of a husband, a wife and a child*”.<sup>8</sup> On March 13, 2023, the Supreme Court referred these petitions to a constitutional bench observing that it was an issue of “seminal importance” and should be appropriately resolved by a five judges bench.<sup>9</sup>

Prior to this in January 2020, a petition was filed by a couple before the Kerala High Court seeking a declaration that “*homosexual couples should be entitled to solemnize*

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petition that succeeded before the Supreme Court in 2018 originated with a petition filed by Naz Foundation before the Delhi High Court in 2006.

<sup>5</sup> Alok Kumar, ‘Historic and necessary: By decriminalising gays, SC ushers in new dawn for an inclusive society and country’ (The Times of India, 11 September 2018)

<<https://timesofindia.indiatimes.com/blogs/toi-edit-page/historic-and-necessary-by-decriminalising-gays-sc-ushers-in-new-dawn-for-an-inclusive-society-and-country/>>; Ratna Kapur, ‘There’s a Problem with the LGBT rights movement - it’s limiting freedom’ (*The Conversation*, 17 September 2018) <<https://theconversation.com/theres-a-problem-with-the-lgbt-rights-movement-its-limiting-freedom-101999>> accessed 23 January 2023

<sup>6</sup> Supreme Court Observer, ‘Recognition of Same-Sex Marriage’ <<https://www.scobserver.in/cases/legality-of-same-sex-marriage/>> accessed 23 January 2023.

<sup>7</sup> Ibid.

<sup>8</sup> LiveLaw News Network ‘Heterosexual Marriages The Norm’ : Centre Opposes Pleas In Supreme Court Seeking Recognition For Same-Sex Marriages’ (*LiveLaw*, 12 March 2023) <<https://www.livelaw.in/top-stories/same-sex-marriage-supreme-court-heterosexual-marriage-homosexual-centre-opposes-223558>> accessed 13 March 2023.

<sup>9</sup> Padmakshi Sharma, ‘Supreme Court Refers Petitions Seeking Legal Recognition For Same-Sex Marriage To Constitution Bench’ (*LiveLaw*, 13 March 2023) <<https://www.livelaw.in/top-stories/supreme-court-refers-petitions-seeking-legal-recognition-for-same-sex-marriage-to-constitution-bench-223621>> accessed 13 March 2023.

and register their marriage”<sup>10</sup> under the SMA, the legislation governing secular marriages/marriages between parties of different religions. In 2021, various petitioners<sup>11</sup> approached the Delhi High Court seeking legal recognition of non-heterosexual marriages under the SMA, the Hindu Marriage Act, 1955 (the “HMA”), and the Foreign Marriage Act, 1976 (the “FMA”). All the petitions argue that a denial of the right to marry to non-heterosexual persons is a violation of fundamental rights enshrined in Articles 14, 15, and 21 of the Constitution. They argue that there is an entire body of rights for heterosexual couples that non-heterosexual couples are not entitled to because of a lack of legal recognition of their right to marry. The petitions also argue that discrimination between heterosexual and non-heterosexual couples violates India’s international legal obligations, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights. Prior to this, in April 2019, a three judge Bench of the Supreme Court dismissed a petition seeking a review of the Supreme Court’s judgment in *Navtej* to include various civil rights, such as right to marriage, adoption, and surrogacy. The Centre opposed any change in existing marriage laws, arguing before the Court that the ambit of the judgement of the Supreme Court in *Navtej* does not extend to the granting of right to marriage, but only to a “basic right to companionship.”<sup>12</sup> Importantly, the Centre argued that *Navtej* applied to a “personal private domain of individuals akin to right to privacy and cannot include a public right in the nature of recognition of same sex marriage.”<sup>13</sup> Two private members’ Bills were also introduced in 2022, which seek to amend existing legal provisions concerning marriage to include non-heterosexual unions.<sup>14</sup>

<sup>10</sup> Nikesha and Anr. v. Union of India and Ors., W.P. (C) No. 2186 of 2020 (Kerala High Court).

<sup>11</sup> Abhijit Iyer Mitra and others v Union of India (PIL seeking a declaration that the Hindu Marriage Act, 1955 ought to be interpreted as permitting same sex marriage between two Hindus); Dr. Kavita Arora & anr vs Union of India (civil writ seeking a declaration that SMA is applicable to all couples regardless of gender identity and sexual orientation); Vaibhav Jain & Anr vs Union of India (civil writ seeking a declaration FMA provisions are unconstitutional in so much as they do not permit marriage between same-sex couples and read FMA to include same-sex marriages); Udit Sood and Ors. v. Union of India and Anr. (Petition seeking a declaration that couples of the same sex can get married under SMA); Joydeep Sengupta & Anr. v. Union of India and Anr. (Plea moved by an OCI card holder and his partner, seeking a declaration that “a spouse of foreign origin of an Indian citizen or OCI cardholder is entitled to apply for registration as an OCI under the Citizenship Act, 1955 regardless of the gender, sex, or sexual orientation of the applicant spouse”);

Samanwaya Rautray, ‘Same sex marriages cannot be given legal sanction: Government’ (*The Economic Times*, 25 February 2021) <<https://economictimes.indiatimes.com/news/politics-and-nation/same-sex-partners-not-comparable-with-indian-concept-government/articleshow/81209328.cms?from=mdr>> accessed 23 January 2023

<sup>13</sup> Ibid.

<sup>14</sup> Member of Parliament Supriya Sule introduced the Special Marriage (Amendment) Bill, 2022 that proposes that “notwithstanding anything contained in this Act or any other law for the time being in force, a marriage between any two persons of same sex may be solemnized under this Act” in Section 4 of the SMA. The Special Marriage (Amendment) Bill 2022. <<http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/67%20of%202022%20As%20introduce.d.pdf>>; Member of Parliament Dr. Senthilkumar introduced the LGBTQIA+ Persons (Protection of

In this paper, we highlight the relevance of the Supreme Court's judgement in *Puttaswamy* on the right to privacy in advancing the legal right to marry irrespective of gender identity and/or sexual orientation in India. The paper first acknowledges concerns of extending the current legal framework for marriage, which is itself inadequate, to LGBTQIA+ persons. The paper then explores judgements by Indian courts that uphold the right of individual adults to define and choose their own relationships, who they wish to marry or associate with, and where and with whom they wish to live with and under what conditions – all of which are rights unequivocally granted to all adults within the Indian constitutional scheme.

