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SAME-SEX MARRIAGE AND THE LIMITS OF JUDICIAL POWER IN INDIA

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I. ABSTRACT

The Constitution Bench decision in Supriyo @ Supriya Chakraborty v Union of India (2023) marks the point at which the Supreme Court's LGBTQ+ jurisprudence met the limits of judicial power. Five years after decriminalising consensual same-sex relations in Navtej Singh Johar v Union of India (2018), the Court declined to extend the Special Marriage Act, 1954 to same-sex couples. This paper asks whether a constitutional court can extend a statutory institution such as marriage to same-sex couples without breaching the separation of powers. It argues that the Court drew a defensible line between interpretation and legislation, but that judicial restraint carries a matching duty on the legislature and the executive to act. The paper follows a doctrinal method. It examines the four opinions in Supriyo, the earlier decisions in NALSA, Puttaswamy, Koushal and Navtej, and the statutes that attach legal consequences to marriage, including the Juvenile Justice (Care and Protection of Children) Act, 2015, the Adoption Regulations, 2022 and personal-law statutes on succession and maintenance. It also traces developments after the judgment, among them the constitution of the Cabinet Secretary committee in April 2024, the dismissal of the review petitions in January 2025 and the Transgender Persons (Protection of Rights) Amendment Act, 2026. A short comparison with the United States, Taiwan and Thailand shows that lasting recognition has more often come through legislation prompted by courts than through adjudication alone. The paper finds that all five judges rejected a fundamental right to marry and that the Bench divided 3:2 only on civil unions and joint adoption. It concludes that Parliament remains the appropriate forum, and recommends a civil union statute, targeted amendments to the Special Marriage Act and binding administrative measures in the interim.

II. KEYWORDS

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Same-Sex Marriage; Supriyo; Special Marriage Act; Judicial Restraint; Separation of Powers.

III. INTRODUCTION

The question of same-sex marriage in India represents one of the most significant contemporary debates concerning constitutional rights, equality, dignity and the role of the judiciary. The Indian constitutional framework has witnessed a gradual expansion of LGBTQ+ rights through landmark judicial decisions. However, the recognition of same-sex marriage raises a more complex question: whether the judiciary can extend an existing statutory institution to same-sex couples, or whether such recognition must come through Parliament.

The issue came before a Constitution Bench of the Supreme Court in *Supriyo @ Supriya Chakraborty v Union of India*, decided on 17 October 2023.² The Court unanimously declined to recognise a fundamental right to marry and refused to interpret the Special Marriage Act, 1954 in a manner that would permit same-sex marriages. At the same time, the Court affirmed important constitutional protections relating to dignity, privacy, autonomy and the freedom to choose a partner.

This paper addresses a specific research problem: whether a constitutional court can extend a statutory institution such as marriage to same-sex couples without breaching the separation of powers, and what obligations fall on the other branches when it declines to do so. Its thesis is that *Supriyo* drew a defensible line between interpretation and legislation, but that the legitimacy of that restraint depends on the legislature and the executive acting on the discrimination the Court acknowledged. The judgment is therefore important not only for LGBTQ+ rights but also for understanding the limits of judicial power and the constitutional principle of separation of powers.

A. Research Objectives

1. To examine the holdings of each opinion in *Supriyo* on the right to marry, the Special Marriage Act, 1954, civil unions and joint adoption.

² *Supriyo @ Supriya Chakraborty v Union of India* 2023 INSC 920.

2. To analyse how the Court distinguished judicial interpretation from judicial legislation.
3. To assess the legal position of same-sex couples after the judgment, including developments up to 2026.
4. To propose legislative and administrative measures that would address the discrimination the Court acknowledged.

B. Research Questions

1. Can courts extend the Special Marriage Act, 1954 to same-sex couples without breaching the separation of powers?
2. Does the Constitution guarantee a fundamental right to marry, or a right to have a union legally recognised?
3. What legal disadvantages do same-sex couples face because their unions lack marital status?
4. Which institution is better placed to provide legal recognition, and through what measures?

C. Research Methodology

This paper follows a doctrinal method.

Its primary sources are the Constitution of India, the Special Marriage Act, 1954, the Juvenile Justice (Care and Protection of Children) Act, 2015, the Adoption Regulations, 2022, personal-law statutes on succession and maintenance, the Transgender Persons (Protection of Rights) Act, 2019 and its 2026 amendment, official notifications and advisories, and the judgments of the Supreme Court and the High Courts.

Its secondary sources include the Constituent Assembly Debates and scholarly commentary on constitutional morality. The paper also draws a limited comparison with the United States, Taiwan and Thailand. Citations follow OSCOLA (4th edn).

