

## Legal Recognition of LGBTQIA+: A Tussle between Popular morality and constitutional morality

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### Abstract

*The Apex Judicature of the nation has held the prism of human rights high ever since 2009, but the fight for social acceptance seems never-ending. The question is whether society is understanding or accepting “them” to be one of them? The rights of the non-conformists are being referred to as ‘an urban elite trend’, and their distress calls are blatantly ignored by society and even the government. The repeated recognition of their rights by the Supreme Court is hurdling a cultural revolution that society is not ready to stand. This lesser treatment to the LGBTQIA++ necessitates society and not just the protector of unpopular citizens to walk a full mile.*

*Right to live with dignity is a recognised fundamental right to every citizen of this nation, which guarantees enjoyment of more than the bare minimum of life. The progressive journey of Supreme Court raises a storm betwixt popular morality and constitutional morality. One hopes that the Supriyo @ Supriya Chakraborty case, questioning the established narrative of only man and woman’s association as a family unit, becomes instrumental to illuminate as to what many numbers of legislation are inclusive of the new age, if not a precursor to legislative amendments. The primary focus of the authors is to interpret the present Indian legislations to understand the support it furthers to the LGBTQIA++ community along with analysing the stance of other jurisdictions on the same. The paper advances to reveal the impact of their intersecting identities on the pre-existing lack of legal recognition and social stigma of the community notwithstanding the rights accorded by the courts. Finally, the authors make non-illusory recommendation to the deplorable discrimination, extreme abhorrence and non-inclusivity by focusing on constitutional idealism.*

**Keywords:** Supreme Court, Social Inclusion, LGBTQIA++, Marriage Equality, Right To Live, Human Rights.

### Introduction

Backing the apex judicature’s ruling in Navtej Singh Johar v. Union of India<sup>2</sup> (hereinafter referred to as the Navtej judgement), which struck away Section 377 of the Penal Code, 1860<sup>3</sup> to decriminalise “consensual sexual intercourse” between people of the LGBTQIA++, the predominant debate has focused on possible strategies to recognise homosexual relationships constitutionally on par with heterosexual ones. Over the course of paper, the authors refer to several paragraphs of the judgement to substantiate their arguments. It flows from this case that in order to completely protect their rights, it is necessary to grant affirmative or recognising rights. The Cambridge dictionary defines “recognition” to mean “agreement that something is true and legal”.<sup>4</sup> The historic case of Navtej was premised on this recognition of the LGBTQIA++. A trifling decriminalization of Section 377 fails to restore the sanctity of homosexuals and neither establishes a norm of equivalent social

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<sup>2</sup> Navtej Singh Johar v. Union of India, (2018) 1 SCC 791.

<sup>3</sup> The Indian Penal Code, § 377, No. 45, Acts of Parliament, 1860.

<sup>4</sup> CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english-hindi/recognition> (last visited on May 17, 2023).

degree.<sup>5</sup> The legislations of the contemporary society regard marriage to be a union of a man and a woman,<sup>6</sup> essentially a heteronormative couple is recognised to be married in the Indian society, which stems the debate of greater acceptance as simply decriminalising their relationship does not grant the same degree of equality enjoyed by the heteronormative couples in the society. In India homosexuality is perceived as a non-exclusive strike by British apostles on Indian sexual demeanours and civilities.<sup>7</sup> Along with other detrimental effects, imperialism played a significant role in eradicating our authentic culture. Crown power was used to introduce the word “homosexuality” and enact regulations outlawing “unnatural” sex. Numerous works of Hindu compositions, mediaeval history, folklore, and representations of homosexual couples in the Khajuraho palaces and Mughal archives all attest to the fact.