The paper examines the significance of the right to privacy and its elements from the *Puttaswamy* judgement, in consideration of the right to equal marriage and other related rights. It also argues that the right to marry is available to all persons irrespective of gender and sexual orientation as per the reading of Articles 14, 19, and 21 of the Constitution in judicial precedent.

## 2. Critique of the right to marry

In this paper, we use the term 'right to equal marriage' as an umbrella term to describe the right to all forms of marriage and unions, including both traditional and non-traditional marriages. The more commonly used term 'same-sex marriage' erases transgender, non-binary, and intersex individuals, whose identities and relationships do not fall within the confines of traditional definitions of 'sex,' or 'same-sex,' and therefore we refrain from using this terminology.<sup>15</sup> While we acknowledge the necessity of viewing relationships of care and kinship beyond the institution of marriage and the unit of the 'couple,' the scope of this paper is limited to an exploration of the legal right to traditional and non-traditional marriages between two people under the Indian constitutional framework. We hope that this forms part of broader scholarship that continues to expand and challenge constitutional and societal frameworks of heteronormativity, including marriage and traditional family and community structures.

Alongside the demand for equal marriage rights in the LGBTQIA+ community, there has also existed opposition to the right to marry as a frontier for the LGBTQIA+

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Rights) Bill, 2022, which explicitly recognises various rights that LGBTQIA+ persons are entitled to, including the right to marriage, adoption, guardianship, surrogacy, among others. The LGBTQIA+ Persons (Protection of Rights) Bill 2022 <[http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/28%20of%202022%20\(AS\).pdf](http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/28%20of%202022%20(AS).pdf)>.

<sup>15</sup> Ryan Conrad (Ed.) *Against Equality: Queer Revolution, Not Mere Inclusion* (AK Press 2014); Rajeev Anand Kushwah, 'A Queer-Trans Critique on Marriage Equality in India (*Centre for Law and Policy Research*, 20 December 2022) <<https://clpr.org.in/blog/a-queer-trans-perspective-on-the-marriage-equality-question-in-india/>> accessed 26 January 2023.

movement and a critique of marriage as an institution.<sup>16</sup> Activists argue that the right to equal marriage does not top the list of priorities for the LGBTQIA+ community in India or elsewhere, with several other pressing challenges such as finding employment, safe shelter and living environments, safety from violence and abuse, and a need for anti-discrimination laws. In particular, activists also point out that focusing on equal marriage rights amounts to an erasure of transgender persons, who face far greater challenges than a lack of legal/formal recognition of their relationships.<sup>17</sup>

As an institution, marriage has been critiqued as tied to property and patriarchy.<sup>18</sup> In India, it is tied to caste and maintaining caste-based hegemony through caste endogamous marriages.<sup>19</sup> Activists argue that call for equal marriage rights overlooks and erases this history of marriage as an institution in India. Further, seeking equal marriage rights does not address pre-existing problems with personal laws that govern marriage in India,<sup>20</sup> and the manner in which they encourage caste-based endogamy and other patriarchal, sexist practices, which receive critique independent of their gendered exclusionary framing.<sup>21</sup> Activists are of the view that marriage laws in India are imbued with problems; asking for same rights for LGBTQIA+ persons as are available to heterosexual and/or monogamous individuals will not bring about transformation in the sexual order or the manner in which sex, sexuality, gender, and

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<sup>13</sup> Ratna Kapur, 'There's a Problem with the LGBT rights movement - it's limiting freedom' (*The Conversation*, 17 September 2018) <<https://theconversation.com/theres-a-problem-with-the-lgbt-rights-movement-its-limiting-freedom-101999>> accessed 26 January 2023; Vaishnavi Prasad, 'The Respectable Indian Queer Unmasked' (*The Citizen*, 28 September 2020) <<https://www.thecitizen.in/index.php/en/NewsDetail/index/7/19424/The-Respectable-Indian-Queer-Unmasked>> accessed 26 January 2023; Shyam Prakash Pandey, 'Changing Dimensions of Institutions of Marriage in India: A Socio-Legal Evaluation' [2021] 4(2) *International Journal of Law Management and Humanities* 58-72; Courtenay W. Daum, 'Social Equity, Homonormativity, and Equality: An Intersectional Critique of the Administration of Marriage Equality and Opportunities for LGBTQ Social Justice' [2020] 42(2) *Administrative Theory and Praxis* 115-132; Mary Bernstein, 'Same-Sex Marriage and the Assimilationist Dilemma: A Research Agenda on Marriage Equality and the Future of LGBTQ Activism, Politics, Communities, and Identities' [2018] 65(14) *Journal of Homosexuality* 1941-1956

<sup>17</sup> Ryan Conrad (Ed.) *Against Equality: Queer Revolution, Not Mere Inclusion* (AK Press 2014); Rajeev Anand Kushwah, 'A Queer-Trans Critique on Marriage Equality in India (*Centre for Law and Policy Research*, 20 December 2022) <<https://clpr.org.in/blog/a-queer-trans-perspective-on-the-marriage-equality-question-in-india/>> accessed 26 January 2023.

<sup>18</sup> Friedrich Engels, *The Origin of the Family, Private Property and the State* (New York International Publishers 1942); Wendy Lynne Lee, 'Socialist/Marxist Feminism', *Literary and Critical Theory*, Oxford Bibliographies <<https://www.oxfordbibliographies.com/display/document/obo-9780190221911/obo-9780190221911-0088.xml>>

<sup>19</sup> Uma Chakravarti and Maithreyi Krishnaraj. 'Gendering Caste: Through a Feminist Lens', *Theorizing Feminism* (SAGE Publications, 2018).

<sup>20</sup> Ratna Kapur, 'There's a Problem with the LGBT rights movement - it's limiting freedom' (*The Conversation*, 17 September 2018) <<https://theconversation.com/theres-a-problem-with-the-lgbt-rights-movement-its-limiting-freedom-101999>> accessed 26 January 2023

<sup>21</sup> Uma Chakravarti and Maithreyi Krishnaraj. 'Gendering Caste: Through a Feminist Lens', *Theorizing Feminism* (SAGE Publications, 2018) .

relationships are viewed.<sup>22</sup> They further highlight that it works to only extend heteronormative frameworks, which stand to marginalise many LGBTQIA+ individuals.<sup>23</sup> A right to marry would offer greater control over relationships to LGBTQIA+ persons, but not over their design. Legal academic Saptarshi Mandal argues, “*The right to marry not only means obtaining legal recognition for one’s relationship, but entails entering a complex of laws that determine each aspect of the relationship.*”<sup>24</sup> Several concerns will remain unaddressed, even if the right to marry is expanded to all individuals irrespective of gender identity and sexual orientation.

