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Family Law Reforms After Marriage (In)Equality

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The marriage equality verdict is a decisive break from the Supreme Court's rights-enhancing jurisprudence in the realm of gender. The new approach could adversely shape how the court approaches constitutional claims against unequal provisions in family law.

A constitution bench of the Supreme Court of India in October delivered a disappointing decision in *Supriyo Chakraborty v. Union of India* (Supriyo), rejecting marriage-equality in Indian law. Of late, the Supreme Court has come under criticism for excessive deference to the executive and legislative branches of the state. Despite this, in the realm of gender and sexuality the court's jurisprudence has been remarkably progressive and rights-enhancing. The marriage equality verdict marks a decisive break from this progressive past.

The apex court's hesitance in intervening in secular marriage law mirrors its longstanding hesitance in intervening in religious personal laws. This stance is broadly reflective of a certain legal viewpoint that locates the family as existing outside the state and sees it as not being constituted by state law and therefore beyond the reach of constitutional justice.

The implications of the marriage equality decision are not limited to LGBTQ+ rights alone, but have wider significance for the larger project of justice and equality within the family in India.

A key to understanding the court's decision is, therefore, to locate it in the broader politics of family law reforms in India.

What the court held

The court unanimously held that the Indian Constitution does not grant a right to marry. The petitioners' assertion that the gendered provisions of India's secular marriage law, the Special Marriage Act (SMA), violate the equality guarantees of the Constitution was also unanimously rejected. The court, however, clarified that transgender persons in heterosexual relationships could marry under existing family laws which had already been the legal position under previous High Court decisions.

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On all other issues, the court split 3-2. While the minority held that same-sex couples had a right to civil union and could jointly adopt, the majority disagreed. In the ultimate analysis, the judgement did not grant any additional rights to India's LGBTQ+ community.

As I, along with other legal commentators, have pointed out, many of the Supreme Court's legal conclusions in the marriage equality case are doctrinally weak and inconsistent with its previous jurisprudence. In prior cases, such as the Supreme Court's 2018 decision decriminalising homosexuality, the court had stressed concepts like the equal constitutional citizenship for LGBTQ+ Indians, constitutional morality, and transformative constitutionalism. All of these remain absent from its marriage equality decision.

A complex web of family law

While most petitions seeking marriage equality had challenged provisions of the secular SMA, a few had also challenged the Hindu Marriage Act. At the very outset of the proceedings, however, the court restricted the scope of the challenge to provisions of the secular SMA and postponed any deliberations on personal law to the future.

This strategy of solely focusing on secular marriage law has a long history in the Indian LGBTQ+ rights movement, where scholars, activists, and lawyers have preferred focusing on secular law to avoid wading into potential conflicts with religious freedom guarantees that personal laws allegedly represent.

> Secular marriage law remains inherently interconnected with other aspects of family law.

I have critiqued this approach in the past since it ignores the intersectional identities of religious LGBT+ Indians and, more practically, ignores the continuing interconnectedness of personal and secular family law in India. Therefore, secular marriage law remains inherently interconnected with other aspects of family law such as parenthood, inheritance, and property which continue to be governed by religious personal laws. Thus, for a marriage between two Hindus under the SMA, Hindu succession law continues to apply. Similarly, questions of parent-child relationships continue to be governed by the provisions of the Hindu Minority and Guardianship Act.

Even though the court had restricted the challenge during the hearings, in its decision it acknowledges the reality of this interconnectedness and uses it to justify its inability to declare multiple laws unconstitutional. This practical difficulty is compounded by gendered provision in Indian family law, which often treat men and women differently, such as for purposes of maintenance and inheritance.

While these practical limitations are understandable, what remains inexplicable is the court's refusal to declare rights which is a constitutional court's primary responsibility. Instead, while acknowledging that LGBTQ+ couples and their families are indeed discriminated against in relation to several marriage linked-material benefits including pensions and gratuity, the court leaves these issues to be taken up by a government-appointed 'high powered committee' in the future.

State and family

While the court unanimously rejected marriage equality, the majority and minority opinions disagreed on a number of points. A key disagreement between them was, however, telling.

