POLICY BRIEF

HAPPIER TOGETHER
Law & Policy Brief on LGBTIQ+ Rights in India

SAATHII
Solidarity and Action Against The HIV Infection in India

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Law & Policy Brief on LGBTIQ+ Rights in India

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The Centre for Health Equity, Law and Policy (est. 2019) at the Indian Law Society, Pune, uses the law as a tool for health transformation. C-HELP's work is grounded in the belief that the right to health — rooted in the Constitutional framework and reinforced by international commitments — is central to social justice. Through research, dialogue, and advocacy, it seeks to shape policies and laws that enable equitable health outcomes for all. More info at https://www.c-help.org/ or get in touch at contact@c-help.org.

SAATHII (est. 2002) is a Charitable Trust working towards access to rights and stigma-free access to inclusive healthcare, social protection and legal services for communities marginalized on account of gender, sexuality, HIV and other factors through community support, information dissemination, networking, operational research, advocacy, training and other technical assistance services. More info at saathii.in or via email at info@saathii.org.

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INTRODUCTION

Happy Together: Law and Policy Concerns of LGBTIQ+ Persons and Relationships in India (2021) was published by the Centre for Health Equity, Law and Policy (C-HELP) to promote critical perspectives on access to social and economic rights in the context of claims of 'marriage equality' by the queer community. In 2022, a national consultation organized by LBT groups in Kolkata deliberated these concerns of de-linking claims to social and economic justice from marital status and identified several areas of advocacy, including redressal of conflict with natal family, recognizing chosen families which challenge doctrinal assumptions of the binary of gender, conjugality and monogamy as well as addressing discrimination and violence by state and non-state actors.[1]

As the Supreme Court assumed jurisdiction of the marriage equality cases in 2022, hitherto pending before the Kerala and Delhi High Courts, LBT activists Rituparna Borah (Nazariya: Queer Feminist Resource Group), Chayanika Shah (Hasrat-e-Zindagi Mamuli), Maya Sharma (Vikalp Women's Group), Minakshi Sanyal (Sappho for Equality) and 3 LBT couples intervened before the court by filing *Rituparna Borah & Ors. v. Union of India, Writ Petition (Civil) No. 260/2023* to bring these critical perspectives to the hearings on marriage equality, in the context of seeking registration of marriage by lesbian, gay, bisexual, transgender and intersex persons (LGBTIQ+) under the *Special Marriage Act, 1954* ('SMA'). The removal of the 'notice, domicile and objection' framework under of the SMA[2] was a key issue in the petition, which sought a declaration of invalidity on grounds that LGBTIQ+ couples are similarly situated with inter-caste and inter-faith couples, insofar as they would be obstructed from solemnizing and registering marriages by state and non-state actors who deem such intimacies to be 'against the order of nature', as these individuals exercise their right to love at enormous personal risk by disrupting social control along the lines of gender, caste and religion.[3]

[1] Queer Trans Intimacies and Communities – Envisioning Rights and the Way Forward, National Queer Trans People Meet Report (25-26 June 2022), Sappho for Equality

[2] Sections 5-9, Special Marriage Act, 1954

[3] Navtej Singh Johar & Ors. v Union of India (2018) SCC Online SC 1350, para. 385

After hearings in April-May 2023, the court issued its decision in *Supriyo Chakraborty v Union of India ('Supriyo')*[4] in October 2023, wherein the majority verdict broadly held that while the judiciary lacks the institutional capacity to interpret SMA to facilitate the right to form families by LGBTIQ+ persons, the Parliament and/or State Legislatures are vested with powers to grant such recognition. Further, any discrimination in access to goods, services or facilities for unmarried LGBTIQ+ families would constitute a violation of the guarantee of anti-discrimination in Article 15 of the Indian Constitution.

With this latest edition, '*Happier Together'*, C-HELP and SAATHII hope that the perspectives shared herein continue to foster rights-based interventions by the community and appropriate stakeholders in areas of legislative advocacy, executive action and judicial interpretation.

[4] 2023 SCC Online SC 1348

1. SUPRIYO CHAKRABORTY AND ITS DISCONTENTS

The 5-judge bench in *Supriyo* issued 4 separate opinions, with Ravindra Bhat, J., Hima Kohli, J. and Pamidighantam Narsimha, J.'s opinions constituting the majority verdict against Dhananjay Chandrachud, J. and Sanjay Kishan Kaul, J.'s opinions constituting the minority verdict. All 5 judges unanimously agree on 3 broad aspects relating to marriage, prohibition of discrimination and violence, and the role of the High-Powered Committee (HPC), which form the operational part of the decision, discussed below:

1.1. Unanimity

I. The validity of excluding LGBTIQ+ persons from the SMA and the status of marriage under the Indian Constitution

The court observes that recognition of a fundamental right to marry under the Constitution would require Parliament and State Legislatures to "create an institution", which cannot be accepted. This position ignores that marriage as a social and legal institution is already governed extensively under a body of personal and secular laws relating to rights and obligations of marital parties, child custody, succession to property, divorce, maintenance, etc. The petitioners asked the court to interpret the existing scheme of the SMA in a manner to facilitate solemnization and registration of marriages of LGBT couples, which would ultimately have a cascading effect on the aforesaid areas of law and require legislative, executive and/or judicial measures to safeguard rights of LGBT families.

The petitioners' submissions on the fundamental right to marry were unanimously (mis)characterized as emerging from the statutory framework of marriage laws in India by all 5 judges, blind to extensive jurisprudence on the fundamental right to marry under Articles 19 and 21 in relation to inter-caste and inter-faith couples facing violations from state and non-state actors. In *Supriyo*, the court interprets its rulings in *NALSA* (2014),[5]

[5] National Legal Services Authority (NALSA) v Union of India (2014) 5 SCC 438

Puttaswamy, [6] *Shafin Jahan* (2018)*,* [7] *Shakti Vahini* (2018) [8] and *Navtej* (2018) [9] as concerned only with prohibition of interference in the right to choice of a partner by state or non-state actors, which are interpreted here to state only that there shall be no interference in the right to choice of a partner for LGBTIQ+ persons. The distinction between the right to marry and the right of choice of a partner under Articles 19 and 21 of the Constitution, as the court's interpretation proceeds in *Supriyo*, is flawed: it fails to apply the law to facilitate the right to form families by LGBTIQ+ persons and heightens the vulnerability of inter-caste and inter-faith couples to arbitrary violations by state and non-state actors on account of the abuse of the 'notice, domicile and objection' framework under the SMA. The validity of this framework was kept in abeyance during hearings for consideration by a coordinate bench which is hearing similar petitions by several aggrieved parties. The court's verdict on application of the SMA to transgender and intersex persons in heterosexual relationships means that the validity of this framework can be tested in a future case in the context of gender identity of the parties.

The court's finding that marriage is not central to the values espoused by the Constitution[10] is contestable on, at least, three grounds. Firstly, the court's decision in *Puttaswamy* (2017),[11] where 9 judges unanimously declared a fundamental right to privacy to be constitutionally protected by undertaking a purposive interpretation of the Constitution, amply clarifies that absence of explicit recognition of the right to marry under the Constitution cannot be a valid ground to deny it's significance to the lived realities of people. Secondly, the court's ruling that marriage is not a constitutionally protected right ignores the well-settled expansive interpretation of law afforded to the 'right to life and personal liberty' under Article 21 for nearly half a century,[12] that has laid the foundation for the government's duty to provide access to food security,[13] formal

[6] Justice KS Puttaswamy & Anr. v Union of India (2017) 10 SCC 1
[7] *Shafin Jahan v Asokan KM* 2018 SCC Online SC 343
[8] Shakti Vahini v Union of India & Ors. (2018) 7 SCC 192
[9] Navtej Singh Johar & Ors. v Union of India (2018) SCC Online SC 1350
[10] *Supriyo Chakraborty*, paras. 166, 173, 180-193
[11] Justice KS Puttaswamy & Anr. v Union of India (2017) 10 SCC 1
[12] Francis Coralie Mullin v Administrator, UT of Delhi (1981) 1 SCC 608
[13] People's Union for Civil Liberties v. Union of India, WP (Civil) No. 196/2001

education for children[14] and making available healthcare goods, services and facilities,[15] which are otherwise not explicitly recognized under the Constitution. Thirdly, a purposive reading of child-centric provisions under Article 21A (right to education), Article 24 (prohibition of employment of children in factories etc.), Article 39(e-f) (certain policy principles to be followed by the state), Article 45 (provision of early childhood care and education to children below the age of six years) and Article 51A(k) (fundamental duties) of the Constitution suggests that the government performs its role as the welfare state complementarily with the responsibilities of parents, who are typically a lawfully married couple. Therefore, social and economic justice for the child under the Constitution does not exist in a vacuum, rather, it is inextricably linked to guaranteeing rights of a family that is founded by solemnizing and registering a lawful marriage.