IV. THE COMMUNITY

The LGBTQ+ community comprises people with diverse sexual orientations and gender identities, including Lesbian, Gay, Bisexual and Transgender persons. Historically, the community has faced discrimination and social marginalisation.

Under colonial rule, Section 377 of the Indian Penal Code, 1860 was used to criminalise certain same-sex sexual acts.³ In *Suresh Kumar Koushal v Naz Foundation*, decided in December 2013, the Supreme Court upheld the provision.⁴ However, in *Navtej Singh Johar v Union of India* (2018), the Supreme Court overruled *Koushal*, decriminalised consensual same-sex relations between adults and recognised the constitutional rights to equality, dignity, privacy, autonomy and sexual orientation.⁵

The Indian Penal Code itself now stands repealed. The Bharatiya Nyaya Sanhita, 2023, which came into force on 1 July 2024, replaced it and contains no counterpart to Section 377.⁶ The omission has left non-consensual sexual acts against adult men without a specific penal provision. In August 2024 the Delhi High Court disposed of a public interest petition on this gap with a direction to the Union to treat it as a representation,⁷ and fresh petitions on the issue remain pending before that Court.⁸

Despite this progress, same-sex marriage is not legally recognised in India. In *Supriyo*, the Supreme Court held that legal recognition of same-sex marriage requires legislative action, while affirming the constitutional protection of queer persons' freedom to form relationships.⁹

Thus, the struggle for LGBTQ+ rights has moved from *Koushal* through *Navtej* to *Supriyo*, that is, from decriminalisation of same-sex relationships towards seeking equal legal recognition, dignity and protection in family and marital relationships.

V. EVOLUTION OF LGBTQ+ RIGHTS IN INDIA

³ Indian Penal Code 1860, s 377.

⁴ *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1.

⁵ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 [253(xviii)] (Misra CJ).

⁶ Bharatiya Nyaya Sanhita 2023, s 358; Ministry of Home Affairs, Notification SO 850(E) (23 February 2024).

⁷ *Gantavya Gulati v Union of India* (Delhi HC, 28 August 2024).

⁸ *Shubhi Srivastava v Union of India* (Delhi HC, 12 August 2026).

⁹ *Supriyo* (n 1) [149(ii)], [149(iv)] (Bhat J).

The legal recognition of LGBTQ+ rights in India has developed through several landmark judgments.

A. NALSA v Union of India (2014)

In *National Legal Services Authority v Union of India*, the Supreme Court recognised the constitutional right of transgender persons to self-identification and emphasised dignity, equality and personal autonomy.¹⁰

The judgment established that constitutional protection extends to gender identity and that individuals cannot be denied their basic rights merely because they do not conform to traditional gender identities.

The statutory framework that followed *NALSA* has since changed. The Transgender Persons (Protection of Rights) Act, 2019 conferred a right to self-perceived gender identity.¹¹ The Transgender Persons (Protection of Rights) Amendment Act, 2026, which received Presidential assent on 30 March 2026, omits that right, narrows the statutory definition of a transgender person, and requires the recommendation of a medical board before the District Magistrate issues a certificate of identity.¹²

Its commencement depends on notification by the Central Government. On 4 May 2026, the Supreme Court issued notice on petitions under Article 32 challenging the amendment and directed that they be placed before a three-judge bench.¹³ The petitioners contend that the amendment displaces the principle of self-identification affirmed in *NALSA*. The outcome will decide whether that principle continues to bind the State or yields to a medical model of gender recognition.

B. Justice K.S. Puttaswamy v Union of India (2017)

In *Justice K.S. Puttaswamy (Retd.) v Union of India*, a nine-judge Constitution Bench recognised privacy as a fundamental right under Article 21.¹⁴

¹⁰ *National Legal Services Authority v Union of India* (2014) 5 SCC 438 [135.2].

¹¹ Transgender Persons (Protection of Rights) Act 2019, ss 2(k), 4(2).

¹² Transgender Persons (Protection of Rights) Amendment Act 2026.

¹³ *Laxmi Narayan Tripathi v Union of India* WP (C) No 548 of 2026 (SC, 4 May 2026).

¹⁴ *Justice KS Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1.

The judgment recognised that privacy includes aspects of personal autonomy, intimate choices and decisional freedom. This constitutional understanding later became important in LGBTQ+ rights jurisprudence.