The minority opinion, authored by Chief Justice D.Y. Chandrachud, held that even though marriage as an institution predates the state, in modern India it is a consequence of legal recognition by the state. This is evidenced by the multiplicity of statutes that lay down a detailed framework to regulate marriage and the family. The logical consequence of this framing is that family law, like all other state law, is subject to constitutional guarantees of equality, liberty, privacy, and dignity.

> In the majority view, marriage fundamentally remains a social status which derives its authority from outside the state.

The majority opinion by Justice Ravindra Bhat offers a competing view. In Justice Bhat's framing, marriage stems from personal law and customs which predate the modern state and therefore as a social institution marriage lies outside the state. While the state indeed exercises regulatory powers over family law, the enactment of statutes has either been an act of codification of existing personal laws and customs or the state has merely "reformed" these frameworks in furtherance of its constitutional duties, mostly to protect the interests of women and children. Therefore, despite being subject to the state's regulatory powers, in the majority view, marriage fundamentally remains a social status which derives its authority from outside the state.

The implication is that even though the state by law can create social institutions, there cannot be constitutional rights to the creation of such institutions.

These two competing visions of the State's relationship with the family, inform the majority and minority's approaches to applying rights to family law issues. The majority's hesitance echoes the longer history of the controversy about subjecting religious personal law to fundamental rights guaranteed by the Constitution.

The ghost of *Narasu*

The origin of this controversy can be traced to the High Court of Bombay's decision in *State of Bombay v Narasu Appa Mali* (Narasu), where the court had held that personal laws were immune from rights claims under the Indian Constitution.

The case concerned the constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946. The petitioner had argued that the act discriminated based on religion since it only punished polygamy amongst Hindus, even though after the enactment of the Constitution polygamy under all personal laws, including Muslim law, had become illegal as it violated constitutional provisions on equality.

The court rejected this argument by stating that personal laws were immune from constitutional rights claims. While the legislature could enact laws on areas governed by personal law, personal law itself was not simultaneously subject to rights claims. The idea that personal law pre-dated the Indian Constitution and the modern state animated the court's logic.

This feat of judicial logic – originally intended to achieve a progressive outcome in a specific case – has a cast a long shadow on the interaction between constitutional rights and family law.

While Indian family law has seen the introduction of secular alternatives such as the SMA for marriage and the Juvenile Justice Act for adoptions, religious-identity-based personal laws still comprise a large part of family law. The judgement in Narasu has insulated these laws from constitutional scrutiny, even though over time the decision has come to be understood to not apply to statutory personal law. This is only logical.

> While the state indeed has regulatory powers to enact laws about the family, by the majority view, the application of rights to the family are limited.

The judges in *Narasu* had acknowledged that though personal law was not subject to claims of fundamental rights, legislature could indeed legislate on it. But what happens once a legislature does codify personal law? Are not all statues automatically subject to constitutional scrutiny? Is the resulting statutory personal law not a statue after all?

In the marriage equality case, the majority's arguments that marriage and the family as a whole predate the state and its law echoed a similar logic.

While the state indeed has regulatory powers to enact laws about the family, by the majority view, the application of rights to the family are limited. In framing the issue before itself as being one of creating a new social institution, the majority did not consider that the actual issue is about non-discriminatory access to an already existing institution which is a product of state law. This is because the majority viewed marriage and family as not creatures of the state –and therefore correspondingly being subject to rights claims – but as falling outside the state and only subject to the state's regulatory powers.

This view in *Supriyo* resonates with the longer history of the Supreme Court where in hearing constitutional challenges to family laws, the court has often strained statutory interpretation instead of directly deciding on constitutional grounds. This approach is exemplified in landmark family law cases such as *Githa Hariharan v Reserve Bank of India* and *Mary Roy v State of Kerala*, which dealt with equal parental rights and equal rights to inheritance, respectively.

The legal correctness of this view is suspect.

The institution of marriage and the family admittedly precede modern law, but it is also true that the shape and structure of the law today is radically different from what it was in the past.

> At what point do these so-called regulatory changes become so fundamental that they transform the meaning of marriage and accord it a new legal basis?