Indian society is recognised for assimilating its predecessors’ cultures. However, it doesn’t seem to be the case in LGBTQIA++ community’s acceptance. There were various kings in India’s diverse and ever-evolving heritage who, based on sources, were attracted to other men sexually. Mubarak, the son of Alauddin Khilji, was rumoured to be dating an aristocrat who served at his court.<sup>8</sup> Babur, who established the Mughal dynasty, also expressed his passion for males in his writings. He has shown his affection for Baburi, a boy.<sup>9</sup> The Kamasutra by Vtsyana is amid the vast body of ancient Indian literature that has achieved worldwide acclaim. The text asserts, “in all things connected with love, individuals may engage in different types of sexual activity, provided everyone should act according to the custom of the country and his inclination” in reference to unusual or non-normative sexual practises. The Kamasutra and other ancient books discuss man-man partnerships which states that if two male friends have entire faith in one another and are supportive of one another, they may reunite. In addition to describing “queer” sexual practises like “auparishtaka,” or mouth congress, these writings also prescribe them. The word parigraha, which has been given many interpretations by various academics, is used in the Kamasutra to refer to same-sex partnerships. It is translated as “marry” by some academics and as “embrace” by others. The term “homophobia” introduced the concept of homosexuality to India.<sup>10</sup> With this word, sex is emphasised as opposed to love. Evidently, traditional writings emphasise joy and affection rather than reproduction. According to scholars of history, the conservative attitude against same-sex relationships began under British administration and intensified following freedom.

## Judicial Acceptance and Societal Exclusion

The sacrosanct right of dignity which grants substance and meaning to life is tight knit to the Right to life guaranteed to every Indian citizen under Article 21 of the Constitution.<sup>11</sup> Through the Navtej judgement the court contemplated provision of non-discrimination to the LGBTQIA++ community to be at par with the other heterosexual individuals and furthering a stable “marriage-like” relationship. It forms the core of Indian jurisprudence on the subject as it clarified that LGBTQIA++ community includes L for Lesbians, G for Gays, B for bisexual,

<sup>5</sup> Astha and Aryan, *Is Decriminalisation of Homosexuality Enough*, SCC Online (May 18, 2023, 9:29 PM), <https://www.sconline.com/blog/post/2020/10/31/is-decriminalisation-of-homosexuality-enough/>

<sup>6</sup> The Special Marriage Act, No. 43 Acts of Parliament, 1954 and the Hindu Marriage Act, No. 25 Acts of Parliament, 1955.

<sup>7</sup> Vanita, Ruth, *Same-Sex Weddings, Hindu Traditions and Modern India*, 91 *Feminist Review* 47, (2009).

<sup>8</sup> Sanjana Ray, *Indian Culture Does Recognise Homosexuality Let Us Count the Ways*, *The Quint*, (May 18, 2023, 9:49 PM), <https://www.thequint.com/voices/opinion/homosexuality-rss-ancient-indian-culture-section-377>.

<sup>9</sup> Vanita, Ruth *supra* note 6.

<sup>10</sup> VĀTSYĀYANA, *THE KAMASUTRA*, BENARES: JAI KRISHNA-DAS-HARIDAS GUPTA, 89 (1929).

<sup>11</sup> INDIA CONST. art. 21.

T for transgenders, Q for queer, I for intersex, A for asexual and the + denotes presences of several such other people.

The Navtej decision led to enactment of what is called the Transgender Persons Act, 2019 which includes the definition of transgender person in Section 2(k) to encompass “every person who do not conform to the gender identities given to them at birth and their sexual orientations vary and are not dependent on their gender identity”,<sup>12</sup> this largely addresses all the members of the LGBTQIA+ community by titling all of them as ‘transgenders’. The act makes provision for a certificate to be granted to the person by the district magistrate, although, there exists no mechanism in case of denial of the same. The act also does not provide for a timeline for grant of certification. This provision is a significant violation of the NALSA judgement<sup>13</sup> of this court as the purpose of self-identification is defeated.<sup>14</sup> The proposal for screening committee was rejected while sanctioning the legislation.<sup>15</sup> The large-scale discontent of the community is resultant from the institutionalised discriminatory nature of the act. The members of the LGBTQIA+ are skirted with discrimination in educational system, the economy, public employment, or other equal opportunity programmes, the act stalls to allocate reservations to remedy such situations. The act in every way furthers the gatekeeping by ensuring availability of resources, power and opportunities to the heteronormative population of the country and impediment to the out-group.<sup>16</sup>

An investigation by ‘The Guardian’ found that 70% of LGBTQIA++ individuals experience sexual harassment at the workplace.<sup>17</sup> Another study titled “The Fiscal Implications of Homosexuality and the Discrimination of LGBTQIA+: A Case Study of India” is an analysis released by the World Bank.<sup>18</sup> It was discovered that prejudice and the omission of the community members from the workforce results in a 1.7% deficit in Gross Domestic Product. LGBTQIA++ people experienced harassment in mainstream employment at a rate of 56%.<sup>19</sup> However, even after public presence of such reports there is no provision within the Sexual Harassment Act, 2013 for the community.<sup>20</sup> This is the position even after recognition of right against sexual harassment to be a fragment of the Article 21.<sup>21</sup> The very fundamental definition of sexual harassment as propounded by the act furthers a legislative discrimination towards the community by asserting that only a “woman” can file a complaint against such acts.<sup>22</sup> It is argued that the act opposes the constitutional scheme of non-discrimination and

<sup>12</sup> The Transgender Persons (Protection of rights) Act, No. 40, Acts of Parliament, § 2(k).