C. *Navtej Singh Johar v Union of India* (2018)

A major breakthrough came in *Navtej Singh Johar v Union of India*, where the Supreme Court read down Section 377 of the Indian Penal Code insofar as it criminalised consensual sexual relations between adults.¹⁵

The Court emphasised dignity, equality, privacy, autonomy and constitutional morality. The decision established that sexual orientation is an essential part of individual identity and cannot be used as a basis for unconstitutional discrimination.

These judgments laid the constitutional foundation for the later debate concerning same-sex marriage.

VI. IS MARRIAGE A FUNDAMENTAL RIGHT?

One of the central questions in *Supriyo* was whether the Constitution guarantees a fundamental right to marry.

All five judges held that there is no fundamental right to marry under the Constitution. The Chief Justice, with whom Justice Kaul concurred, held that the Constitution does not expressly recognise such a right, although facets of marriage reflect the constitutional values of dignity, life and liberty.¹⁶ Justice Bhat, writing for himself and Justice Kohli, treated marriage as a status conferred by statute or custom and held that no unqualified right to marry exists beyond it.¹⁷

Justice Narasimha agreed that there is no unqualified fundamental right to marry and held that the right flows from statute or enforceable custom.¹⁸ The 3:2 division arose only on the right to a civil union and on joint adoption. The Court distinguished

¹⁵ *Navtej* (n 4) [253(xvii)] (Misra CJ).

¹⁶ *Supriyo* (n 1) [340(g)] (Chandrachud CJ).

¹⁷ *ibid* [149(i)] (Bhat J).

¹⁸ *ibid* (Narasimha J).

between the right of an individual to choose a partner and the right to obtain legal recognition of that relationship as a marriage.

The Court recognised that the choice of a partner is protected by constitutional values of privacy, autonomy and personal liberty. However, this does not automatically create an entitlement to a particular legal status.

Therefore, the existence of a constitutional right to personal autonomy does not necessarily mean that every couple has a constitutional right to have their relationship recognised as a marriage.

VII. SUPRIYO V UNION OF INDIA: THE CENTRAL CASE

In *Supriyo*, same-sex couples challenged the exclusion of their relationships from the legal framework governing marriage. The petitioners primarily relied upon constitutional guarantees under Articles 14, 15, 19 and 21.¹⁹

They argued that denying same-sex couples' access to marriage violated equality, dignity, autonomy and the right to choose one's partner.

The petitioners also sought a gender-neutral interpretation of the Special Marriage Act, 1954, so that its provisions could apply to same-sex couples.²⁰

The Supreme Court, however, refused to rewrite the legislation. Its holdings on each issue are set out below.

A. The Special Marriage Act, 1954

All five judges declined to strike down the Special Marriage Act or to read it in a gender-neutral manner. The Chief Justice held that striking down Section 4 would undo the Act's purpose of enabling inter-faith and inter-caste marriages, and that reading words into the Act would enter the legislative domain.²¹ Justice Bhat found that Parliament framed the Act for heterosexual couples and that its gender-specific

¹⁹ Constitution of India, arts 14, 15, 19, 21.

²⁰ Special Marriage Act 1954, s 4.

²¹ *Supriyo* (n 1) [340(h)] (Chandrachud CJ).

provisions, including those protecting women, could not be read neutrally.²² Justice Narasimha held a gender-neutral reading to be semantically impossible.²³

Justice Kaul found the exclusion of queer couples inconsistent with Article 14 but agreed that the Court lacked the institutional capacity to remedy it by reading the Act neutrally.²⁴

B. The Right to a Civil Union

The Bench divided 3:2 on this issue. The Chief Justice and Justice Kaul held that the freedom to enter a union is protected by Part III, that “sex” in Article 15 includes sexual orientation, and that the State must recognise such unions and extend the benefits that flow from them.²⁵ Justice Bhat, with Justice Kohli, accepted that queer couples have a right to a relationship under Article 21 but held that a legally recognised status can come only through enacted law.²⁶ Justice Narasimha agreed, holding that a civil union carrying legal status cannot be located within Part III.²⁷

C. Adoption and CARA Regulation 5(3)

Regulation 5(3) of the Adoption Regulations, 2022 bars adoption by a couple unless they have at least two years of stable marital relationship.²⁸ The Bench again divided 3:2. The Chief Justice and Justice Kaul would have read down the regulation to permit joint adoption by unmarried couples, including queer couples, as the regulation violated Articles 14 and 15.²⁹ The majority held that the regulation is not void, which keeps joint adoption limited to married couples, while calling on the State to address the discriminatory impact of benefits tied to marital status.³⁰

D. Transgender and Intersex Persons

²² *ibid* [149(v)] (Bhat J).