It has also been argued that advocating for equal marriage rights amounts to “homonationalism,”<sup>25</sup> which seeks to prioritise LGBTQIA+ individuals who are able and willing to assimilate into majoritarian culture and thinking, over those who cannot or do not wish to do so. This point of view may be because marriage as an institution is a form of amassing respectability within society, which many individuals cannot do, or are not desirous of doing. Therefore, a performance of “*acceptable scripts of homosexuality*” can be othering to those who do not, or cannot, perform those scripts.<sup>26</sup> This can be distressing to LGBTQIA+ persons and can marginalise other historical experiences of sexuality that are rooted in indigenous culture. Especially as they may view unions and relationships differently from relationship models mirroring the Global North, that demand legal recognition of relationships.<sup>27</sup>

Several types of sexual organising do not imply monogamy, marriage, or a desire for legal recognition, in addition to non-conjugal communities of kinship and care that have existed historically.<sup>28</sup> Activists argue that by solely seeking the right to marry,

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<sup>22</sup> Ratna Kapur, ‘There’s a Problem with the LGBT rights movement - it’s limiting freedom’ (*The Conversation*, 17 September 2018) <<https://theconversation.com/theres-a-problem-with-the-lgbt-rights-movement-its-limiting-freedom-101999>> accessed 26 January 2023.

<sup>23</sup> Vaishnavi Prasad, ‘The Respectable Indian Queer Unmasked’ (*The Citizen*, 28 September 2020) <<https://www.thecitizen.in/index.php/en/NewsDetail/index/7/19424/The-Respectable-Indian-Queer-Unmasked>> accessed 26 January 2023.

<sup>24</sup> Saptarshi Mandal, ‘Redefining the Same-sex Marriage Question’ (*The India Forum*, 27 September 2021) <<https://www.theindiaforum.in/article/redefining-same-sex-marriage>> accessed 26 January 2023.

<sup>25</sup> Jasbir Puar ‘Rethinking Homonationalism’ [2013] 45(2) *International Journal of Middle East Studies* 336-339.

<sup>26</sup> Shreshtha Das and Aijaz Ahmad Bund, ‘The Homonationalist Agenda of ‘Good’ Queers Who Love the Nation-State’ (*The Wire*, 13 February 2020) <<https://thewire.in/lgbtqia/homonationalism-india-sedition>> accessed 26 January 2023.

<sup>27</sup> Ratna Kapur, ‘There’s a Problem with the LGBT rights movement - it’s limiting freedom’ (*The Conversation*, 17 September 2018) <<https://theconversation.com/theres-a-problem-with-the-lgbt-rights-movement-its-limiting-freedom-101999>> accessed 26 January 2023.

<sup>28</sup> ‘Interview with Judith Butler: “Gender is Extramoral”’ (*MR Online*, 16 May 2005) <<https://mronline.org/2009/05/16/interview-with-judith-butler-gender-is-extramoral/>> accessed 26 January 2023.

the petitions before the Courts prioritise monogamy as a form of relating. They further highlight that this is already socially entrenched, excluding, and stigmatises LGBTQIA+ individuals who practice other forms intimacy, kinship, and care, or who have unconventional and non-heteronormative ways of living and relating. For instance, individuals who identify as non-monogamous, have chosen families, and/or live in *hijra gharanas* (non-traditional home structures that have historically identified outside traditional frameworks of marriage and family, but assert themselves as institutions and networks of kinship, intimacy, and care).<sup>29</sup> This also includes single individuals who do not wish to marry, but wish to access several rights that these petitions tie to marriage, such as the right to surrogacy, adoption, the right to choose an insurance nominee, who can inherit one's property.

It is important to explore how partnerships between individuals of all genders can be made legally valid, both within and outside the institution of marriage. Legal precedent recognises the fundamental right inherent in all individuals to autonomously design and define relationships, and their contours; scholars and activists point to what is missing is the framework and the bouquet of rights that accompany this. Activists argue marriage is not the only way forward; heterosexual cisgender individuals also exist outside of marriage and find legal relevance in their partners' lives, for instance as single parent families, and co-habiting but unmarried heterosexual couples.

Exploring how the institution of marriage can be made more inclusive and expansive is crucial. When doing so, it is important that questions around the institution of marriage itself and as a vehicle to access fundamental rights and civil liberties remain central to legal and social discourse, movement work, and legal work around equal marriage rights. Hence, while working toward the legal recognition of marriages across gender identities and sexual orientation from the state, it should be accompanied by questioning the need for this recognition, and the institution of marriage. As Mandal argues,

*“If the primary argument for same-sex marriage is that it is a one-stop solution that will secure for queers a range of practical benefits pertaining to their relationships, then we also need to ask if those benefits can be secured without encountering marriage. Is it possible to assert each individual's right to choose their relations for official purposes, without the state deciding it for them as per familiar and established templates of kinship? Could the values of autonomy and self-determination that have made it possible for us to claim our individual*

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<sup>29</sup> Katyayani Sinha, 'The Regulation, Reclamation, and Resistance of Queer Kinship in Contemporary India' (2022) 30 *Feminist Legal Studies* 281, 300

*sexual orientations and gender identities be used to assert the right to choose the kind of “families” we want?”<sup>30</sup>*

In our paper, we argue that as long as marriage is available to any individuals, it should be available to all individuals, despite the challenges experts have highlighted with regard to it not being an ideal model of co-relating. This paper does not seek to affirm marriage as an institution, as a model of co-relating, or as a vehicle to make rights available to individuals. As scholar and activist Judith Butler writes, “*Of course, if marriage exists, then homosexual marriage should also exist; marriage should be extended to all couples irrespective of their sexual orientation; if sexual orientation is an impediment, then marriage is discriminatory.*”<sup>31</sup>

### **3. Framework of marriage laws and the evolution of the right to marry, autonomy, and liberty**

Marriage in India is governed by both secular and religion-specific statutes originating from customary law. They are amended from time to time according to evolving sociolegal standards, with specific conditions prescribed for the solemnisation of marriage in all statutes and law. While neither religion-specific personal law nor secular personal law in India defines marriage as a union specifically between a man and a woman, there exists a clear heterosexist underpinning in the language of all statutes concerning marriage, which use terms such as ‘bridegroom,’ ‘bride,’ ‘husband,’ and ‘wife.’ The HMA, which governs the marriages of Hindus, Sikhs, Buddhists, and Jains refers to ‘bride’ and ‘bridegroom’ and their respective minimum legal ages for a valid marriage, though the terms are not defined.<sup>32</sup> The Indian Christian Marriage Act, 1872 prescribes the ages of a ‘man’ and ‘woman,’ respectively, for a legally valid marriage.<sup>33</sup> The Parsi Marriage and Divorce Act, 1936 also uses the terms ‘husband’ and ‘wife,’ in various provisions, in addition to prescribing the ages of a ‘male’ and ‘female,’ respectively, for a legally valid marriage.<sup>34</sup> The Goa Civil Code, 1869 also refers to a ‘husband’ and a ‘wife.’ The SMA has no explicit definition of marriage, though it defines the that a “*prohibited*

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<sup>30</sup> Saptarshi Mandal, ‘Redefining the Same-sex Marriage Question’ (*The India Forum*, 27 September 2021) <<https://www.theindiaforum.in/article/redefining-same-sex-marriage>> accessed 26 January 2023.