In the context of same-gender couples, the relief with respect to the SMA is rejected by the minority verdict on account of the court lacking institutional capacity to interpret the statute[16] and by the majority verdict on the basis that the exclusion of lesbian and gay couples from the statute is constitutionally valid insofar as the object of the statute is not to discriminate against the affected groups.[17] The minority verdict notes that the petitioners struggled to arrive at a workable interpretation of the SMA that would advance their claims without disrupting the scheme of the statute. Another reason for the court's inability to arrive at a favourable decision was posed by the statute's interplay with personal law on succession to property, which was beyond the scope of the case. However, the minority verdict's reasons for arriving at its conclusion were not an insurmountable threshold to cross, especially since *NALSA's* directions on recognition of transgender persons serves as adequate precedent; in that case the court was not restrained by the possible disruption of the gender binary in the gamut of Indian law to advance transgender persons' fundamental rights.

[14] Unni Krishnan JP v. State of Andhra Pradesh, (1993) 1 SCC 645

[15] In re: Distribution of Essential Supplies and Services during the Pandemic, Suo Moto WP (Civil) No. 3/2021

[16] *Supriyo Chakraborty*, paras. 214-218, 510-511

[17] Supriyo Chakraborty, paras. 403-405

The majority verdict's opinion that the SMA is valid since its legislative intent is not based in a discriminatory motive against sexual orientation and gender identity[18] is questionable. Established legal doctrine postulates that in assessing the constitutional validity of a law or state action, the court must not be confined by the objects and reasons of the said law, but focus its enquiry on the direct and inevitable impact on the fundamental rights of aggrieved parties.[19]

The court recognizes the right of transgender and intersex persons in heterosexual relationships to solemnize and register marriages under existing laws, including personal laws.[20] *Arunkumar*[21] is relied upon for this decision. Consequently, non-binary transgender persons are left in a vacuum on account of the court's inability to interpret the scheme of the SMA without disturbing the gender-specific protections for wives under it. The court then declares that under Articles 245-246 of the Constitution read with Entry 5 of Concurrent List in Schedule VII, Parliament and/or State Legislatures are competent to enact laws to recognize and regulate marriages of lesbian and gay couples.[22]

II. The duty of Central and State Governments to prohibit discrimination and violence against LGBTIQ+ persons.

The court affirms *NALSA* on the point that legal gender recognition must be based on self-determination and medical procedures for the same must be prohibited. As a corollary of this declaration, Central and State government are directed to prohibit all forms of medically abusive procedures against queer, trans and intersex persons.

In recognition of the epidemic of abuse against LGBTIQ+ persons by natal families, local communities and/or police officials, the court directs Central and State Governments to apply the *Shakti Vahini* protocol of adopting preventive, remedial and punitive measures

[18] Supriyo Chakraborty, para. 489-494
[19] Rustom Cavasjee Cooper v Union of India, 1970 (1) SCC 248; Maneka Gandhi v Union of India, (1978) 1 SCC 248
[20] Supriyo Chakraborty, para. 533
[21] Arunkumar & Anr. v Inspector General of Registration & Ors., AIR 2019 Mad 265
[22] *Supriyo Chakraborty*, paras. 448-453, 562-563

at the district-level to safeguard rights of runaway LGBTIQ+ persons in conflict with state and non-state actors.[23]

Further, the court notes that trans persons can seek legal redress against both public and private bodies by approaching High Courts for enforcement of remedies under provisions[24] of the *Transgender Persons (Protection of Rights) Act, 2019*.[25]

As per the settled position of law, the directions for Central and State Governments on prohibition of discrimination and violence in the minority verdict of Dhananjay Chandrachud, J.[26] are legally binding and enforceable insofar as they are not explicitly disagreed by the majority opinion. [27] Chandrachud, J. and Ravindra Bhat, J. issue a complete response to their respective opinions, wherein they explicitly identify the areas of disagreement. In Bhat, J.'s postscript, [28] the majority verdict does not contest the concerned directions of Chandrachud, J. and, Chandrachud, J.'s response to Bhat, J.'s opinion[29] further clarifies that the difference of opinion between the two does not cover his directions on protection from violence and discrimination. Rather, the focus of contention between the majority and minority verdicts is explicitly on the directions to the government to facilitate access to a bouquet of rights to LGBTIQ+ persons on the basis of the right to union.

Consequently, High Courts would be mandated to ensure implementation of the directions on prohibition of discrimination and violence in petitions by aggrieved parties, including establishing hotline numbers to respond to crises, establishing Garima Greh - like safe houses in every district to protect LGBTIQ+ persons from violence and provide mental healthcare services to prevent incidents of suicide within the LGBTIQ+ community as per the mandate of the *Mental Healthcare Act, 2017.*[30]

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[23] Supriyo Chakraborty, para. 564
[24] Sections 3 (anti-discrimination) and 8 (obligations of appropriate governments), *Transgender Persons (Protection of Rights) Act, 2019*
[25] Supriyo Chakraborty, paras. 292-296
[26] Supriyo Chakraborty, paras. 364-366
[27] *M/s. Narinder Batra v Union of India*, ILR (2009) IV Delhi, paras. 123-146
[28] Supriyo Chakraborty, paras. 565-581
[29] Supriyo Chakraborty, paras. 348-363
[30] Section 29, Mental Healthcare Act, 2017

The majority verdict held, in conclusion, that if the Central or State governments enact a law to provide recognition to relationships of lesbian and gay couples, and if such a law violates their rights, the affected group can seek redress under Article 32.[31]

III. The mandate of the HPC

The Committee constituted by the Central government (pursuant to an undertaking by the Solicitor General during hearings) is required to settle the scope of rights and benefits for lesbian, gay and bisexual persons in non-marital relationships. The court directed that the Committee include experts with experience working with queer persons as well as representatives of the queer community. The Committee was to hold wide consultations with queer community members, Central and State government representatives. [32] The court directed the Committee to particularly consider the following:

- Enabling LGBTIQ+ persons in relationships to be treated as part of the same family unit for purposes of ration cards, seek joint bank accounts with the option of nominating the partner in case of death;
- LGBTIQ+ persons in unions must be treated as 'family' in law for purposes of medical practitioners' duty to consult family, next of kin or friends for a terminally ill person who has not executed an advance directive on course of treatment, as per *Common Cause* (2023)[33];
- Jail visitation rights, the right to access body of deceased partner and arranging last rites;
- Legal consequences such as succession rights, maintenance, financial benefits under IT Act, 1961 and rights flowing from employment such as gratuity, family pension and insurance.[34]

The report of the Committee is directed to be implemented administratively by the Central and State governments and Union Territories.[35]

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[31] Supriyo Chakraborty, para. 580
[32] Supriyo Chakraborty, para 365 (s)
[33] Common Cause v Union of India, 2023 SCC Online SC 99
[34] Supriyo Chakraborty, para. 366
[35] Supriyo Chakraborty, para. 367

The majority verdict by Bhat, J. held that the exclusion of LGBTIQ+ persons from laws and regulations conferring benefits on the basis of marital status (including adoption, employment benefits, provident fund, gratuity, family pension, health insurance etc.) amounts to indirect discrimination under Article 15.[36] However, this deprivation must be addressed by Central and State governments to secure the rights of LGBTIQ+ persons in long-term relationships, including by the HPC. As noted, in *Lt. Col. Nitisha* (2021), where the Supreme Court developed the theoretical framework on indirect discrimination under Article 15 of the Constitution, it declared that statistical evidence, witness testimonies and other qualitative methods can be relied upon for establishing the law's exclusionary impact. [37]

Sanjay Kishan Kaul, J.'s minority opinion held that notwithstanding the Committee's mandate, the everyday task of application of law which governs benefits to marital parties must be applied in a manner to extend the benefits on an equal basis to LGBTIQ+ persons in unions to fulfil the constitutional guarantees of Articles 14 and 15.[38] As this view does not conflict with the majority verdict, legislative, executive and/or judicial measures are required to apply existing laws to safeguard rights of LGBTIQ+ persons in long-term relationships, notwithstanding the HPC's efforts in parallel.