²³ *ibid* (Narasimha J).

²⁴ *ibid* (Kaul J).

²⁵ *ibid* [340(i)], [340(j)], [340(k)] (Chandrachud CJ), [33] (Kaul J).

²⁶ *Supriyo* (n 1) [149(ii)], [149(iv)] (Bhat J).

²⁷ *ibid* (Narasimha J).

²⁸ Adoption Regulations 2022, reg 5(3).

²⁹ *Supriyo* (n 1) [340(p)] (Chandrachud CJ).

³⁰ *ibid* [149(vi)], [149(x)] (Bhat J).

The Court held unanimously that transgender persons in heterosexual relationships may marry under existing laws.³¹ The Chief Justice added that intersex persons who identify as male or female may also marry under existing laws.³²

E. The Committee and the Solicitor General's Assurance

During the hearing on 3 May 2023, the Solicitor General stated that the Union would constitute a committee chaired by the Cabinet Secretary to examine the concerns of same-sex couples. The Court recorded this assurance, and both the Chief Justice and Justice Bhat left the questions of entitlement to that committee.³³

VIII. JUDICIAL INTERPRETATION VERSUS JUDICIAL LEGISLATION

The most important aspect of *Supriyo* is the distinction between judicial interpretation and judicial legislation.

The judiciary has the constitutional authority to interpret legislation. It can also invalidate laws that violate fundamental rights. However, there is a constitutional limit to this power.

If interpreting a statute requires the Court to introduce an entirely new legal framework, the Court risks moving from interpretation into legislation. The Chief Justice held that reading words into the Special Marriage Act and allied laws would amount to the Court deciding matters of policy that belong to the legislature.³⁴ Justice Bhat reasoned that a gender-neutral reading would conflict with the Act's object and its gender-specific provisions, and that the Court could not build a parallel legal regime.³⁵

Recognition of same-sex marriage would have consequences under numerous areas of law. Joint adoption depends on Section 57 of the Juvenile Justice (Care and Protection of Children) Act, 2015 and Regulation 5(3) of the Adoption Regulations,

³¹ *ibid* [340(m)] (Chandrachud CJ), [149(ix)] (Bhat J).

³² *Supriyo* (n 1) [340(n)] (Chandrachud CJ).

³³ *ibid* [340(s)] (Chandrachud CJ), [149(vii)] (Bhat J).

³⁴ *Supriyo* (n 1) [340(h)] (Chandrachud CJ).

³⁵ *ibid* [149(v)], [149(xiii)] (Bhat J).

2022.³⁶ Succession and maintenance depend on personal-law statutes such as the Hindu Succession Act, 1956 and the Hindu Adoptions and Maintenance Act, 1956, and on Section 144 of the Bharatiya Nagarik Suraksha Sanhita, 2023.³⁷ Family pension, provident fund and similar employment benefits depend on rules that define eligible family members by reference to a legally wedded spouse.³⁸ Part IX examines these provisions in detail.

Therefore, recognising same-sex marriage through judicial interpretation would not merely involve changing a few words in the Special Marriage Act. It would potentially require a comprehensive restructuring of several legal provisions. The majority in *Supriyo* therefore concluded that such a task was primarily for the legislature rather than the judiciary.

The contrast with *Navtej* clarifies the limit. In *Navtej*, the Court read down Section 377 to exclude consensual acts between adults and left the rest of the provision intact.³⁹ That remedy removed a prohibition and required no new legal structure. In *Supriyo*, the relief sought would have created a new legal status with consequences across several statutes. On this reading, the doctrinal test is whether a remedy operates by subtraction, removing an unconstitutional burden, or by addition, constructing a legal institution that the legislature has not enacted. Courts may grant the first through judicial review. The second belongs to the legislature.

IX. SEPARATION OF POWERS AND JUDICIAL RESTRAINT

The Indian Constitution distributes governmental functions among the legislature, executive and judiciary.

³⁶ Juvenile Justice (Care and Protection of Children) Act 2015, s 57; Adoption Regulations 2022, reg 5(3).

³⁷ Hindu Succession Act 1956, ss 8, 15; Hindu Adoptions and Maintenance Act 1956, s 18; Bharatiya Nagarik Suraksha Sanhita 2023, s 144.

³⁸ Central Civil Services (Pension) Rules 2021, r 50(6); Employees' Provident Funds Scheme 1952, para 2(g).

³⁹ *Navtej* (n 4) [253(xvii)] (Misra CJ).