<sup>13</sup> *National Legal Services Authority v. Union of India* (2014) 5 SCC 438.

<sup>14</sup> The Transgender Persons (Protection of rights) Act, No. 40, Acts of Parliament, § 6.

<sup>15</sup> Abhishek Goyal, *Transgender Persons (Protection of Rights) Act, 2019: Enduring Struggle for Gender Rights Recognition*, SCC Online, (May 18, 2023, 9:34 PM)

<https://www.sconline.com/blog/post/2020/06/25/transgender-persons-protection-of-rights-act-2019-enduring-struggle-for-gender-rights-recognition/>

<sup>16</sup> Abhimanini Sawhney and Sara Grover, *The Transgender Persons (Protection of Rights) Bill 2019 Divergent Interpretations and Subsequent Policy Implications* 6.1 IJLPP (2019).

<sup>17</sup> Frances Perraudin, *Survey Finds 70 per cent of LGBT People Sexually Harassed at Work*, THE GUARDIAN, (May 17, 2019, 10:55 PM) <https://www.theguardian.com/uk-news/2019/may/17/survey-finds-70-of-lgbt-people-sexually-harassed-at-work>

<sup>18</sup> World Bank, *THE ECONOMIC COST OF STIGMA AND THE EXCLUSION OF LGBT PEOPLE: A CASE STUDY OF INDIA* (2014), 94040 (Oct. 2014).

<sup>19</sup> Dr. Manika Kamthan, *Need for Inclusion of LGBTQIA+ under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013*, SCC Online (Jul. 8, 2022) available at <https://www.sconline.com/blog/post/2022/07/08/need-for-inclusion-of-lgbtqia-under-the-sexual-harassment-of-women-at-workplace-prevention-prohibition-and-redressal-act-2013/> (last visited on 17 May, 2023).

<sup>20</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, No. 14, Acts of Parliament, 2013.

<sup>21</sup> *Union of India v. Mudrika Singh*, 2021 SCC Online SC 1173 (India).

<sup>22</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 S. 2(a).

equality. The draconian act created for so-called protection of the transgenders has no particular category of preventing sexual harassment in workplace, notwithstanding the nominal penalty in any other case of discrimination i.e., imprisonment of 6 months to 2 years, with or without a fine.<sup>23</sup> The Justice Verma Committee constituted upon the Nirbhaya case realisations proposed grant of rights against sexual harassment for the trans community, is again shrug off.<sup>24</sup> Hence, it is argued that even after medico-legal binary understanding of sex, gender and their interrelationships demolition by the court, the old-ways are upheld and nurtured by the present legislations.

The Navtej judgment is built on the concept of transformative constitutionalism and progressive realisation of the rights. At its core, the notion of transformative constitutionalism is a vow, covenant, and fancy to revolutionise public morality in order for it to approve of the tenets of “justice, liberty, equality, and fraternity” as proclaimed in the Preamble to our Constitution in text as well as substance.<sup>25</sup> It is the same doctrine and concept on which the doors of the court are approached once again in the case of *Supriyo@ Supriya Chakraborty v. Union of India*.<sup>26</sup> The case seems to be revisiting an issue which is already decided in the *Puttaswamy case*<sup>27</sup> wherein people were given right to marriage equality and several similar cases, praying for a declaration by the Apex Judicature expanding certain sections of the Special Marriage Act by way of interpretation with a focus on endorsing “personhood” as opposed to the gender binary language used in the present legislation.<sup>28</sup> The struggles of recognition of the panoply of rights of the LGBTQIA+ is centred on the debate of recognition of marriage of the members of the community. The petitioners pray the Court to supplant the deficiency of the parliament and locate the modalities for implementing the declaration in existing legislation. To achieve the end goal of marriage recognition the Court has confined the canvass to interpretation of SMA, barring debates of religious acceptance of the same.<sup>29</sup> Marriage is a bouquet of rights in India, not just a status of dignity and respect. A registered marriage entitles the spouses certain benefits such as joint bank account, medical insurance including nomination of partner, life insurance, rental accommodation. These rights can be exercised when one is able to protect their relationships. One subset of the right is their constitutional value such as dignity, equality and fraternity. The other facet of the right is their day-to-day business of life. There are several acts which confer definite prerogatives to spouse in a recognised marriage such as: Income tax act. It does not recognise a “gift” between same sex partners.<sup>30</sup> The Juvenile Justice (Care and Protection of Children) Act, 2015, necessitates fosters or guardians to be married.<sup>31</sup> It is thus requested by the petitioners to replace the term “man” and “woman” to “person” under the SMA.<sup>32</sup> It is further proposed, in order to avoid the age conundrum, application of the Section can be based upon the gender as professed by the person.<sup>33</sup> Similar changes were put forward for provision of judicial