<sup>31</sup> Interview with Judith Butler: “Gender is Extramoral” (*MR Online*, 16 May 2005) <<https://mronline.org/2009/05/16/interview-with-judith-butler-gender-is-extramoral/>> accessed 26 January 2023.

<sup>32</sup> In *Arunkumar v. Inspector General of Police*, W.P. (MD) No. 4125 of 2019, the Madras High Court held that a marriage solemnized between a Hindu male and a Hindu trans woman is a valid marriage under section 5 of the HMA and is bound to be registered by the Registrar of Marriages. It specifically confirmed that the word ‘bride’ under the HMA would also cover transgender persons who identify as women.

<sup>33</sup> Section 60, Indian Christian Marriage Act 1872.

<sup>34</sup> Section 2(5), Section 2(9), Section 3(1)(c), Parsi Marriage and Divorce Act 1936.



*relationship*” cannot be a legally valid marriage which is specifically between a man and a woman that have a specific kind of existing relationships as defined within the Schedules of the Act.<sup>35</sup> The Act recognises a marriage as between ‘any two persons’ and while the SMA does use the terms husband and wife in other contexts, the absence of a specific definition may simply require the Act to be amended linguistically for its scope to be expanded beyond heterosexual marriages.<sup>36</sup> Several laws use marital status as a ground for granting benefits across a range of areas including maintenance, citizenship and residency permits, insurance benefits, and spousal privileges before a court of law. As a result, marriage often becomes a necessary vehicle to access other entitlements and benefits.

The right to marry is not explicitly recognised as a fundamental right under the Constitution. The recognition and advancement of this constitutional right has evolved through judicial decisions over several decades. Legal discourse in India around chosen relationships, and marriages, has centred around the right of legal adults to determine the conditions of their intimate and domestic lives, and free from illegal confinement by their families (natal or marital), or in any other private actor’s custody without their consent.<sup>37</sup> Numerous judgements have construed this right both in terms of the right to not be physically, emotionally, economically, and/or sexually confined against one’s will, as well as the positive right to determine the physical, emotional, economic, and sexual conditions of one’s life. This section explores significant judgements that have constitutionally affirmed an individual’s right to liberty and autonomy in defining their identity and role within the contours of a marriage or relationship.

In 1976, *Gian Devi v. Superintendent, Nari Niketan, Delhi & Ors.* the Supreme Court observed, in the case of a woman who said she had been kept against her wishes in a women’s shelter home in Delhi, “*As the petitioner is sui juris (legally competent) no fetters can be placed upon her choice of the person with whom she is to stay, nor can any restriction be imposed regarding the place where she should stay. The court or the relatives of the petitioner can also not substitute their opinion or preference for that of the petitioner in such a matter.*”<sup>38</sup>

Strengthening the element of choice, in 2006, the Supreme Court in *Lata Singh v. State of U.P.*,<sup>39</sup> upheld a woman’s right to choose who she wishes to marry,

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<sup>35</sup> Section 4(d), Special Marriage Act 1954.

<sup>36</sup> Bastian Steuwer and Tulasi K. Raj, ‘Same-sex marriage: All that is needed is a small change in the Special Marriage Act’ (*Indian Express*, 17 March 2023) <<https://indianexpress.com/article/opinion/columns/same-sex-marriage-small-change-special-marriage-act-8498683/>> accessed 23 March 2023.

<sup>37</sup> Priyadarshini Thangarajah and Ponni Arasu, ‘Queer Women and the Law in India’ in Arvind Narrain and Alok Gupta (Eds.), *Law Like Love: Queer Perspectives on Law* (Yoda Press 2011).

<sup>38</sup> *Gian Devi v Superintendent, Hari Niketan, Delhi and Ors.* (1976) 3 SCC 234, paragraph 7.

<sup>39</sup> *Lata Singh v. State of UP* (2006) 5 SCC 475.

irrespective of societal or familial approval of the marriage, stating “*This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes.*”<sup>40</sup> In 2014, a woman who was in relationship with a man outside of her community received violent punishment on orders of the community.<sup>41</sup> The Supreme Court of India observed that “*an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage.*”<sup>42</sup> The Court also reiterated that the state has a duty to protect the right to freedom of choice in marriage. This interpretation of Article 21 has been reaffirmed by Courts in later cases such as *Shafin Jahan* and *Shakti Vahini* (discussed in the next section) to protect choice and the right to marry.

In 2014, in *National Legal Services Authority v. Union of India* (“*NALSA*”), the Supreme Court upheld the right of persons to self-identify their gender, interpreting the right to dignity as being inclusive of the right to gender identity and self-expression.<sup>43</sup> The Court reaffirmed that all transgender persons/persons who do not identify their gender(s) within the gender binary are entitled to fundamental rights under Articles 14, 15, 16, 19, and 21 of the Constitution. This decision affirmed the right of persons to bodily autonomy in terms of gender identity, and has played an important role in jurisprudence around the body and bodily rights, as well as rights pertaining to sexual freedom and bodily decision-making.

In *Soni Gerry v. Gerry Douglas*<sup>44</sup>, a 2018 case concerning a major woman’s decision to reside and study in Kuwait, the Supreme Court held, “*It needs no special emphasis to state that attaining the age of majority in an individual's life has its own significance. She/He is entitled to make her/his choice.*”

Indian courts have also recognised live-in relationships, i.e., partners choosing to reside together and be in a domestic relationship, outside the institution of marriage. In *Nandakumar & Anr. v. State of Kerala & Ors.*,<sup>45</sup> the Supreme Court observed that live-in relationships outside the context of marriage are legally permissible. Under the Protection of Women from Domestic Violence Act, 2005 (“**Domestic Violence Act**”), live-in relationships are recognised as a form of domestic relationship, with partners entitled to protection from the law.<sup>46</sup> The Supreme Court had extended a right to women to be maintained financially by male partners they were in a live-in relationship with, reading “wife” in section 125 of the Code of Criminal Procedure,

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<sup>40</sup> Ibid., paragraph 17.