Parliament is primarily responsible for making laws. Courts interpret laws and determine their constitutional validity. Although the judiciary possesses wide powers of judicial review, those powers do not make the Court a substitute for Parliament.

The same principle becomes particularly important when dealing with socially significant questions.

The Supreme Court recognised that queer couples may suffer disadvantages because several benefits are connected to marital status. However, it held that the Court could not itself undertake the complex task of restructuring all such laws and policies. Instead, the Court directed attention towards the need for the State to examine discriminatory consequences faced by queer couples.⁴⁰

The Court also recorded the Union's assurance, given by the Solicitor General on 3 May 2023, that it would constitute a committee chaired by the Cabinet Secretary. The Court specified the entitlements the committee would examine, including the treatment of queer partners as members of the same family for ration cards, joint bank accounts and nominations, next-of-kin status for medical decisions, jail visitation and access to a deceased partner's body, and legal benefits such as succession, maintenance, income tax, gratuity, family pension and insurance.⁴¹

The Centre constituted the committee by a notification dated 16 April 2024, with the Secretaries of the Department of Home, the Ministry of Women and Child Development, the Department of Health and Family Welfare, the Legislative Department and the Department of Social Justice and Empowerment as members.⁴²

This reflects the principle of judicial restraint: courts can identify constitutional concerns but may leave complex policy choices to the appropriate constitutional institution.

X. CONSTITUTIONAL MORALITY VERSUS SOCIAL MORALITY

⁴⁰ *Supriyo* (n 1) [149(vi)] (Bhat J).

⁴¹ *ibid* [340(s)] (Chandrachud CJ).

⁴² Ministry of Law and Justice (Legislative Department), Notification F No 23(45)/2022-Leg-III(LD) (16 April 2024), Gazette of India, Extraordinary, Part I, s 1.

The debate over same-sex marriage also involves the concept of constitutional morality.

Social morality is often influenced by tradition, religion, custom and prevailing social attitudes. Constitutional morality, on the other hand, requires the State and its institutions to uphold constitutional values such as equality, liberty, dignity, fraternity and individual autonomy. Dr B.R. Ambedkar, drawing on George Grote, described constitutional morality as “a paramount reverence for the forms of the Constitution” and warned that it “is not a natural sentiment” but “has to be cultivated”.⁴³ Later commentary reads the concept as an allegiance to constitutional form and process as much as to particular substantive outcomes.⁴⁴

The Supreme Court’s earlier LGBTQ+ judgments, particularly *Navtej*, demonstrated the importance of constitutional morality in protecting minorities from majoritarian prejudice. Chief Justice Misra held that the Court must be guided by constitutional morality and not by societal morality, and that members of the LGBT community must not be outlawed in the garb of social morality.⁴⁵

In *Supriyo*, the two strands of the judgment applied the concept differently. The Chief Justice relied on the same constitutional values to hold that the freedom of queer persons to enter a union is protected by Part III and that “sex” in Article 15 includes sexual orientation.⁴⁶ The majority did not deny those values, but held that giving them effect through a new legal status required a multidisciplinary and polycentric choice that the Court was not the right forum to make.⁴⁷ Both strands therefore accepted constitutional morality and differed on which institution should give it effect.

However, *Supriyo* demonstrates that constitutional morality does not necessarily mean that courts can create every legal institution that might advance equality.⁴⁸

⁴³ Constituent Assembly Debates, vol 7 (4 November 1948) (BR Ambedkar).

⁴⁴ Pratap Bhanu Mehta, ‘What is Constitutional Morality?’ (2010) 615 Seminar.

⁴⁵ *Navtej* (n 4) [119], [122] (Misra CJ).

⁴⁶ *Supriyo* (n 1) [340(j)], [340(k)] (Chandrachud CJ).

⁴⁷ *ibid* [149(xiii)] (Bhat J).

⁴⁸ *ibid* [149(ii)] (Bhat J).

Constitutional values must operate within the institutional boundaries of the Constitution, a view consistent with Ambedkar's emphasis on constitutional forms.

XI. LGBTQ+ RIGHTS VERSUS EXISTING FAMILY LAWS

Another important issue is the relationship between LGBTQ+ rights and India's existing family-law structure. Marriage in India is connected with numerous legal consequences, and the absence of marital status affects same-sex couples under specific provisions.