Take Hindu law, for example. Hindu law today prohibits polygamy, allows for divorce on fault grounds as well as mutual consent and permits inter-caste marriage. In exceptional situations court can even grant divorce on the irretrievable breakdown of marriage. Similarly, the SMA recognises inter-faith marriages, unions, that were simply impossible under existing personal laws. At what point do these so-called regulatory changes become so fundamental that they transform the meaning of marriage and accord it a new legal basis?

That these far-reaching changes are not enough for the state to claim legal authority over family is hard to accept and this is what the minority opinion in *Supriyo* stresses.

Uniform Civil Code

This judicial disagreement about the relationship between the state and the family has interesting ramifications for political debates on family law reform in India. Changes to family law have often been framed as a Hobson's choice between an all-encompassing Uniform Civil Code (UCC) and the persistence of discriminatory religious personal laws. Enshrined as a directive principle of state policy under Article 44 of the Indian Constitution, a UCC was meant to replace religion as the basis for family law. However, this was always

going to be easier said than done with religious personal law continuing to be an important marker of community identity.

It is for this reason that rights claims in personal law, that are often between the individual and the state, came to be framed as instances of broader conflict between majority and minority communities and community and the state. Therefore, the Supreme Court's decision in the *Shah Bano's Case*, which only sought to grant a statutory right to post-separation maintenance to a Muslim woman, provoked backlash from the Muslim community. The controversy led the then Rajiv Gandhi-led government to enact a new law to overturn the decision.

> In arguing for the UCC, the state has claimed greater regulatory power […] The judiciary, however, seems to claim a continuing autonomous domain for religious and customary law.

Over time, demands for a UCC have been framed by political parties like the Bharatiya Janta Party (BJP) as being necessary for eliminating the gender unequal provisions of personal laws of minority communities, especially Muslims. This framing, while stressing problems with Muslim personal law, ignores continuing issues with Hindu personal law. It is also incredibly narrow. By merely viewing all family law through the lens of gender equality, it ignores many other concrete policy issues such as the effectiveness of justice delivery that plagues the family court system in India.

It is this current framing that led both the women's movement in India, which had initially focused on a UCC as part of its advocacy, as well as liberal legal commentators to give up or argue against the need for a UCC. Instead, their focus has been on reforms within personal laws to equalise standards across these laws. Nevertheless, the UCC has repeatedly featured in national and state election manifestos of the BJP. BJP-led governments in Gujarat and Uttarakhand have taken steps to implement such secular family codes in their states.

There is, however, a central contradiction between the framing of UCC and the judicial disagreement about the relationship between the state and the family in *Supriyo*. In arguing for the UCC, the state has claimed greater regulatory power and has sought to completely replace religion or customary law as the basis of family law with state law. The judiciary, however, seems to claim a continuing autonomous domain for religious and customary law. While conceding to the state's regulatory powers, it does not subject such laws to constitutional rights claims.

Ultimately, if a hypothetical UCC were indeed to be enacted, would the court still claim that the law is not subject to constitutional claims?

Towards a new politics of family law reform

It is unclear what direction the politics of family law reforms will take post *Supriyo*. It is, however, possible to predict some key tensions.

First, the disagreement about the state's relationship with the family may shape how the court approaches future constitutional claims against unequal provisions in family law like challenges to the notice provisions of the SMA or the provision on the restitution of conjugal rights.

Second, after the Supreme Court's call for the legislatures to take up issues of marriage equality and LGBTQ+ family law reform, it remains to be seen how demands for LGBTQ+ equality fit within broader debates on family law reforms such as calls for a UCC. Until now, political debates about the UCC have not explicitly considered questions of LGTQ+ inclusion. With the ball on LGBTQ+ inclusion now in the legislative domain, it would be interesting to see if and how political and civil society actors make demands for inclusion.

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Whatever directions these debates take, it would still be important to resolve *Supriyo's* tension about the state's relationship with the family. This would mean finally exorcising the ghost of *Narasu* and viewing the family as a site of justice. This does not mean that community identity claims to retain personal law have no value. But it is the state that should balance community identity with individual rights and not some pre-constitutional notion of customary superiority.

If we are committed to constitutional rights and justice in society we must view the family as being subject to such values well. After all, justice outside the family is not possible without justice within it.

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