<sup>23</sup> Dr. Manika Kamthan, *supra* note 18.

<sup>24</sup> Justice J.S. Verma, Committee on Amendments to Criminal Law (2013) (May 18, 2023, 10:29 PM) [https://adrindia.org/sites/default/files/Justice\\_Verma\\_Amendmenttocriminallaw\\_Jan2013.pdf](https://adrindia.org/sites/default/files/Justice_Verma_Amendmenttocriminallaw_Jan2013.pdf)

<sup>25</sup> Yashdeep Chalal and Samridhi Sharma, *Decriminalizing the Act: Protecting Individuals as Kings Without Sceptre to Rule*, 9.1, NLIU LR (2020).

<sup>26</sup> *Supriyo@ Supriya Chakraborty v. Union of India*.

<sup>27</sup> *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1.

<sup>28</sup> The Special Marriage Act, § 2 (b), No. 43 Acts of Parliament, 1954.

<sup>29</sup> Live Law, *Same Sex Marriage- Supreme Court Hearing- LIVE*, YOUTUBE, (May 30, 2023, 10:00 PM) available at [https://www.youtube.com/watch?v=vU38559\\_YnY&t=5672s](https://www.youtube.com/watch?v=vU38559_YnY&t=5672s).

<sup>30</sup> Income Tax Act, § 56, No. 43, Acts of Parliament, 1961.

<sup>31</sup> Juvenile Justice (Care and Protection of Children) Act, § 57(2), No. 2, Acts of Parliament, 2015.

<sup>32</sup> *supra* Note 27.

<sup>33</sup> The Special Marriage Act, § 4, No. 43 Acts of Parliament, 1954.

separation and divorce.<sup>34</sup> The wording “non-consensual penile-vaginal sexual penetration” in the SMA act further make the possibility of its applicability to the homosexual couples weaker.<sup>35</sup> The largest democracy of the world is failing before constitutional comity by failing to ensure non-discrimination to non-heteronormative couples.

At this juncture, a notable mention would be the Respect of Marriage Act, 2022 by the United States which grants rights to the recognised marriage to the LGBTQIA++ upon the understanding that marriage has consequential benefits and is not just an empty shell of title. It is submitted that more than 31 Countries in the world have given recognition to the marriage of the LGBTQIA++. India has always followed the footsteps of leading nations in this respect as it was the case of *Lawrence v. Texas*<sup>36</sup> of the US wherein a provision similar to Section 377 was held to be violative of rights after which its decriminalisation became a reality of India.<sup>37</sup> In 2013 the US, ensured equality of homosexuals to the heteronormative population in all facets, upon which the Indian Supreme Court delivered the decisions of *Navtej, Puttaswamy and NALSA*. Further, time and again the International Courts have also recognised the theory of immutable characteristics to form part of several international instruments. It propagates that there should lie no discrimination in any laws on the basis of such individual characteristics which cannot be controlled by a person. Recently, the Indian Courts in *Shafin Jahan*<sup>38</sup> and *Shakti Vahini*<sup>39</sup> case have also furthered the right to marry a person of one’s own choice to its citizens. It is based upon these cases that the present petition is mere reiteration of pre-recognized rights specially for the transgender community.