1. **Adoption:** Section 57 of the Juvenile Justice (Care and Protection of Children) Act, 2015 sets the eligibility of prospective adoptive parents and requires the consent of both spouses where a married couple adopts.⁴⁹ Regulation 5(3) of the Adoption Regulations, 2022 limits adoption by a couple to those in a stable marital relationship of at least two years. By a 3:2 majority, *Supriyo* upheld the regulation.⁵⁰ A same-sex couple therefore cannot adopt jointly, although either partner may adopt as a single parent subject to the conditions in Regulation 5(2).⁵¹
2. **Succession:** The Hindu Succession Act, 1956 names the widow as a Class I heir of a male intestate and the husband as an heir of a female intestate.⁵² These provisions presuppose a marriage valid in law. A surviving same-sex partner therefore takes nothing on intestacy and must rely on a will.
3. **Maintenance:** Section 18 of the Hindu Adoptions and Maintenance Act, 1956 entitles a Hindu wife to maintenance from her husband, and Section 144 of the Bharatiya Nagarik Suraksha Sanhita, 2023, formerly Section 125 of the Code of Criminal Procedure, 1973, provides for the maintenance of a wife.⁵³ Neither provision extends to a same-sex partner, and neither creates reciprocal obligations between partners.

⁴⁹ Juvenile Justice (Care and Protection of Children) Act 2015, s 57(2).

⁵⁰ *Supriyo* (n 1) [149(x)] (Bhat J).

⁵¹ Adoption Regulations 2022, reg 5(2).

⁵² Hindu Succession Act 1956, ss 8, 15 and Schedule.

⁵³ Hindu Adoptions and Maintenance Act 1956, s 18; Bharatiya Nagarik Suraksha Sanhita 2023, s 144.

4. **Guardianship and Parenthood:** Because joint adoption is unavailable, only the adopting partner becomes the legal parent of the child.⁵⁴ The other partner has no recognised status as parent or guardian, which affects decisions on the child's education, health and custody.
5. **Social and Employment Benefits:** Family pension under the Central Civil Services (Pension) Rules, 2021 is payable to a widow or widower, meaning a spouse legally wedded to the deceased Government servant, and the Employees' Provident Funds Scheme, 1952 defines "family" by reference to a member's wife or husband.⁵⁵ Same-sex partners fall outside both definitions.

The Supreme Court specifically acknowledged that queer couples can face discriminatory impacts where legal benefits depend upon marital status.⁵⁶ Thus, the debate is not confined to the ceremony of marriage; it concerns the entire legal structure of family and personal law.

XII. THE MINORITY OPINIONS

The minority opinions of Chief Justice D.Y. Chandrachud and Justice Kaul provide an important alternative constitutional perspective, but they dissented only in part. Both judges agreed with the majority that the Constitution does not guarantee a fundamental right to marry and that the Court could not read the Special Marriage Act in a gender-neutral manner.⁵⁷ They dissented on two issues. First, they would have recognised the right of queer couples to enter a civil union, reading "sex" in Article 15 to include sexual orientation.⁵⁸ Second, they would have read down Regulation 5(3) of the Adoption Regulations, 2022 as violating Articles 14 and 15.⁵⁹

The Chief Justice placed greater emphasis on the lived experiences of queer persons and on transformative constitutionalism, which requires constitutional interpretation

⁵⁴ Adoption Regulations 2022, reg 5.

⁵⁵ Central Civil Services (Pension) Rules 2021, r 50(6); Employees' Provident Funds Scheme 1952, para 2(g).

⁵⁶ *Supriyo* (n 1) [149(vi)] (Bhat J).

⁵⁷ *ibid* [340(g)], [340(h)] (Chandrachud CJ).

⁵⁸ *ibid* [340(i)], [340(j)], [340(k)] (Chandrachud CJ).

⁵⁹ *ibid* [340(p)] (Chandrachud CJ).

to address historical discrimination and promote substantive equality.⁶⁰ Justice Kaul concurred with the Chief Justice and described legal recognition of non-heterosexual unions as a step towards marriage equality, while observing that marriage is not an end in itself.⁶¹

However, the minority position did not become the binding law of the Court. The common ground on the Special Marriage Act also shows that the Chief Justice applied judicial restraint where the remedy required rewriting a statute. The difference between the majority and the minority therefore did not lie between transformative constitutionalism and judicial restraint as such. It lay in whether the Constitution itself obliges the State to recognise a union, which the minority affirmed and the majority denied, and whether a court could declare that obligation in the absence of a statute.