<sup>41</sup> *In Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News dated 23.01.2014 v. Union of India* (2014) 4 SCC 786.

<sup>42</sup> Ibid, paragraph 14.

<sup>43</sup> *National Legal Services Authority v. Union of India* (2014) 5 SCC 438, paragraphs 74-75

<sup>44</sup> *Soni Gerry v. Gerry Douglas* (2018) 2 SCC 197, paragraph 10.

<sup>45</sup> *Nandakumar v. State of Kerala* (2018) 16 SCC 602, paragraph 10.

<sup>46</sup> Section 2(f), The Protection of Women from Domestic Violence Act 2005.

1973 (“CrPC”) inclusively.<sup>47</sup> The Court in this instance took a broad and expansive interpretation of these terms in light of the “*constant change in social attitudes and values.*”

In 2018, the question of choice as an aspect of the right to privacy was extensively dealt with by the Supreme Court in *K.S. Puttaswamy v. Union of India* (“**Puttaswamy**”). The Court observed that “*privacy facilitates freedom and is intrinsic to the exercise of liberty,*” as a result of which all questions of liberty are tied to privacy, including in the context of sexual and relational autonomy.<sup>48</sup> The Court held that the fundamental right to privacy in India encompasses privacy of the person, informational privacy, and decisional privacy - privacy in terms of a person’s autonomy over their choices. The Court held, “*Privacy represents the core of the human personality and recognizes the ability of each individual to make choices and to take decisions governing matters intimate and personal.*”<sup>49</sup> J. Kishan Kaul observed, in his opinion, “*It is an individual’s choice as to who enters his house, how he lives and in what relationship. The privacy of the home must protect the family, marriage, procreation, and sexual orientation which are all important aspects of dignity.*”<sup>50</sup>

#### 4. The right to privacy framework and the right to marry

Jurisprudential development on right to privacy has been central to expanding the understanding of individual identity and its bearing on personal relationships for the LGBTQIA+ community. This section explores the journey of the right to privacy in this context and the role elements such as decisional autonomy have played in furthering the right to marry.

The petition filed by Naz Foundation, an NGO working on HIV/AIDS and sexual health and rights, before the Delhi High Court in 2006 sought the decriminalisation of section 377 of the IPC. They relied on multiple authorities from various jurisdictions to argue that private consensual sexual relations “*lie at the core of intimacy,*” and therefore merit protection under the right to privacy.<sup>51</sup> It contended that individual choices regarding sexual conduct and preference lie at the heart of the ‘private space,’ which is integral to one’s identity.<sup>52</sup> The petitioners also sought to articulate the right to privacy in spatial terms, arguing that consensual sexual conduct in private should be excluded from the purview of section 377. In 2009, a

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<sup>47</sup> *Chanmuniya v. Virendra Kumar* (2010) 10 SCALE 602.

<sup>48</sup> *K.S Puttaswamy v. Union of India* (2017) 10 SCC 1, part R, paragraph 169

<<https://privacylibrary.cegnlud.org/case/justice-ks-puttaswamy-ors-vs-union-of-india-ors>>

<sup>49</sup> *Ibid.*, paragraph 299.

<sup>50</sup> *Ibid.*, paragraph 645.

<sup>51</sup> *Naz Foundation vs. Government of NCT of Delhi & Ors.* ((2009) 111 DRJ 1, paragraphs 40, 41.

<sup>52</sup> *Ibid.*, paragraphs 8, 22

Division Bench of the Delhi High Court allowed Naz Foundation's petition, finding that section 377 of the IPC violated various fundamental rights guaranteed to individuals under Part III of the Constitution, to the extent that the provision criminalised consensual sexual relations in private between consenting adults.

The appeal to the decision in *Naz Foundation* came from an astrologer, Suresh Kumar Koushal, who was not a party to the High Court proceedings.<sup>53</sup> The Naz Foundation judgement was overturned by the Supreme Court in December 2013 in *Suresh Kumar Koushal vs. Naz Foundation* ("**Koushal**").<sup>54</sup> The Court held that section 377 was not unconstitutional for two reasons. First, according to the Bench, "*lesbians, gays, bisexuals or transgenders constituted a miniscule fraction of the total population*" based on the fact that less than 200 people had been prosecuted under section 377 since its introduction. Second, the Bench in *Koushal* chastised the High Court for what it considered its overzealous approach in applying foreign jurisprudence to an Indian context without checking to see if the two were compatible. It observed that, "*Though these judgments shed considerable light on various aspects of this right and are informative in relation to the plight of sexual minorities, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian Legislature.*"<sup>55</sup>

In 2017, the Supreme Court of India unanimously upheld the right to privacy as a fundamental right guaranteed under Part III of the Constitution in *Puttaswamy*.<sup>56</sup> In doing so, it expounded on the protection of privacy in the private and public sphere. It located privacy across the spectrum of protected freedoms, including the right to equality, prevention of discrimination, the right to freedom of thought and self-determination and autonomy, dignity and freedom. The nine-judge Bench's judgement was historic for its comprehensive articulation of privacy as a fundamental right in India, arrived at through reliance on Indian and international jurisprudence.

On the right to privacy and gender, the Court observed, "*When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual.*"<sup>57</sup> Finding that sexual orientation is an essential attribute of privacy, the Court held, "*Discrimination against an individual on the basis of sexual orientation is deeply offensive to the*

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<sup>53</sup> Sangeeta Barooah Pisharoty, "It is like reversing the motion of the earth", *The Hindu*, December 20, 2013, <<https://www.thehindu.com/features/metroplus/society/it-is-like-reversing-the-motion-of-the-earth/article5483306.ece>>.

<sup>54</sup> (2014) 1 SCC 1.

<sup>55</sup> *Ibid.*, paragraph 52.

<sup>56</sup> *K.S Puttaswamy v. Union of India* (2017) 10 SCC 1.

<sup>57</sup> *Ibid.*, paragraph 298.