### **Tussle Between Constitutional Morality and Popular Morality**

In the case at hand, while everyone is focused on the arguments of the petitioners and the stance of the government, it is of utmost importance to understand that the Courts have always held the prism of human rights and the government responds gradually and systematically to address the issues but another major party to the case has to be the society. It is an accepted fact that even after several rulings of the Supreme Court granting LGBTQIA++ their rights and its subsequent implementation through the transgender act and actual executions resting upon the society is still unfulfilled. The courts have accepted that the frozen concepts are detrimental to their commitment of ensuring constitutional morality over ages and thus has acted. Even the legislature has somewhat attempted to secure rights. However, the popular morality stands against the change. This stems the debate of whether popular morality or constitutional morality shall prevail within a society.

The popular/social morality is a set of values and norms that exist in the society aka the majoritarian view. It is based on two broad principles that is principle of reciprocity and hierarchy.<sup>40</sup> Consisting of the shared beliefs and norms, this social morality can be construed to be at loggerheads with the constitutional morality in the present case. Constitutional morality was first embraced by Dr. B.R. Ambedkar in a constitutional assembly debate. In the case of *Manoj Narula v. Union of India*<sup>41</sup>, the then CJI Deepak Misra referring to the Ambedkar’s debate held that “Constitutional Morality means to bow down to the norms of

<sup>34</sup> The Special Marriage Act, § 23, No. 43 Acts of Parliament, 1954.

<sup>35</sup> The Special Marriage Act, § 27, No. 43 Acts of Parliament, 1954.

<sup>36</sup> *Lawrence et al v. Texas*, 2003 SCC OnLine US SC 73.

<sup>37</sup> *supra* note 2.

<sup>38</sup> *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 408.

<sup>39</sup> *Shakti Vahini v. Union of India*, (2018) 7 SCC 192.

<sup>40</sup> MANUPATRA, (May 22, 2023, 9:29 PM) <https://articles.manupatra.com/article-details/Social-Morality-vs-Constitutional-Morality-with-special-reference-to-Navtej-Singh-Johar-V-Union-of-India>

<sup>41</sup> *Manoj Narula v. Union of India*, (2014) 9 SCC 1.

the Constitution and not act in a manner which would become violative of the rule of law of action in an arbitrary manner.”<sup>42</sup> Further in the Navtej decision, the Supreme Court has most appropriately stated that in order to further the protections guaranteed by the preamble the organs of the state must stay loyal to the constitutional morality.<sup>43</sup>

It is un-deniable right to live with dignity is a right associated with the societal beliefs and values. The soul of the law lies in its values. The courts render their judgements, and the lawmakers enact laws not in a state of inertia. The societal ideas that serve as the foundation from which judges or lawmakers construct laws serve as their guiding principles. Values are more important to legislators than resources. They represent potential legislative proposals. In every court proceeding, Choice and discretion importation are governed by values by their very nature. Values could evolve together with societal advancement. The legislations are amended which such evolutions.<sup>44</sup> This same has been affirmed by the current CJI during the proceedings of the Navtej case. However, it cannot be said that rights can be accorded and protected only on the basis of popular morality.<sup>45</sup> In the Suresh Kaushal case, the court denied the rights to the petitioner based upon the test of popular acceptance.<sup>46</sup> The said test was held to be “not at all a valid basis to disregard rights which have been conferred with the sanctity of constitutional protection”.<sup>47</sup> This is the very basis of the authors argument of upholding the Constitutional morality over Popular morality. However, even after such specific observations been made in the case there is little to no implementation and acceptance of the judgement by the society. The Sabrimala verdict<sup>48</sup>, known for upholding constitutional supremacy over the age-old customs has met the same fate as the Navtej judgments that is essentially of its non-acceptance by the society. The stigma of LGBTQIA++ is based on being characterized as “mentally ill and sexually deviant”.<sup>49</sup> The non-acceptance of any judgment by society does not render the judgement void.

In the case of Supriyo @ Supriya Chakraborty it was argued by the respondents that public morality is defined by normative attitudes, the norm is decided primarily by the mainstream. It was further argued that the judiciary cannot decide such cases as it cannot replace the norm makers.<sup>50</sup> However, a counter to this argument directly lies in the Navtej case wherein the Supreme Court held that the popular belief cannot be a bar to adjudge the claims of minority as it is essentially the protector of rights of unpopular citizen. Further, right to die as fundamental right stem from the essence of an individual requirements in special circumstances not from the majority requirements, considering majoritarianism for deciding one’s fundamental rights cannot be held as a restrain. Moreover, the right of a recognised marriage must be granted by the Supreme Court to the members of LGBTQIA++ as the Supreme Court is the constitutional authority for the interpretation of legislations enacted by the parliament. This duty of Supreme Court surges from the words “Unless the context otherwise requires” used by the lawmakers itself in every legislation’s definition clause.<sup>51</sup> This makes the oppositions argument of the Supreme Court not being the correct forum for confinement of socio-legal status, unsustainable. The Indian Constitution is based on an

<sup>42</sup> *Id* at 421.