XIII. PARLIAMENT VERSUS JUDICIARY

The question ultimately becomes one of institutional responsibility. If Parliament enacts legislation recognising same-sex marriage, such legislation would still have to satisfy constitutional requirements, and the judiciary would retain the power of judicial review. Where Parliament has not enacted such a legal framework, however, the question is whether the judiciary should create one. The Supreme Court answered this question in the negative in *Supriyo*.⁶²

The Court's approach rests on a division of functions in which Parliament creates or modifies the legal framework, the executive implements legislation and policy, and the judiciary interprets legislation and protects constitutional rights. This division does not give Parliament unlimited authority. Any future legislation concerning same-sex marriage, civil unions or gender identity would remain subject to constitutional scrutiny, as the pending challenge to the 2026 amendment shows.⁶³

XIV. PRESENT LEGAL POSITION

⁶⁰ *ibid* [340(b)], [340(o)] (Chandrachud CJ).

⁶¹ *ibid* [33] (Kaul J).

⁶² *ibid* [149(ii)] (Bhat J).

⁶³ *Laxmi Narayan Tripathi* (n 12).

The *Supriyo* judgment remains the principal Supreme Court authority on same-sex marriage in India. The judgment records the Court's conclusion that the constitutional right to choose a partner and form an intimate relationship does not itself confer a right to claim a particular legal status for that relationship.⁶⁴

Consensual same-sex relationships between adults are constitutionally protected, and sexual orientation is protected by the constitutional principles of dignity, equality and privacy.⁶⁵ Individuals have the right to choose their partners. There is, however, no judicially recognised fundamental right to same-sex marriage, and the Supreme Court has declined to rewrite the Special Marriage Act to permit it. Comprehensive legal recognition of same-sex marriage therefore remains primarily a matter for Parliament.

Several developments since October 2023 have shaped this position:

1. **16 April 2024:** The Centre constituted the committee chaired by the Cabinet Secretary to examine issues relating to the queer community.⁶⁶
2. **August and September 2024:** The Department of Financial Services advised on 28 August 2024 that there is no restriction on queer persons opening a joint bank account or nominating a queer partner,⁶⁷ and on 1 September 2024 the Ministry of Social Justice and Empowerment announced further interim measures, including an advisory treating queer partners as part of the same household for ration cards.⁶⁸
3. **9 January 2025:** A bench of Justices Gavai, Surya Kant, Nagarathna, Narasimha and Datta dismissed the review petitions in chambers, finding no error apparent on the record.⁶⁹

⁶⁴ *Supriyo* (n 1) [149(iv)] (Bhat J).

⁶⁵ *Navtej* (n 4) [253(xvii)] (Misra CJ).

⁶⁶ Notification F No 23(45)/2022-Leg-III(LD) (n 41).

⁶⁷ Ministry of Finance (Department of Financial Services), Advisory F No 6/8/2024-Welfare (28 August 2024).

⁶⁸ Ministry of Social Justice and Empowerment, Press Release on Measures for the Queer Community (1 September 2024).

⁶⁹ *Supriyo @ Supriya Chakraborty v Union of India* RP (C) No 1866 of 2023 (SC, 9 January 2025).

4. **22 May 2025:** The Madras High Court held in *M.A. v Superintendent of Police, Vellore* that same-sex couples cannot marry but can form a family, observing that marriage is not the sole mode of founding a family.⁷⁰
5. **30 March 2026:** The Transgender Persons (Protection of Rights) Amendment Act, 2026 received assent, and on 4 May 2026 the Supreme Court issued notice on the challenges to it (see Part III).⁷¹

XV. CRITICAL ANALYSIS

The judgment presents a difficult balance between individual rights and institutional limitations.

From one perspective, judicial restraint is essential to maintaining the separation of powers. Marriage affects numerous areas of law, and creating a new legal framework through judicial directions could result in the judiciary effectively performing a legislative function.

From another perspective, the decision can be criticised because the absence of marriage recognition may continue to place same-sex couples at a disadvantage. If marriage provides important economic, social and legal benefits, exclusion from the institution can have significant consequences for equality.

Comparative experience bears on this choice. In *Obergefell v Hodges*, the United States Supreme Court recognised the right of same-sex couples to marry through adjudication.⁷² In Taiwan, the Constitutional Court held in J.Y. Interpretation No. 748 (2017) that the exclusion of same-sex couples from marriage was unconstitutional and allowed the legislature two years to act, after which the Act for Implementation of J.Y. Interpretation No. 748 came into force on 24 May 2019.⁷³ In Thailand, Parliament amended the Civil and Commercial Code, and the Marriage Equality Act took effect

⁷⁰ *MA v Superintendent of Police, Vellore* 2025 SCC OnLine Mad 2542.

⁷¹ *Laxmi Narayan Tripathi* (n 12).

⁷² *Obergefell v Hodges* 576 US 644 (2015).