Pursuant to *Supriyo*, the Ministry of Law and Justice (MLJ) constituted the HPC by order dated 16 April 2024. The committee comprises the Cabinet Secretary (chairperson), Ministry of Social Justice and Empowerment (MOSJE, convenor), the Ministry of Home Affairs (MHA), the Ministry of Women and Child Development (MWCD), the Ministry of Health and Family Welfare (MOHFW) and MLJ (members). As per the terms of reference in the order, the HPC is tasked with examining and submitting recommendations to the Central and State governments on the following broad issues:

a. Measures to ensure non-discrimination in access to goods, services and social welfare entitlements to LGBTIQ+ persons;
b. Redressal for violence against LGBTIQ+ persons;

[36] Supriyo Chakraborty, para. 564
[37] *Lt. Col. Nitisha v Union of India*, 2021 SCC Online SC 261, paras. 85 ,95
[38] Supriyo Chakraborty, paras. 389-390

c. Prohibition of forced medical interventions against LGBTIQ+ persons and promotion of mental health;
d. Any other issues as deemed necessary.[39]

In July 2024, MOSJE convened a stakeholder consultation. However, the meeting was riddled with several procedural irregularities. For instance, the failure of publication of a notice of stakeholder consultation in the public domain, adopting only English to the exclusion of regional languages (as required by the Eighth Schedule of the Constitution of India) for public notices, closed-door meetings, unreasonably short deadlines for submissions etc. Such procedural irregularities have a substantive impact on people's participation in advancing rights-based approaches in law and policy concerns. As such, courts have routinely intervened and directed concerned departments/ ministries to adopt inclusive processes for all affected stakeholders.[40]

In order to adequately engage with the HPC, LGBTIQ+ communities need to organize, collaborate and hold meetings to deliberate the role of gender and sexual orientation, gender identity and expression and sex characteristics (SOGIESC) in the body of family law, best interests of the child, redressal against gender-based violence, public healthcare measures to promote the highest attainable standard of physical and mental health, etc. A group of individuals, people's collectives and civil society organizations working with LGBTIQ+ communities have issued joint submissions (hereinafter 'joint submissions') to the HPC, to provide substantive inputs as well as remedy the process of stakeholder consultation.[41]

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[39] Order dated 16.04.2024, Legislative Department, Ministry of Law and Justice

[40] Order dated 03.09.2020 by the Hon'ble High Court of Delhi in *Dr. Satendra Singh v Union of India & Ors*., WP (C) No. 5959/2020; Order dated 30.06.2020 by the Hon'ble High Court of Delhi in *Vikrant Tongad v Union of India*, WP (C) No. 3747/2020; Order dated 05.08.2020 by the Hon'ble High Court of Karnataka in *United Conservation Movement Welfare and Charitable Trust v Union of India,* WP (C) No. 8632/2020; *MC Mehta v Union of India, (2019) 12 SCC 720*; Order dated 12.09.2018 by the Hon'ble Supreme Court in *Swasthya Adhikar Manch v Union of India*, WP (C) No. 33/2012; *Cellular Operators Association of India v TRAI*, (2016) 7 SCC 703; *Chandramouleshwar Prasad v Patna High Court, (1969) 3 SCC 5*

[41] *Joint submissions to the Ministry of Social Justice and Empowerment on the Stakeholder Consultation on Supriyo Chakraborty* (2024), SAATHI, C-HELP, Vikalp Women's Group, Hasrat-e-Zindagi Mamuli, Nazariya: Queer Feminist Resource Group and Sappho for Equality. Available at: https://www.c-help.org/post/joint-submissions-re-lgbtqia-issues-to-ministry-of-social-justice-empowerment

1.2. Divergence

Having traversed aspects on which the court agreed, it is important to note where there was a divergence of views. The split between the majority and minority verdicts is on the following two aspects, which consequently do not form legally binding directions.

I. The recognition of a right to union under Part III of the Constitution

The minority verdict issued a direction to the Central and State governments to facilitate access to a bouquet of rights for unmarried LGB couples in long-term relationships that are otherwise available to only lawfully married couples. This direction was based on the understanding that Article 32 of the Constitution authorizes the court to not only perform the 'negative' duty of prevention of violation of fundamental rights guaranteed under Part III, but also imposes a 'positive' duty to issue directions, orders and writs to enjoin the state to enable the exercise of rights.[42]

The constitutional basis of issuance of such directions was based on the petitioner's submissions that *Vishaka* (1997), [43] *NALSA* (2014) and *Common Cause* (2018) [44] provide well-settled precedent on the court's expansive powers under Article 142 of the Constitution to do 'complete justice' by issuing directions to govern circumstances until a suitable legislation is passed.

The majority verdict, however, disagreed on the court's power to issue such directions since the regulation of marriage was deemed a legislative matter, thereby violating the doctrine of separation of powers.[45]

II. The validity of adoption regulations on exclusion of (unmarried) LGB couples

The minority opinion held that unmarried couples, including LGBTIQ+ couples in long-term relationships, can jointly adopt a child, as the Central Adoption Resource Authority (CARA) regulations, which impose a restriction on the basis of marital status, are

[42] *Supriyo Chakraborty*, paras. 61-67, 74-75
[43] Vishaka and Ors. v State of Rajasthan (1997) 6 SCC 241
[44] Common Cause v Union of India (2018) 5 SCC 1
[45] *Supriyo Chakraborty*, paras. 361, 454-474, 526-532, 546-550, 552-560

inconsistent with the authority vested by the *Juvenile Justice (Care and Protection of Children) Act, 2015* ('JJ Act').

The majority verdict disagreed with this analysis and finding – it held that determination of this issue (like the SMA) must be in the domain of the legislature due to the multiplicity of laws governing marital parties (maintenance, custody, etc.) which ensure protection of the best interests of the child.[46]

1.3. Open question

I. The growing recognition of chosen family in Indian law and policy

The *Rituparna Borah* petition made extensive submissions on the legal recognition of chosen families of LGBTIQ+ people, i.e., non-conjugal relationships of un-partnered LGBTIQ+ people, such as friends or peers from the community, which provide mutual care, support and economic security. Although the court did not rule on this issue in *Supriyo*, this means that LGBTIQ+ communities can continue to advocate for recognition of chosen families before legislative, executive and judicial authorities as the issue has not attained finality.

Notably, there is a growing trend of recognition of rights and obligations among non-conjugal relationships (including chosen families of LGBTIQ+ people in particular) under Indian law and policy. Since the 1990s, Indian courts have recognized the right of hijra gharana members to succeed to the property of deceased members, [47] which are constituted beyond the limits of marriage, blood or adoption.