<sup>43</sup> *Id* note 1 at 9.

<sup>44</sup> Hagos, T. W, *Separation of Law and Morality: The Art of Constitution Making*, 9 International Journal of Ethiopian Studies (2015).

<sup>45</sup> *Id* note 1 at 162.

<sup>46</sup> Suresh Kumar Koushal v. Naz Foundation (2014) 1 SCC 1 (India).

<sup>47</sup> *supra* note 44.

<sup>48</sup> Indian Young Lawyers Association v. State of Kerala, 2016 SCC OnLine SC 1783 (India).

<sup>49</sup> Bhavya Sehajpal, *LGBTQ rights and Societal impact of decriminalising Homosexuality*, 2.4 JCLJ (2022).

<sup>50</sup> *supra* Note 28.

<sup>51</sup> The Special Marriage Act, § 2, No. 43 Acts of Parliament, 1954.

abiding faith in those constitutional values. In the march of civilisations across the spectrum of a compassionate global order, India cannot be left behind.

It is commonly acknowledged that the Universal Declaration of Human Rights served as an inspiration for the ratification of over 70 civil rights accords. A report claims that basic freedoms are replicated, or perhaps prompted by, the UDHR in at least ninety country charters drafted since 1948.

Article 16 reads: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. Marriage shall be entered into only with the free and full consent of the intending spouses. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

The recent ruling in the *Supriyo@Supriya* case by the Supreme Court of India marked a setback for same-sex couples seeking official recognition of their unions. The court asserted that the definition of marriage varies across countries, religions, and legal frameworks, emphasizing the absence of a universal meaning. While this perspective may appear reasonable, the court’s narrow interpretation potentially curtails the marriage rights of sexual minorities. The court’s analytical approach is fraught with errors, particularly in its failure to scrutinize specific sections of the Special Marriage Act of 1954 that have a biased impact, notably the stringent requirements for marriage. Paradoxically, the court deems the legislation non-discriminatory while overlooking the discriminatory effects embedded in its provisions. Moreover, the ruling introduces conflicting perspectives on government involvement in marriage. If marriage is fundamentally a “social” institution unaffected by government intervention, then the government's reluctance to grant same-sex couples the right to marry constitutes a significant intrusion into this social sphere. This raises questions about the state's selective role in shaping and overseeing the institution of marriage, particularly concerning sexual orientation. In the context of marriage equality, the court's reasoning reveals a fundamental misunderstanding. The quest for marriage equality is not a plea for the establishment of a new institution but rather a demand for access to an existing, widely recognized, and respected institution. By neglecting this crucial distinction, the court distorts the true nature and intent of the challenge, perpetuating discriminatory barriers that prevent certain individuals from participating in a societal institution already embedded in community norms.

Justice Bhat's insistence on an “external threat” as a prerequisite for recognizing the right to marry imposes an unduly burdensome requirement. Essentially, this implies that the State is only obligated to defend the right to marry in the presence of an evident and imminent threat of bodily harm or coercion. Such an approach undermines the proactive protection of individual rights envisioned by constitutional provisions. In addition to jeopardizing individual liberties, restricting the right to marry raises questions about broader ideals of equality and non-discrimination within the institution of marriage. Furthermore, Justice Bhat's limited interpretation of the “external threat” results in scant protections under Constitution’s Part III. This suggests that the State should disregard systemic discrimination and social prejudices faced by LGBTQ individuals, intervening only when necessary to protect freedom of choice from external dangers.

The examples chosen by Justice Bhat suggest that his definition of a “threat” is confined to direct bodily harm. This not only inaccurately downplays the physical risks confronting queer unions and relationships but also reveals a narrow understanding of social realities. The significant lack of overall security, encompassing legal, financial, and physical aspects,

experienced by the LGBTQIA++ community should be recognized as a serious hazard justifying the establishment of corresponding protective rights.