*dignity and self-worth of the individual.*<sup>58</sup> It upheld the premise that “one’s sexual orientation is undoubtedly an attribute of privacy.”<sup>59</sup>

In *Puttaswamy*, the Supreme Court also disagreed with the reasoning in *Koushal*.<sup>60</sup> As mentioned above, the Supreme Court in *Koushal* overturned the Delhi High Court’s judgement in *Naz Foundation* and held that Section 377 was not unconstitutional and disregarded the right to privacy with respect to sexuality under Article 21. Further, the Court, in *Puttaswamy*, referred to *Koushal*’s referencing of LGBTQIA+ persons as a “*miniscule fraction*” of the Indian population, as an unsustainable basis to deny LGBTQIA+ persons the right to privacy.<sup>61</sup> *Koushal* used the phrase “*so called rights*” when referring to the rights of LGBTQIA+ persons and the Supreme Court in *Puttaswamy* challenged this clarifying that they are existent rights founded on sound constitutional doctrine, inherent in the right to life.<sup>62</sup> This includes the principles of privacy, dignity, liberty and freedom, of which the Court stated that sexual orientation is an essential component. Importantly, in this context, the Court observed, “*The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular.*”<sup>63</sup>

Specifically in the context of marriage and intimate relationships, in J. Bobde’s decision, the Court observed that “*Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation (...) Personal choices governing a way of life are intrinsic to privacy.*”<sup>64</sup>

In 2018, *Puttaswamy* was relied upon in two critical judgements of the Supreme Court pertaining to the right to freedom of choice available to adult individuals in relationships and marriage - *Shakti Vahini v. Union of India*<sup>65</sup> (“**Shakti Vahini**”) and *Shafin Jahan v. K. M. Asokan* (“**Shafin Jahan**”).<sup>66</sup> The Court upheld the fundamental right guaranteed to all individuals under Articles 19 and 21 of the Constitution to marry a person of their choice. It does so by emphasising that autonomy and liberty are intrinsic aspects that allow a person to make their own

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<sup>58</sup> Ibid., paragraph 144.

<sup>59</sup> Ibid., paragraph 169, conclusion 3(F).

<sup>60</sup> Ibid, paragraph 125.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid, paragraph 127.

<sup>63</sup> Ibid, paragraph 144. The Union of India has submitted before the Delhi High Court in response to petitions seeking recognition of equal marriage rights under the HMA and SMA that non-heterosexual marriages are not part of the ‘Indian ethos’ and cannot be legally recognized.

<sup>64</sup> Ibid, Section T, paragraph 323.

<sup>65</sup> *Shakti Vahini v. Union of India* (2018) 7 SCC 192.

<sup>66</sup> *Shafin Jahan v. Asokan KM* (2018) 16 SCC 368 <<https://privacylibrary.ccgndud.org/case/shafin-jahan-vs-asokan-km-and-ors>>.

intimate decisions, particularly related to their choice of partner and marriage. In *Shafin Jahan*, the Court held,

*“The Constitution recognises the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects which define one’s personhood and identity. The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. (...) Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. They form the essence of personal liberty under the Constitution. In deciding whether Shafin Jahan is a fit person for Hadiya to marry, the High Court has entered into prohibited terrain. Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognising them. Indeed, the Constitution protects personal liberty from disapproving audiences.”<sup>67</sup>*

*Puttaswamy* also set the stage for *Navtej Singh Johar* in many ways. The Court in *Puttaswamy* did not comment on the constitutionality of section 377 as it was already pending consideration before a larger bench of the Supreme Court.<sup>68</sup> However, it provided the legal apparatus to overturn section 377 by making direct references to it and the rights of LGBTQIA+ persons stemming from the right to privacy.<sup>69</sup>

In 2016, Navtej Singh Johar, a classical dancer based in New Delhi, filed a writ petition before a Three-Judge Bench of the Supreme Court for a declaration that: (i) the right to sexuality, right to sexual autonomy, and right to choose a sexual partner are part of the right to life under Article 21 of the Constitution, and; (ii) section 377 of the IPC is unconstitutional to the extent that it applies to consensual sexual relations between adults in private. Several other petitioners and intervenors also filed petitions seeking the decriminalisation of section 377, in addition to Navtej Singh Johar.<sup>70</sup> Broadly, the petitioners and intervenors argued that the Supreme Court’s decision in *Koushal* was guided by social morality, not constitutional morality. They

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<sup>67</sup> Ibid., paragraph 84.

<sup>68</sup> *K.S Puttaswamy v. Union of India* (2017) 10 SCC 1, paragraph 147.

<sup>69</sup> For example, Justice Chandrachud in the context of section 377 expressly clarified that the right to privacy cannot be denied to the LGBTQIA+ community solely on the basis that they constitute a ‘miniscule fraction of the country’s population’. He further held that sexual orientation is an “essential attribute of privacy”. See, *K.S Puttaswamy v. Union of India* (2017) 10 SCC 1, paragraph 125. Justice Chandrachud goes on to criticise the Delhi High Court’s decision in *Koushal*. See *K.S Puttaswamy v. Union of India* (2017) 10 SCC 1, paragraph 145-146. Further, the court referred to statute and judicial precedent in other countries where consensual sexual activity between homosexual individuals is decriminalised and same-sex couples are granted the right to marry under the right to privacy. See *K.S Puttaswamy v. Union of India* (2017) 10 SCC 1, paragraph 195.

<sup>70</sup> *Navtej Singh Johar and Ors. v. Union of India* (2018) 10 SCC 1

also cited the Supreme Court decisions in *NALSA* and *Puttaswamy* that read the right to self-identification of gender identity and sexual orientation, respectively, as part of constitutional morality and the constitutional rights, intrinsic to Articles 14, 15, 19 and 21.<sup>71</sup>

In *Navtej*, the Supreme Court, invoking its judgement in *Puttaswamy*, found that the right to privacy is intrinsic to the right to liberty and the right to dignity, as a result of which a right to determine and pursue one's sexual orientation, in an important aspect of the right to sexual autonomy and sexual privacy, inherent in the right to privacy. The Court also relied on both *Puttaswamy* and *Shafin Jahan*, amongst other decisions, to read down section 377 to the extent that it applied to private consensual sexual intercourse between adults, recognising that all LGBTQIA+ persons are entitled to the full range of constitutional rights. The Court observed,

*“There can be no doubt that an individual also has a right to a union under Article 21 of the Constitution. When we say union, we do not mean the union of marriage, though marriage is a union. As a concept, union also means companionship in every sense of the word, be it physical, mental, sexual or emotional. The LGBT community is seeking realisation of its basic right to companionship, so long as such a companionship is consensual, free from the vice of deceit, force, coercion and does not result in violation of the fundamental rights of others.”*<sup>72</sup>

Importantly, the Court observed much like in *Shafin Jahan* that the state cannot intervene in any adult's choice of partner, or their desire for personal intimacy of any kind. It stated that *“The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an insegregable facet of individual liberty.”*<sup>73</sup>

In J. Chandrachud's opinion in *Puttaswamy*, the Court also observed, *“The right to intimacy emanates from an individual's prerogative to engage in sexual relations on their own terms. It is an exercise of the individual's sexual agency, and includes the individual's right to the choice of partner as well as the freedom to decide on the nature of the relationship that the individual wishes to pursue.”*<sup>74</sup>

Post the Supreme Court's judgement in *Navtej*, High Courts across the country have been steadily recognising relationships and unions, and offering protection to LGBTQIA+ couples against familial violence.<sup>75</sup> In *Sreeja S. v. The Commissioner of*

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<sup>71</sup> Ibid, paragraph 149, 253.