The *Mental Healthcare Act, 2017* (MHCA) recognizes the right of persons with mental illness to appoint 'any person' as the nominated representative in addition to 'relatives', for purposes of giving effect to their advance directive on the course of mental healthcare treatment in the event of their incapacity.[48] During legislative deliberations, this provision met with objections on grounds that codification of such practice in formal law is "alien

[46] Supriyo Chakraborty, paras. 534-545
[47] Illyas v Badshah alias Kamla AIR 1990 MP 334; Sweety v General Public AIR 2016 HP 148
[48] Section 14, Mental Healthcare Act, 2017

to Indian culture", will pose a "danger" to the patient's health, lead to "conflict" between the natal family and the nominated representative over the best interests of the patient, and is liable to "misuse" by the nominated representative in usurping the economic rights of the patient. However, the Department of Health and Family Welfare issued a response to all concerns by stating that the appointment of a nominated representative is limited for purposes of mental health care decision-making and the principle complies with the rights-based framework that seeks to protect the autonomy of persons with mental illness against "perceived rights" of natal families and caregivers.[49]

In 2022 and 2024, the Ministry of Home Affairs issued circulars with respect to the treatment of LGBTQIA+ prisoners, which explicitly recognize the role of chosen families (including friends) in executing legal affairs on their behalf, in matters relating to the preparation of an appeal, applying for bail, and managing their estate or family affairs.[50] In 2024, concerning habeas corpus petitions to secure the life and liberty of LGBTQIA+ people, the Supreme Court declared that courts shall not make roving enquiries into the precise nature of the relationship between the appellant (partner or friend) and the detainee.[51]

In light of growing recognition of chosen families under various areas of Indian law and policy, chosen families of LGBTIQ+ people deserve social and economic rights on equal terms with those of LGBTIQ+ people in conjugal/marital relationships. This must be articulated in the recommendations of the HPC to Central and State governments, especially since the Supreme Court has declared that 'atypical' manifestations of love and families are as real as 'traditional' families; social welfare laws must be responsive to their needs.[52] The body of Canadian, English and American statutes that formally recognize such kinship as equally deserving of benefits as available to a traditional family unit, as reviewed in *Happy Together* (I), provide valuable guidance on legislative advocacy to this effect.

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[49] Report No. 74, Department Related Parliamentary Standing Committee on Health and Family Welfare, pages 8, 52

[50] MHA (2022), Treatment and Care of Transgender Persons in Prisons; MHA (2024), Prison Visitation Rights ofQueer Community (LGBTQ+)

[51] Devu G Nair v State of Kerala & Ors. 2024 INSC 228

[52] Deepika Singh v Central Administrative Tribunal 2022 SCC Online SC 1088

2. PRACTICES OF EXCLUSION AND LAW ON INCLUSION

As the right of transgender and intersex persons in heterosexual relationships to perform lawful marriage is recognised under all existing marriage laws in India, the logical corollary would be that legislative, executive and/or judicial measures shall confer marital benefits on such couples on an equal basis as a cisgender heterosexual married couple at the earliest.

However, while marriage equality for lesbian and gay couples and non-binary transgender persons must await future legislative and/or executive efforts, the majority verdict in *Supriyo* that denial of marital or partnership benefits to unmarried LGBTIQ+ couples in long-term relationships would violate the guarantee of anti-discrimination under Article 15 means that High Courts and the Supreme Court must adjudicate such claims notwithstanding their inability to solemnize and register marriages under Indian law at present.

In the following section, we provide a law and policy update on the areas of social and economic rights reviewed in the initial edition.

2.1. Healthcare

In *Navtej*, the Supreme Court has observed that pursuant to General Comment No. 14 (Right to the Highest Attainable Standard of Health) to the *International Convention on Economic, Social and Cultural Rights* (ICESCR), which must be read jointly with the right to health under Article 21 of the Constitution, access to healthcare goods, services and facilities for LGBTIQ+ people must comply with the AAAQ standard, i.e., they must be *available* (in sufficient quantity), *accessible* (physically, geographically, economically and in a non-discriminatory manner), *acceptable* (respectful of medical ethics) and of *quality* (scientifically and medically appropriate and of good quality).[53]

Subsequently in *Supriyo*, taking into account the structural pathologisation of LGBTI people, the Supreme Court unanimously directed Central and State governments to

[53] *Navtej Singh Johar* (2018), para. 422

adopt measures for the prohibition of medical procedures that seek to alter the sexual orientation or gender identity of individuals and forced corrective surgeries against intersex minors.[54]

While the Supreme Court's direction has not resulted in any concerted efforts by the Central and State governments yet, several state-level developments offer guidance on scaling up the existing law and policy measures needed for a cessation of medical abuses against LGBTI people.

I. Conversion therapy and LGBTIQ+ people

Although the International Classification of Diseases (ICD-10), published by the World Health Organization (WHO), de-classified 'homosexuality' *per se* in 1990, the retention of *'egodystonic sexual orientation'* as a psychological and behavioural disorder until the issuance of the ICD-11 (2018) served as a pretext for mental healthcare practitioners in performing 'conversion therapy' with impunity. A 'diagnosis' of ego-dystonic sexual orientation meant that an individual wished their sexual orientation (whether heterosexual, homosexual or bisexual) were different because of 'associated psychological and behavioral disorders' and may seek 'treatment' to change their sexual orientation.

The facially neutral category misses the woods for the trees. The vast majority of people who report distress associated with their sexual orientation and seek 'treatment' are lesbian, gay or bisexual persons on account of structural factors like cultural norms of compulsory heterosexuality, marriage and child-birth, which are enforced by natal families, religious leaders, traditional healers, communities, mental health practitioners, school authorities and employers.[55] In recognition of widespread infliction of medically abusive practices against lesbian, gay and bisexual persons, the ICD-11 dropped this category,[56] thereby fully de-pathologizing diverse expressions of sexuality.

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[54] *Supriyo Chakraborty* (2023), paras. 364(a)(viii), 564(xi)

[55] *Human rights violations against sexuality minorities in India* (2001), A PUCL-K fact-finding report about Bangalore, page 20

[56] International Classification of Diseases, World Health Organization (Version ICD-11). Available at: https://icd.who.int/browse/2024-01/mms/en

Additionally, the ICD-10's categorization of a range of 'gender identity disorders' as a disorder of adult personality or behaviour, pathologized transgender and gender diverse persons for the incongruence between the sex assigned at birth with their deeply felt, internal and individual experience of gender, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerism.[57]

"Conversion therapy" is an umbrella term for wide-ranging interventions which are premised on the erroneous belief that a person's sexual orientation and gender identity can and should be changed or suppressed when they are at odds with cultural norms of gender roles. Natal families routinely resort to medical practitioners, traditional healers and religious leaders who adopt measures to coerce lesbian, gay, bisexual, transgender and gender diverse persons (minors and adults alike) to alter their sexual orientation and gender identity: talk therapy, cognitive behavioral therapy, aversion therapy, behaviour modification techniques, hypnosis, religious rituals, anti-depressant drugs, anti-psychotic drugs, anti-anxiety drugs, nausea-inducing drugs, psychoactive drugs, hormone injections, starvation, verbal and emotional abuse, physical deprivation, solitary confinement, forced institutionalization, electro-convulsive therapy, withholding medically-necessary treatments for transitioning, physical violence, 'corrective' rape and forced pregnancy.[58]

In the context of Tamil Nadu-based psychiatrists prescribing medicines (stimuli capsule and fluoxet) and referring gay men to psychotherapists for cognitive behavioural therapy for 'M2M behaviour', the Madras High Court observed that prescription of anti-depressants and erectile dysfunction drugs to gay men and referring them to cognitive

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[57] International Classification of Diseases, World Health Organization (Version ICD-10). Available at: https://icd.who.int/browse10/2019/en

[58] Ranade, K. (2009), *Medical response to male same-sex sexuality in western India: An exploration of 'conversion treatments' for homosexuality,* Health and Population Innovation Fellowship Programme Working Paper No. 8, Population Council, pages 16-19; *Harmful treatment: The global reach of so-called conversion therapy* (2019), Outright Action International, page 40; Kottai, S. and Ranganathan, S. (2019), *Fractured narratives of psy disciplines and the LGBTQIA+ movement in India: A critical examination,* Indian Journal of Medical Ethics, pages 5-6; Mhatre, P. et al (2023), *A critical medico-socio-legal analysis of conversion therapy in the Indian subcontinent,* Sexuality and Culture, Springer, pages 4-5

behavioural therapy is essentially conversion therapy under the pretext of offering mental healthcare services.[59]

The court ordered the National Medical Commission (NMC) to take measures to prohibit conversion therapy. [60] In compliance of such orders, the NMC amended the *Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002* to frame conversion therapy as professional misconduct, which provides for disciplinary action against registered medical practitioners performing such procedures.[61] However, the prohibition is pending notification under the later *NMC Registered Medical Practitioner (Professional Conduct) Regulations, 2022*,[62] which will overrule the IMC regulations on coming into effect.