The current depiction of the “threat” appears deliberately narrow, omitting the more pervasive forms of discrimination and obstacles that LGBTQIA++ individuals encounter in their pursuit of marriage equality. The argument here posits that if the existence of a threat is a prerequisite for a constitutional right, then that threat must be precisely defined. This necessitates the development of an “inclusive concept of endangerment” that considers all “hazards to equality” faced by the LGBTQ community.

## Way Forward

***“This tyranny of the majority must be put down with a firm hand if we are to guarantee to the untouchable the freedom of speech and action necessary for their uplift.”***

- Dr. B.R. Ambedkar<sup>52</sup>

The dominating philosophy in Indian society is heterosexuality. It creates a heterosexual paradigm while discriminating versus, denying, as well as stereotyping LGBT identities. Through this, social standards are controlled to exclude individuals that do not meet the requirements and to embrace the ones that comply. These principles find expression in the press, in the classroom, in faith, and—above all—in the legal system. It gets tougher to voice queer disputes and worries if the legal system, whose primary goal is to provide equal opportunity, starts to support heteronormative ideologies. Furthermore, Indian legislation permits open discrimination against the LGBTQ+ population, which is already pervasive in our society, by endorsing heterosexuality. This creates enormous gender and sexual orientation-based disparities and isolates queer groups as aberrations inside the heterosexual society. Thus, it is imperative that laws pertaining to LGBT issues and the use of inclusive language in already-existing legislation be passed. There is unutilized capacity in the Indian legal system to establish genuine equality in society. That is only possible, if heteronormative tendencies on different laws are acknowledged and subsequently corrected.

Collective Consciousness and so called “Popular Morality is the first blow on egalitarianism and economic & political liberties such that the top courts are baffling on these issues. CJI D.Y. Chandrachud is known as one of the most progressive and liberal judges to hold the office. The time today calls for the CJI to go beyond his epithet and ameliorate societal acceptance, as this is pivotal to thriving administration. Following the Navtej ruling there has been a shift in the recognition of the gender identities of the member of the LGBTQIA+ community, but not significant enough to eradicate the stigma of the people. The Supreme Court has rendered significant protection through several broad interpretation to grant the right to equality and non-discrimination time and again to the aggrieved keeping in mind the separation of powers. However, such judgments have turned into dead letters due to societal non-acceptance. The constitution bestows upon the Supreme Court a power equivalent to that of the parliament, in cases of the latter’s inaction.<sup>53</sup> In the present appeal it is hoped that the Supreme Court will once again uphold the Constitutional Morality as against the Popular morality and safeguard the interests of the minorities. In the recent judgment of the Court in the case of Sikkim old settlers<sup>54</sup> the Court has sent a precedent by granted even the excluded or out grouped, the rights equal to the others. Another precedent that strengthens the belief of

<sup>52</sup> Aravind Narain, *What Would an Ambedkarite Jurisprudence Look Like?* 29 NLS LR (2017).

<sup>53</sup> INDIA CONST. art. 142.

<sup>54</sup> Association of Old Settlers of Sikkim v. Union of India.



an effective remedy is the Vishaka case<sup>55</sup> wherein even in the absence of parliamentary guidelines, the court accorder protection to women at workplaces. Moreover, a climate of awareness and education can serve as vital requisites in constituting the desired societal appreciation to the members of the LGBTQIA++ community.

In a constitutional democracy, the right to equality and non-discrimination on various grounds, including gender identity, is enshrined in their constitution and intrinsic to human values. There may be conflict in protecting and recognizing LGBT rights, which may vary significantly from one country to another, but basic rights remain the same. To address these problems, advocacy groups, human rights organizations, and activists often work together to promote legal reforms and raise awareness about the importance of societal acceptance and inclusion of LGBT individuals. Article 14 cannot be read in isolation because it is a crucial component in the protection of the rights of LGBT individuals. Article 14 asserts that every person has the right to live equally. It is particularly relevant as it contributes to the broader international framework that seeks to protect the rights of vulnerable populations, including the LGBT community. It ensures that they are not subjected to any discrimination.

It is a constitutional goal to ensure that all individuals, regardless of their gender identity, can enjoy their fundamental human rights and live free from discrimination. Similarly, international organizations play a vital role in advancing the rights of LGBT individuals globally. These efforts are crucial in ensuring that all individuals, regardless of their gender identity, can live free from discrimination and enjoy the same rights as everyone else.

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<sup>55</sup> Vishaka v. State of Rajasthan, (1997) 6 SCC 241 (India).