⁷³ Judicial Yuan Interpretation No 748 (Taiwan, 24 May 2017); Act for Implementation of JY Interpretation No 748 (Taiwan, in force 24 May 2019).

on 23 January 2025.⁷⁴ The Taiwanese model in particular shows a court identifying the constitutional wrong while the legislature designs the remedy.

This paper takes the view that Parliament is better placed to act. A legislature can design a complete scheme of entitlements, consult affected groups and reconcile personal-law regimes in a way that a court deciding a single dispute cannot. Restraint is legitimate, however, only if the political branches respond within a reasonable time to the discrimination that the Court acknowledged.

Therefore, the constitutional challenge is to ensure that judicial restraint does not become an excuse for discrimination, while ensuring that judicial power does not become a substitute for democratic law-making.

XVI. SUGGESTIONS AND RECOMMENDATIONS

In light of the foregoing analysis, this paper makes the following suggestions:

1. **Civil union statute:** Parliament should enact a civil union law open to adult couples irrespective of sex, sexual orientation or gender identity, with defined rights of succession, maintenance, nomination, medical decision-making and employment benefits. A standalone statute would leave intact the Special Marriage Act's protections for inter-faith and inter-caste couples, which the Chief Justice sought to preserve.⁷⁵
2. **Amendments to the Special Marriage Act, 1954:** If Parliament prefers marriage to a separate status, it should amend the gendered conditions in Section 4 to refer to "parties", while retaining the protections for women that Justice Bhat identified in a separate provision.⁷⁶
3. **Adoption:** The Central Adoption Resource Authority should revisit Regulation 5(3) to permit joint adoption by couples in stable unions, since the majority itself left the question of de facto families open for consideration.⁷⁷

⁷⁴ Civil and Commercial Code Amendment Act (No 24) BE 2567 (Thailand, in force 23 January 2025).

⁷⁵ *Supriyo* (n 1) [340(h)] (Chandrachud CJ).

⁷⁶ Special Marriage Act 1954, s 4; *Supriyo* (n 1) [149(v)] (Bhat J).

⁷⁷ *Supriyo* (n 1) [149(x)] (Bhat J).

4. **Administrative measures:** The Cabinet Secretary committee should publish its findings, and the Union should convert the 2024 advisories into binding rules covering ration cards, bank nominations, next-of-kin status in hospitals, jail visitation and the release of a deceased partner's body.⁷⁸
5. **Penal law:** Parliament should enact a gender-neutral offence of non-consensual sexual acts to close the gap left by the omission of Section 377 from the Bharatiya Nyaya Sanhita, 2023.⁷⁹
6. **Gender recognition:** Pending the Supreme Court's decision on the 2026 amendment, the authorities should apply any medical certification procedure in a manner consistent with the principle of self-identification affirmed in *NALSA*.⁸⁰

XVII. CONCLUSION

Same-sex marriage represents one of the most important contemporary questions concerning the relationship between individual liberty, equality and institutional power. The constitutional journey from *NALSA* to *Puttaswamy* and *Navtej Singh Johar* has established strong protection for LGBTQ+ identity, dignity, privacy and personal autonomy. However, *Supriyo @ Supriya Chakraborty v Union of India* demonstrates that recognition of these constitutional rights does not automatically require the judiciary to create a new institution of marriage.

On the first research question, the paper finds that courts cannot extend the Special Marriage Act to same-sex couples without moving from interpretation into legislation, because the Act's gender-specific scheme and its links to other statutes would require reconstruction rather than interpretation. On the second, all five judges rejected a fundamental right to marry, and the Court divided only on whether the Constitution obliges the State to recognise a civil union.

On the third, the absence of marital status continues to exclude same-sex couples from joint adoption, intestate succession, statutory maintenance and family pension, with

⁷⁸ *ibid* [340(s)] (Chandrachud CJ).

⁷⁹ Bharatiya Nyaya Sanhita 2023, s 358.

⁸⁰ *NALSA* (n 9) [135.2].

only limited relief from the 2024 advisories. On the fourth, the paper concludes that Parliament is better placed to provide recognition, as the experience of Taiwan and Thailand suggests.

The paper therefore recommends a civil union statute, targeted amendments to the Special Marriage Act, a revision of Regulation 5(3), binding administrative rules on the entitlements identified in *Supriyo*, and a gender-neutral penal provision to replace the protection lost with Section 377. The judgment draws an important boundary between protecting constitutional rights and exercising legislative power. While the judiciary must remain vigilant against discrimination, Parliament remains the institution primarily responsible for deciding whether and how Indian marriage law should be extended to same-sex couples.

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