The Kerala High Court's approach on conversion therapy, on the other hand, falls into the trap of resurrecting the diagnosis of 'ego-dystonic sexual orientation'. In response to a petition to seek prohibition of conversion therapy on the news of death by suicide of a 21-year-old bisexual woman, the court directed the state government to frame guidelines to prevent "forced" conversion therapy.[63] As concerning during the court proceedings were the Indian Psychiatric Society (IPS), Kerala's intervention which emphasized that conversion therapy is proven to succeed in providing relief to a minority of lesbian, gay and bisexual individuals who 'choose' to alter their sexual orientation. The IPS-Kerala sought prevention of only 'forced' conversion therapy, which has been critiqued by public health and social sciences experts.[64] In addition to being contrary to the national IPS' unequivocal condemnation of such practices[65] and in flagrant violation

[59] S. Sushma and U. Seema Agarval v Commissioner of Police & Ors., WP No. 7284/2021, order dated 31.08.2021

[60] S. Sushma and U. Seema Agarval v Commissioner of Police & Ors., WP No. 7284/2021, order dated 07.06.2021

[61] Conversion Therapy of LGBTQIA+ Community Group as a Professional Misconduct under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, notification dated 25.08.2022 of Ethics and Medical Registration Board, National Medical Commission

[62] S. Sushma and U. Seema Agarval v Commissioner of Police & Ors., WP No. 7284/2021, order dated 12.06.2023

[63] *Queerala v State of Kerala*, WP (C) No. 21202/2020, order dated 10.12.2021

[64] Kottai SR, Ramprakash R. (2023), Evolving jurisprudence on conversion therapy: Reconsidering ethics in mental health systems, Indian Journal of Medical Ethics, page 3

[65] *Position statement of Indian Psychiatric Society regarding LGBTQ* (2020), IPS/HGS/20-22/0311. Available at: https://indianpsychiatricsociety.org/ips-position-statement-regarding-lgbtq/

of directions in *Navtej* to adopt queer affirmative counselling practices by mental healthcare practitioners,[66] the court's order is in ignorance of the scheme of the MHCA.

The MHCA provides that mental illness shall be determined in accordance with internationally accepted medical standards, including the latest edition of ICD.[67] As ICD-11 has completely de-pathologized diverse expressions of sexuality, the court's order is *per incuriam* on this count alone, i.e., bad in law due to ignorance of relevant facts and law. It is thus, liable to be set aside by an appellate court. The corollary of eradication of ego-dystonic sexual orientation as a diagnosis is that consent does not serve as a defense for a practitioner of conversion therapy, as the law would treat consent to an inherently harmful act as immaterial.

The MHCA further provides that mental illness shall not be determined on the basis of an individual's non-conformity with moral, social, cultural or religious values, which restraints mental healthcare practitioners from allowing their private belief systems to interfere with their practice of medicine, which particularly intersects with LGBTI people's non-conformity with norms of compulsory heterosexuality, marriage and child-birth.[68]

The MHCA also statutorizes the AAAQ framework and explicitly provides that sexual orientation and gender identity (among other grounds) must not act as barriers in access to mental healthcare services.[69]

Additionally, the MHCA prohibits all forms of physical, verbal, emotional and sexual abuse, [70] and must be read jointly with the declaration of conversion therapy as constituting cruel, inhuman and degrading treatment under international human rights law.

[66] Navtej Singh Johar, para. 449
[67] Section 3(1), Mental Healthcare Act, 2017
[68] Section 3(3), Mental Healthcare Act, 2017
[69] Section 18(2), Mental Healthcare Act, 2017
[70] Section 20(k), Mental Healthcare Act, 2017

Finally, the MHCA's prohibition on the recommendation of any medicine or treatment that is not authorised by the applicable field[71] leads to the irrefutable conclusion that mental healthcare practitioners who perform conversion therapy are in violation of the MHCA and aggrieved persons can seek remedies under the law. *Adithya Kiron's* case in 2024,[72] where the Kerala High Court set at liberty a transgender woman who was forcefully committed to a mental healthcare institution by her natal family and subjected to forced medical treatment, emphasizes the imperative to operationalize the framework of MHCA for regulating conduct of mental healthcare establishments.

The absence of any reported orders since 2021 in the case suggests that the Kerala government has not taken action on framing the guidelines to date. When the government undertakes such an exercise, it would be bound by the supervening events of *Navtej* (2018), *Supriyo* (2023), the amended IMC regulations as well as the scheme of MHCA to abandon the 'regulatory' approach of the Kerala High Court and instead seek a prohibition of conversion therapy.

As recommended in *Navtej* and *Supriyo*, public health interventions must focus on affirming the health and lives of LGBTIQ+ people, including by promoting suicide-prevention programmes in accordance with the MHCA.[73]

II. Prohibition of medical intervention as pre-requisite for legal gender recognition

The ICD-11 governs the field on gender incongruence, which states that any hormonal treatment, surgery or other healthcare services to align the body with the experienced gender is at the discretion of the individual. In other words, the legal principle of self-determination of gender identity fully complies with the latest edition of gender-affirming care guidelines; any dilution of this position constitutes a violation of extant law and goes against scientific consensus.

In *NALSA*, two of the key inextricably linked directions issued by the Supreme Court mandated Central and State governments to provide legal recognition to transgender

[71] Section 106, Mental Healthcare Act, 2017
[72] *Adithya Kiron v State*, 2024 SCC OnLine Ker 3522
[73] Section 29, Mental Healthcare Act, 2017

persons as male, female or transgender in accordance with the principle of self-determination of gender identity, and held that any compulsion to undergo medical intervention for such purpose would be "immoral and illegal".[74] Presently, however, there is an irreconcilable conflict between *NALSA* and the *Transgender Persons (Protection of Rights) Act, 2019* (TP Act) with respect to the principle of self-determination of gender for transgender persons who identify in the binary of male or female.

In *Supriyo*, the Supreme Court's unanimous affirmation of *NALSA* on self-determination of gender identity is declared in the context of prohibition of compulsory medical intervention for seeking legal recognition under the TP Act. [75] This leads to the inescapable conclusion that District Magistrates must now grant certificates of identity to transgender persons as male, female or transgender strictly in accordance with self-determination of gender identity.

Although a declaration of law on the validity of the TP Act's framework on legal recognition of gender identity or guidelines on issuance of a certificate of identity under the Act has not been forthcoming from the Supreme Court[76] or the Karnataka High Court[77] in cases pending before them, District Magistrates across India are now bound by *Supriyo* under Article 141 (law declared by Supreme Court to be binding on all courts) read with Article 144 (civil and judicial authorities to act in aid of the Supreme Court) of the Constitution. They must grant a certificate of identity to transgender persons identifying as male or female solely based on a self-declaration in an affidavit. The District Magistrate's continued insistence to provide evidence of hormonal therapy or surgical intervention for issuance of a certificate of identity for transgender persons who identify in the binary of male or female would constitute a contempt of the court's order in *Supriyo* and particularly violate the settled law on prohibition of forced medical procedures for granting legal recognition to gender identity.

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[74] *NALSA* (2014), paras. 135.2 and 135.5

[75] *Supriyo Chakraborty* (2023), paras. 364(a)(viii) and 564(xi-xii)

[76] Rachana Mudraboyina v Union of India, WP (C) No. 281/2020; Swati Bidhan Baruah v Union of India, WP (C) No. 51/2020; Grace Banu & Ors. v Union of India, WP (C) No. 406/2020

[77] Ondede v State of Karnataka, WP (C) No. 11670/2020

III. Forced corrective surgeries and intersex people

'Intersex' is an umbrella term used to describe people who are born with sex characteristics (including sex chromosomes, gonads, internal reproductive organs and external genitalia) that do not align with stereotypical definitions of male or female bodies. This understanding of intersex persons is reflected under section 2(i) of the TP Act, since the statute recognizes a limited overlap of medico-legal concerns between the transgender and intersex communities.