<sup>72</sup> Ibid, , paragraph 167

<sup>73</sup> Ibid, paragraph 230.

<sup>74</sup> *K.S Puttaswamy v. Union of India* (2017) 10 SCC, paragraph 479.

<sup>75</sup> *Madhu Bala v. State of Uttarakhand*, HABC No. 8 of 2020 (Uttarakhand High Court); *Adhila Nasarin v. The Commissioner of Police, Ernakulam & Ors.*, W.P. (Crl.) No. 476 of 2022 (Kerala High Court); *Bhawna & Ors. v. State & Ors.*, W.P. (Crl.) No. 1075/2019, Order Dt. 12.04.2019 (Delhi High

*Police, Thiruvananthapuram & Ors.*,<sup>76</sup> the Kerala High Court cited *Navej* and various other judicial precedent on the right of adults to choose their own partners and engage in live-in relationships and articulated the right of all adults, including LGBTQIA+ persons, to be in live-in relationships and choose their own partners, holding,

*“The exercise of jurisdiction should not transgress into the area of determining the suitability of partners to a marital life. That decision rests exclusively with the individuals themselves. Neither the State nor society can intrude into that domain. The strength of our Constitution lies in its acceptance of the plurality and diversity of our culture. Intimacies of marriage, including the choices which individuals make on, whether or not to marry and on whom to marry, lie outside the control of the State. Courts as upholders of constitutional freedom must safeguard these freedoms.”*<sup>77</sup>

Similarly, in *Shampa Singha v. State of West Bengal*,<sup>78</sup> the Calcutta High Court relied on *Navej*, observing,

*“In view of the aforesaid authority, consensual cohabitation between two adults of the same sex cannot, in our understanding, be illegal far less a crime. Fundamental right to life under Article 21 of the Constitution of India inheres within its wide amplitude an inherent right of self-determination with regard to one's identity and freedom of choice with regard to sexual orientation or choice of partner. We are of the view that such self-determination in the matter of sexual preference or consensual intercourse, even if not procreative, is inherent for the enjoyment of life and liberty of every individual and is protected under our scheme of constitutional morality and cannot be whittled down on the concept of morality or religion of others.”*<sup>79</sup>

While no explicit legal recognition is available for non-heterosexual marriages or unions in India, customary marriages between individuals of all genders and sexual orientations have been taking place historically, and have been on the rise since the *Navej* judgment.<sup>80</sup> Post *Navej*, Courts have also provided tacit recognition to such

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Court); *Chinmayee Jena v. State of Odisha & Ors.*, W.P. (Criminal) No. 57 of 2020 (Odisha High Court).

<sup>76</sup> *Sreeja S. v. Commissioner of Police* (2018) 4 KLT 644.

<sup>77</sup> *Ibid.*, paragraph 8.

<sup>78</sup> *Shampa Singha v. State of West Bengal and Ors.*, W.P. No. 23120 (W) of 2018 (Calcutta High Court).

<sup>79</sup> *Ibid.*, paragraphs 4-5.

<sup>80</sup> Poorvi Gupta, ‘Same-sex marriage gets a push in India, but some in queer community feel other rights require more urgent attention’ (*Firstpost*, 14 July 2020) <<https://www.firstpost.com/india/same-sex-marriage-gets-a-push-in-india-but-some-in-queer->



marriages by, for instance, extending police protection to couples in non-heterosexual marriages in Court Orders that refer to the marriage of the parties seeking protection as a fact.<sup>81</sup> The Madras High Court explicitly recognised a marriage between a transgender woman and a cisgender man, directing the jurisdictional marriage registrar to register their marriage, reading the term ‘bride’ in the HMA as inclusive of transgender and intersex persons who identify with the term - a right guaranteed by virtue of the Supreme Court’s judgment in *NALSA*.<sup>82</sup>

Recently, the Supreme Court has also made key observations regarding traditional understandings of the family, and relationships of care and kinship. The Court challenges the paradigm of a heterosexual family unit with two cisgender heterosexual parents, their children, and so forth:

*“The predominant understanding of the concept of a “family” both in the law and in society is that it consists of a single, unchanging unit with a mother and a father (who remain constant over time) and their children. This assumption ignores both, the many circumstances which may lead to a change in one’s familial structure, and the fact that many families do not conform to this expectation to begin with. Familial relationships may take the form of domestic, unmarried partnerships or queer relationships. A household may be a single parent household for any number of reasons, including the death of a spouse, separation, or divorce. Similarly, the guardians and caretakers (who traditionally occupy the roles of the “mother” and the “father”) of children may change with remarriage, adoption, or fostering. These manifestations of love and of families may not be typical but they are as real as their traditional counterparts. Such atypical manifestations of the family unit are equally deserving not only of protection under law but also of the benefits available under social welfare legislation. The black letter of the law must not be relied upon to disadvantage families which are different from traditional ones.”<sup>83</sup>*

The above cases demonstrate reliance on the privacy judgement to allow for deeper interpretations of the right to privacy particularly through the aspect of decisional autonomy. However, there are concerns that grounding the equal right to marry within the privacy framework could result in an inadequate application of marriage rights.

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[community-feel-other-rights-require-more-urgent-attention-8592451.html](https://community-feel-other-rights-require-more-urgent-attention-8592451.html)> accessed 26 January 2023; Ruth Vanita, *Love’s Rite: Same-Sex Marriages in Modern India* (Penguin Books India 2021).

<sup>81</sup> *Mansur Rahman v. The Superintendent of Police, Coimbatore District & Anr*, CRL. O.P. No. 25269 of 2018; *Monu Rajput & Anr. v. State & Ors.*, W.P. (CrI) 3407 of 2019.