Root causes of violations against intersex persons are harmful stereotypes, stigma, taboos and pathologisation of bodily diversity.[78] The major concern for intersex persons is genital mutilation or forced 'corrective' surgeries, often performed at infancy or early childhood when their intersex variations become apparent. These procedures are typically cosmetic and rarely life-saving measures, since intersex individuals usually lead completely healthy lives.[79]

In 2019, the Madras High Court, in recognition of the WHO recommendation, declared that 'corrective surgeries' for intersex children must be deferred until they attain the age of majority and are capable of deciding for themselves. The court also placed reliance on Article 39(f) of the Constitution, which provides that state policy shall ensure that all children are given opportunities to grow in conditions of freedom and dignity for healthy development. In this context, the court ordered the Tamil Nadu government to prohibit forced medical interventions on intersex children.[80] In response, the state's Health and Family Welfare Department issued a government order to implement the court's directive.[81]

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[78] Viktor Madrigal Borloz, The Law on Inclusion (2021), Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/47/27, para. 49

[79] Kothari, J. et al (2020), *Beyond the Binary: Advocating Legal Recognition for Intersex Persons in India*, Centre for Law and Policy Research and Solidarity Foundation, pages 16-19

[80] Arunkumar (2019)

[81] G.O. (Ms.) No. 355 (2019), Health and Family Welfare (M-2) Department. Available at: https://translaw.clpr.org.in/legislation/tamil-nadu-government-order-banning-surgeries-on-intersex-infants-2019/

In 2023, in a case where parents of an intersex child approached the court to seek directions to medical practitioners to conduct a 'corrective surgery', the Kerala High Court refused to pass such an order and held that forced medical interventions violate fundamental rights of intersex children, including the guarantees of equality under Article 14, freedom of expression of identity under Article 19 and the right to health, dignity and privacy under Article 21. The court also relied on General Comment No. 20 of the Convention on Rights of the Child (CRC) to hold that India is mandated to apply such binding international legal standards that forbid discriminatory medical treatment against intersex children. The court ordered the state to constitute a Multi-Disciplinary Committee consisting of a pediatric endocrinologist, surgeon, and psychologist to examine whether the child needs any life-saving medical intervention. The court also directed the government to issue an order to regulate the practice of 'corrective surgeries' of minors only in order to save the life of the child.[82]

In 2022, the Delhi High Court directed the NCT of Delhi to implement the order of the Delhi Commission for Protection of Child Rights (DCPCR) to prohibit forced medical interventions on intersex children and regulate the provision of medically necessary procedures for intersex adults.[83] However, the government has not taken action to date. In 2024, the Supreme Court issued notice in a public interest litigation (PIL) on safeguarding the rights of intersex children who are vulnerable to forced corrective procedures and sought a reply from the Central government, which is awaited.[84]

According to General Comment No. 22 (2016) of the ICESCR, a violation of the obligation to 'protect' occurs when governments fail to take effective steps to prevent third parties from undermining the right to sexual and reproductive health, which includes adopting measures to prevent medically unnecessary, irreversible and involuntary surgery and treatment on intersex infants or children. [85] To effectively address the root causes of violations against intersex persons, Central and State governments must tackle harmful social and cultural gender norms and stereotypes,

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[82] *X v Director of Health Services*, WP (C) No. 19610/2022, order dated 07.08.2023

[83] Srishti Madurai Educational Research Foundation v Govt. of NCT of Delhi, WP (C) No. 8967/2021, order dated 27.07.2022

[84] *Gopi Shankar M v Union of India*, WP (C) No. 241/2024, order dated 08.04.2024

[85] General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the ICESCR), E/C.12/GC/22, para. 59

train healthcare professionals on the range of sexual and related biological and physical diversity and the human rights of intersex persons.[86]

IV. HIV/AIDS and 'High-Risk Groups'

A review of reported cases under the *HIV/AIDS (Prevention and Control) Act, 2017* (HIV Act) in relation to general implementation concerns, anti-discrimination measures, and access to HIV/AIDS-related care, support and treatment offers insights on gaps in implementation by the government, compliance by the private sector and agitation of concerns by people living with HIV (PLHIV).[87]

The appointment of a complaints officer at the institutional level (public and private sectors) and of an ombudsman at the state level for providing forums of legal redress under the law are followed only partially by the government as well as the private sector.

Courts have adjudicated on concerns related to the procurement of adequate supply of antiretroviral therapy (ART) to mitigate stockouts,[88] facilitating access to third-line ART during the lockdown measures of the COVID-19 pandemic[89] and providing HIV/AIDS related care, support and treatment to persons who are dependent on drugs inside prisons,[90] among others. A landmark ruling by the Allahabad High Court declared the automatic lower medical categorization of PLHIV personnel in the armed forces as violating the law.[91] While several orders advanced the rights of PLHIV, often presiding judges, advocates and parties appear to be unaware of the HIV Act and its provisions, as is apparent from the rare invocation of the law in the reviewed cases. For instance, in the case of persons who are dependent on drugs inside prisons, the Tripura High Court failed to take cognizance of section 22 of the HIV Act, which guarantees the provision of harm reduction services for high-risk groups even in custodial settings.

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[86] Human Rights Violations Against Intersex People: A Background Note, Office of the High Commissioner of Human Rights, page 53

[87] Sanap, S. (2024), *An Assessment of Five Years of the HIV/AIDS Act: Part 1*, Leaflet. Available at: https://theleaflet.in/five-years-of-the-hiv-aids-act-2017-an-assessment-part-1/

[88] Network of People Living with HIV/AIDS & Ors. v Union of India, WP (C) No. 686/2022

[89] *ABC v Project Director*, WP (C) No. 5692/2020, orders dated 27.05.2020, 17.06.2020 and 01.07.2020

[90] *Suo Moto v State of Tripura*, WP (PIL) No. 21/2021, orders dated 18.10.2021 and 19.11.2021:

[91] *XYZ v Union of India*, 2023 AHC LKO 44488 DB

The Supreme Court is currently adjudicating a petition which challenging the blanket exclusion of transgender persons, men who have sex with men, female sex workers and persons who use drugs from eligibility to donate blood as per the *Guidelines on Blood Donor Selection and Blood Donor Referral, 2017* issued by the National Transfusion Council (NBTC) and the National AIDS Control Organization (NACO). [92] The policy decision is contended to be arbitrary, unscientific and discriminatory insofar as it results in denial of equality of opportunity to participate in society and deprives them of the right to life with dignity. The guidelines revealed their real and imminent consequences amidst the COVID-19 pandemic: despite increased demand for blood and plasma for patient care, the affected groups were deprived of the opportunity to donate such life-saving resources to family and friends during the public healthcare emergency.

In response to the petition, the Central government contended that the exclusion is evidence-based as the said class of persons are at high-risk of HIV and pleaded non-availability of diagnostic test kits that can screen blood samples during the window period and avert infection.

The reported orders in the case thus far suggest that the petitioner has not relied on the HIV Act as a ground to challenge the concerned guidelines, which should have been the case, given that the Act empowers the Union government to frame guidelines for compliance by testing centres, blood banks, diagnostic centres, etc., which was performed by the NACO and the NBTC in issuing the concerned guidelines.[93]

As such guidelines are framed under the mandate of the law, it follows that they would need to comply with its substantive provisions. The HIV Act ensures anti-discrimination for persons living with HIV, not for persons at high risk of HIV.[94] However, the definition of discrimination includes the concept of 'indirect discrimination'.[95] In *Lt. Col. Nitisha*, the Supreme Court declared that facially neutral policies, criteria or practices ('PCP') — in this case, the concerned guidelines' exclusion of persons who are at high risk of HIV—

[92]Thangjam Santa Singh @ Santa Khurai v Union of India and Ors., WP(C) No. 275/2021
[93] Section 7 read with section 46 of the HIV Act.
[94] See the definition of 'protected persons' in section 2(s) read with the provision on anti-discrimination in Section 3 of the HIV Act.
[95] Section 2(d), HIV Act

that disproportionately and adversely impact a class of persons (the identified high-risk group) would constitute a violation of Article 15. The court added that such PCPs are justifiable only if the government can demonstrate that the impugned act is the least restrictive measure and is directed towards accomplishing a legitimate aim.

A material consideration here is the Central government's response on the non-availability of diagnostic kits that can screen blood samples from individuals belonging to a high-risk group during the window period. The framework of the right to health as developed under Article 21 read with India's obligations as elaborated in General Comment No. 14 of the ICESCR provides that the *inability* of a government to provide healthcare goods, services and facilities must be differentiated from its *unwillingness* to provide the same. In the case of the Central government's inability to procure the concerned diagnostic kits, the government has a duty to provide an explanation of its budgetary constraints in procuring them. However, in case the Central government is unwilling to procure the same, such action falls foul of Constitutional and international obligations, requiring the court to step in and mould relief accordingly.

These aspects beg the question whether the impugned NACO-NBTC guidelines are consistent with the prohibition on indirect discrimination under the HIV/AIDS Act read with Article 15 insofar as they exclude gay men, transgender persons and sex workers for blood donation on the facially neutral ground of high risk of HIV.[96]

Legal aid experience also reveals the challenges faced by queer people in relation to HIV status. In two separate cases of employment discrimination due to HIV status within private establishments in Maharashtra, fundamental aspects of the law, i.e., consent, confidentiality and non-discrimination came into question.[97]

Employers continue to mandate a pre-employment medical check-up as a condition of joining service, often conducted through an externally contracted medical consultant. The trajectory of the cases is similar. At first, the medical consultants obtain a blood

[96] Sanap, S. (2024), *An Assessment of Five Years of the HIV/AIDS Act: Part 2*, Leaflet. Available at: https://theleaflet.in/five-years-of-the-hiv-aids-act-2017-an-assessment-part-2/

[97] The Centre for Health Equity, Law & Policy provided legal advice in these two cases, further information of which is available at https://www.c-help.org/hiv-workplace-discrimination.

sample and perform an HIV test without seeking informed consent for from the candidates. Subsequently, on testing HIV-positive, the medical consultants issue a report of the diagnosis to the employer, again without seeking informed consent of the candidate to do so. Lastly, once the employers learn of the candidate's diagnosis, they either coerce the candidate to voluntarily resign, demote them to less public-facing positions or harass them with demonstrably false accusations of low performance in order to facially justify termination of services.

When the aggrieved employees submitted complaints/representations detailing violations under the HIV/AIDS Act governing employees living with HIV at the workplace, one employee received compensatory and punitive damages whereas the other employee's demotion was reversed to restore him to a position of seniority.[98]

The flagrant violations by the private sector, along with the gaps identified on review of the reported court orders, suggest that implementing authorities, judges, lawyers, the private sector and communities need legal awareness training on the mandate of the HIV/AIDS Act, and in particular, on the following aspects:

1. Organisational policies and service regulations that authorise pre-employment HIV tests must be amended to discard this practice as they are explicitly forbidden under section 3(l) of the Act;
2. As HIV prevalence is about 6–13 times higher among gay men, *hijra* or transgender persons and sex workers compared to the national adult prevalence, [99] pre-employment HIV tests will disproportionately rob vulnerable communities of equal employment opportunities and perpetuate social and economic inequalities. Such acts would constitute indirect discrimination for which the aggrieved person can claim damages, as Article 15 is horizontally applicable to the private sector.
3. Absence from work for HIV-related health complications must not be treated as abandoning duty. The private sector has a legally binding responsibility to offer reasonable accommodation to persons living with HIV with special needs as per section 3(a) of the Act;
4. The routine practice of nominated medical consultants disclosing the HIV status of candidates directly to the employer without seeking informed consent in writing results in a clear violation of doctor-patient confidentiality under section 8(1) of the

[98] The records of the complaints/representations are on file with the authors.
[99] Sankalak: Status of National AIDS Response (2021), NACO,

Act. The mandate of the medical consultant is limited to assess the functional fitness of the candidate, irrespective of HIV status;

5. Health checks conducted as per the *Food Safety and Standards Act, 2006* and its regulations in the hospitality sector must be conducted in a manner that is consistent with the Act, i.e., principles of consent, confidentiality and non-discrimination must govern existing laws and practices;
6. The Act covers the private sector.[100] Hence, private sector workplaces are legally bound to appoint complaints officers to provide institutional grievance redress;
7. Although the government's obligations with respect to access to treatment, diagnostic facilities, etc. are qualified on the basis of budgetary constraints as provided under section 14(1), the government is duty-bound to provide a justification in case of an inability to provide such goods, services and facilities before the court, as per its commitments under the ICESCR;
8. Harm reduction services for sex workers, drugs users, transgender persons and gay men are an integral component of the right to health under Article 21. Sexuality or legal status must not restrict access to such preventive services.

V. An LGBTI-responsive healthcare ecosystem

Trans-affirming healthcare services

In order to operationalize the TP Act's framework on healthcare-related obligations, Central and State governments are required to particularly focus on, *inter alia*:

- Ensuring availability of healthcare goods, services and facilities in relation to gender-affirming care,
- Publication of a manual on gender-affirming care based on the latest edition of the World Professional Association for Transgender Health (WPATH Vers. 8) to be adhered by healthcare professionals,
- Adequate training of specialist healthcare professionals,
- Provide health insurance,
- Review existing medical curriculum to respond to healthcare needs of transgender persons, and

[100] Section 2(f), *HIV/AIDS Act*

- Research for healthcare professionals to address trans-specific health concerns. [101]

The Guwahati High Court is currently adjudicating a petition that seeks implementation of the healthcare obligations under the TP Act in Assam, including framing WPATH-like guidelines.[102]

The Insurance Regulatory and Development Authority of India (IRDAI) must actively monitor the compliance of its circular to public and private health insurance providers to cover gender-affirming care as per the law [103] and ensure its implementation.[104] In addition, the IRDAI must simultaneously strive towards coverage for gender-affirming care in public group insurance schemes like the Employee State Insurance Scheme (ESIS), and Ayushman Bharat - Pradhan Mantri Jan Aarogya Yojana (AB-PMJAY), since the voluntary market (whether public or private) can be exclusionary by imposing barriers like waiting periods for coverage, higher premiums and non-availability of coverage for specialized treatments on account of the 'pre-existing condition' of gender dysphoria.

These crucial aspects of realizing the fundamental right to health are justiciable as per Article 21 of the Constitution read with India's binding commitments under ICESCR.[105]

Revision of medical curriculum for gender-responsiveness

A review of the status of sexual and reproductive health services in India reveals that most public and private healthcare services by design respond to healthcare needs only of married, heterosexual women and are therefore exclusionary of concerns of single women and LGBTIQ+ persons in particular. The Rashtriya Kishore Swasthya Karyakram

[101] Section 15 of the TP Act read with Rule 10 and Annexure II of the *Transgender Persons (Protection of Rights) Rules, 2020*

[102] Swati Bidhan Baruah v State of Assam, PIL No. 74/2018

[103] IRDAI (2022), Disclosure of underwriting philosophy of offering health insurance coverage to transgender persons

[104] Section 15(g), Transgender Persons (Protection of Rights) Act, 2019

[105] The Judiciary-Executive Interface in Areas of Health, RTH-UHC Working Paper 2 (2023), Centre for Health Equity, Law and Policy, Indian Law Society

(RKSK) and Adolescent Reproductive and Sexual Health (ARSH) programmes under the mandate of the National Health Mission (NHM) also lack in providing safe and equal access to sexual and reproductive health services for LGBTIQ+ adolescents. The medico-legal guidelines by the MOHFW, [106] which purportedly apply to LGBTIQ+ survivors, are largely not enforced across the country.[107]

Against this backdrop, under the directions of the Madras High Court and Kerala High Court for revision of curriculum imparted in higher medical education institutions for responding to healthcare needs of LGBTIQ+ persons, [108] the NMC issued a revised curriculum in 2024. However, the initial version was in clear violation and contempt of orders of the courts insofar as it maintained the status quo on several practices from the earlier version of 2019, all of which risk violating the bodily integrity, health and dignity of women and LGBTIQ+ persons. These instances included:

a. Prescribing the 'two finger test' as a forensic practice for determination of 'virginity' of women who are survivors of gender-based violence;
b. Failure to distinguish between consensual and non-consensual sex between adult LGBTIQ+ persons, and use of the term 'unnatural' sex;
c. Treating the diverse expression of sexual orientation and identities of LGB persons as sexual offences;
d. References to transgender persons as having 'gender identity disorder.'