<sup>82</sup> *Arunkumar and Sreeja v. the Inspector General of Registration and Ors.* WP (MD) No. 4125 of 2019. <<https://privacylibrary.ccgnlud.org/case-tracker/arunkumar-and-ors-vs-the-inspector-general-of-registration-and-ors?searchuniqueid=773755>> .

<sup>83</sup> *Deepika Singh v. Central Administrative Tribunal and Ors.*, Civil Appeal No 5308 of 2022, Supreme Court, paragraph 25.

The right to equality under Article 14 may provide a better basis as it can account for systemic barriers that might hinder meaningful decision making. Privacy can act as a supporting right to enable an individual's decisional autonomy. This approach has been argued for other rights such as reproductive autonomy.<sup>84</sup> For instance, incorporating an equality-based approach within reproductive rights can take into consideration how factors such as gender and class impede access to healthcare where the right to privacy may not be adequately applicable.

Similarly, to situate the arguments for equal marriage rights simply within the privacy framework might only focus on the right to marry through an individual's decisional autonomy of their relationship and sexual decisions. Operationalising such decisional autonomy in this context makes an assumption that an individual exists in perfect conditions to be able to easily make these decisions. Justice Ruth Bader Ginsberg observes that privacy and decisional autonomy operates in a fractured framework.<sup>85</sup> In this instance it means that focusing only on decisional autonomy rather than an individual's broader context can invisibilise all the other social, political and economic considerations that can hinder realising what is envisioned as true autonomy. For example, individuals that are societally privileged and without challenges of belonging to a more orthodox household, may find it easier to exercise autonomy over their relationship preferences.

An equality-based approach can ensure that there is a positive duty to create conditions that will facilitate an individual's sexual and decisional autonomy. This can create space to include the realities of lived experiences that impact meaningful choice and can supplement protection that the right to privacy affords to all individuals. An equality-based approach does permit a more holistic perspective of an individual's lived experiences but can also have its own limitations. Equality necessitates the comparison of LGBTQIA+ persons to heterosexual persons, where there are already existing societal factors that do not yet allow for all heterosexual individuals to be treated equally.<sup>86</sup> Therefore, even within an equality framework it can continue to be challenging to ensure substantial equality and these efforts will necessitate structural change.

## 5. Conclusion

As illustrated, it is well-established that the right to choose one's relationships, their nature and contours, is available to all adults, regardless of any gender/sexual

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<sup>84</sup> Dipika Jain, Payal K. Shah, 'Reimagining Reproductive Rights Jurisprudence in India: Reflections on the Recent Decisions on Privacy and Gender Equality from the Supreme Court of India' (2020) *Columbia Journal of Gender and Law*, 39(2), 1–53.

<sup>85</sup> *Ibid.*, page 29.

<sup>86</sup> *Ibid.*, page 42.

identity they hold. The right to marry a person of one's choosing has also been explicitly recognised as a constitutional right that the state is duty-bound to enable and protect. In J. Chandrachud's opinion in *Navtej*, the Court observed that LGBTQIA+ persons are “*entitled to the full range of constitutional rights*,”<sup>87</sup> which would clearly be inclusive of the right to marry. Courts have demonstrably set precedent through many decisions on individual choice and right to marry, irrespective of gender and sexual orientation. *Puttaswamy* and the right to privacy has advanced this position by affirming that this decisional autonomy of an individual is a crucial aspect of the fundamental right to privacy.

The Supreme Court has recognised that “*sexual orientation is an essential component of rights guaranteed under the Constitution which are not formulated on majoritarian favour or acceptance*.”<sup>88</sup> *Puttaswamy* also recognised that sexual orientation is integral aspect of privacy, dignity and non-discrimination, core components of fundamental rights.<sup>89</sup>

The Supreme Court has held that the courts will be guided by the principles of constitutional morality; and that constitutional morality prevails over social morality.<sup>90</sup> This encompasses “*...the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse*.”<sup>91</sup> The Constitution of India also mandates that any infringement to the right to life must be through procedure established by law. Further, such restrictions should be reasonable and non-arbitrary.<sup>92</sup> As a result, any restrictions to the full enjoyment of civil and political rights by individuals on the basis of their sexual orientation, a protected characteristic, is patently discriminatory and fails the test of reasonableness and non-arbitrariness.

As established through jurisprudence, sexual identity and autonomy in sexuality and sexuality-related decision are inherent in the right to privacy. The right to sexual autonomy and the right to self-determine sexual identity and gender identity have also been established through precedent as being inviolable aspects of the right to liberty and the right to dignity, both. All these rights have both positive (the right to

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<sup>87</sup> *Navtej Singh Johar and Ors. v. Union of India* (2018) 10 SCC 1, paragraph 165.

<sup>88</sup> *In Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News dated 23.01.2014 v. Union of India* (2014) 4 SCC 786, paragraph 10 quoting *Puttaswamy*.

<sup>89</sup> *Navtej Singh Johar and Ors. v. Union of India* (2018) 10 SCC, paragraph 127.

<sup>90</sup> *In Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News dated 23.01.2014 v. Union of India* (2014) 4 SCC 786, paragraph 121.

<sup>91</sup> *Govt. of NCT of Delhi v Union of India* (2018) 8 SCC 501 available online at: <<https://indiankanoon.org/doc/144413017/>>.

<sup>92</sup> *Maneka Gandhi v Union of India* AIR 1978 SC 597.

do something) and negative dimensions (the right to not do something/not have something done to you).<sup>93</sup>

Therefore, read together, it may be inferred that the right to marry is a fundamental right, and a fundamental right that extends to adults of all gender identities and sexual orientations. An argument articulated by the petitioners seeking equal marriage rights that are currently before the Supreme Court, as well as the cases transferred from various High Courts, is that recognition of equal marriage rights will provide LGBTQIA+ persons access to a full array of other rights. It will also enable the enjoyment of all civil and political rights that have been arbitrarily denied to them so far, which is essential for the full realisation of constitutional rights of LGBTQIA+ persons. Any restriction to the enjoyment of the full array of civil and political rights for partners of all genders/sexualities would violate fundamental rights to equality, privacy, and non-discrimination. In articulating this further, the Court will simply be reaffirming existing rights and interpreting the Constitution, which is its mandate.<sup>94</sup>

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<sup>93</sup> Isaiah Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed.), *Liberty* (Oxford Academic, 2003).

<sup>94</sup> In the petitions currently before the Supreme Court, the Central Government has filed a counter affidavit submitting that non-heterosexual relationships cannot be compared to the concept of a family unit that is provided by heterosexual relationships. Most recently, the Supreme Court determined it was most appropriate that a constitutional bench address the concerns at hand owing to the seminal and significant nature of these petitions.

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