SAATHII, C-HELP, Vikalp Women's Group, Hasrat-e-Zindagi Mamuli, Nazariya: Queer Feminist Resource Group and Sappho for Equality, with other members of the Vistaara Coalition, issued a representation to the concerned authorities, which critiqued this measure on the grounds detailed below.[109]

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[106] Guidelines & Protocols for Medico-legal Care for Survivors/Victims of Sexual Violence (2014), Ministry of Health and Family Welfare, Government of India

[107] Country Assessment of Human Rights in context of Sexual and Reproductive Health Rights, A study undertaken for National Human Rights Commission (2018), SAMA Resource Group for Women and Health & Partners for Law in Development

[108] S. Sushma v Commissioner of Police, 2021 SCC OnLine Mad 2096; Queerythm v National Medical Commission, 2021 SCC OnLine Ker 8590

[109] The representation is on file with authors.

The Supreme Court has repeatedly directed the government to ensure that the practice of *per vaginum* examination ('two-finger test') is effectively eradicated. The court has declared that such illegal, unscientific and discriminatory practices further victimize and re-traumatize women who are survivors of gender-based violence, thus violating the guarantee of freedom from sex-based discrimination, and constituting torture or cruel, inhuman or degrading treatment or punishment against women as per Articles 14, 15 and 21 of the Constitution and international human rights law.[110] The court has directed the Central and State governments to ensure that the *Medico-legal Care for Survivors/Victims of Sexual Violence (2014)* formulated by the MOHFW are circulated to all government and private hospitals; workshops are conducted for health providers to communicate the appropriate procedure to be adopted while examining survivors of sexual assault and rape; and curricula are reviewed in medical schools to ensure that the impugned practice is completely prohibited.

The prescription of the 'two-finger test' and pathologisation of LGBTIQ+ persons in the initial version of the curriculum blatantly contravenes the doctrine of non-retrogression of rights of women, trans-masculine persons and other LGBTIQ+ persons,[111] insofar as the law postulates that there must not be any regression of rights and prevents the government from adopting measures that lead to retrogression on the enjoyment of rights.

Although the NMC withdrew the initial version and issued a further revised curriculum, the psychiatry section of the latest edition continues the pathologisation of transgender persons with the outmoded diagnosis of "gender identity disorder". ICD-11 has completely de-pathologized transgender persons by eliminating the usage of the stigmatizing diagnostic category of 'gender identity disorder'. Instead, it promotes the usage of 'gender incongruence' as a diagnostic category for the limited purpose of facilitating access to gender-affirming care for those transgender persons who may freely wish to undergo such interventions. As Section 3 of the MHCA has domesticated ICD-11 for application in India, the imperative to eliminate the stigmatizing diagnostic category of 'gender identity disorder' is indisputable. Yet, the healthcare priorities of

[110] State of Jharkhand v Shailendra Kumar Rai (2022) 14 SCC 299; Lillu v State of Haryana (2013) 14 SCC 643

[111] *Navtej Singh Johar*, paras. 201-202

intersex persons are conspicuously absent in sections of the curriculum on puberty or paediatrics, a remaining concern, given the well-documented harmful practices of forced corrective procedures against intersex infants and adolescents.

Notably, 'gender'-based approaches have come to mean and include training with respect to SOGIESC concerns under international human rights law.[112] As the latest edition of the medical curriculum promotes a discussion on "gender and sexuality-based identities and rights", a consistent SOGIESC-inclusive approach across this edition would be compatible with both constitutional and public health goals.

Auxiliary nurse midwives (ANMs), Accredited Social Health Activists (ASHA workers) and Anganwadi workers (AWWs) comprise the very frontline of healthcare workers in India and are tasked with crucial outreach efforts for awareness and delivery of essential healthcare services. The Madras High Court's direction to the Ministry of Women and Child Development and the MOHFW for training such healthcare workers to respond to the needs of transgender persons[113] along with the obligation of Central and State governments to promote information, education and communication programmes on HIV/AIDS in a manner that is age-appropriate, gender-sensitive and non-discriminatory[114] provide viable routes to advance comprehensive sexuality education[115] for LGBTIQ+ adolescents.

2.2. Social Security

Happy Together (2021) addressed the imperative of establishing a right to social security, as prioritizing marriage as the basis for claiming economic security diverts attention away from the government's duty to ensure a social order for the promotion of social, economic and political justice for all, including LGBTIQ+ persons.

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[112] Viktor Madrigal Borloz, Practices of Exclusion (2021), Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/76/152

[113] *Sushma and Seema v Commissioner of Police*, WP No. 7284 of 2021, order dated 07.06.2021

[114] Section 17, HIV/AIDS Act

[115] *A Compendium on Comprehensive Sexuality Education* (2023), UNSR on the Right to Health, UNIE on Sexual Orientation and Gender Identity, UNSR on the Right to Education and the Working Group on Discrimination Against Women and Girls

Part IV (Directive Principles of State Policy) of the Constitution obliges the government to adopt measures, including reducing income inequality, equal access to public goods, services and facilities, promotion of public health, legal aid, unemployment insurance, public assistance on account of age, illness, disability or other grounds and promoting social security for 'weaker sections' of society, among others.

While traditionally understood to be non-justiciable, a now well-settled position of law as declared by the Supreme Court states that a purposive interpretation of the fundamental rights guaranteed in Part III of the Constitution with Part IV oblige the government to adopt measures to realize the aforesaid goals through legislative, executive and/or judicial interventions.[116]

The implementation of social security policies is pertinent for LGBTIQ+ persons who do not choose marriage or partnership as the site of access to resources. In addition to single, divorced and widowed persons, LGBTIQ+ persons who are in conflict with natal families must receive support from the government to rebuild their lives free from violence.[117]

A notable development on social security for LGBTIQ+ persons is presented in the *Tamil Nadu Sexual and Gender Minorities Policy*,[118] which includes measures on reservations and equal opportunities in education and employment, access to healthcare, stakeholder sensitization, housing and short-stay facilities and food security, among others. The policy serves as a valuable guidance for other State governments to adopt social security measures for LGBTIQ+ persons.

[116] State of Kerala v NM Thomas (1976) 2 SCC 310

[117] Our Own Hurt Us The Most: Centering Familial Violence in the Lives of Queer & Trans Persons in the Marriage Equality Debates (2023), National Network of LBI Women and Trans Persons & People's Union for Civil Liberties

[118] The components of the draft policy are discussed in *Sushma and Seema v Commissioner of Police*, WP No. 7284/2021, order dated 29.01.2024

2.3. Property Rights

The manner of distribution of a person's property on death occurs through two routes in law:

- Testamentary succession, i.e., by a will, which is primarily governed by the *Indian Succession Act, 1925* ('ISA') for all communities (except Muslims);
- Intestate succession (in the absence of a will) governed by a mix of community-specific laws, customs as well as the ISA.

The *Hindu Succession Act, 1956* applies to intestate succession of property for Hindus. Parsis and Muslims are governed by customary law; the *Muslim Personal Law (Shariat) Application Act, 1937* codifies the same for the Muslim community. While the ISA uniformly prioritizes the legal heir's nearness in relation to the deceased person (by marriage, birth or adoption), the community-specific laws adopt different schemes of succession for male and female heirs (by marriage, birth or adoption).[119]

The interplay of the regulatory provisions of the SMA on marriage with the scheme of personal and secular laws on succession to property was a crucial determinant in the court's declaration in *Supriyo* that it lacked institutional capacity to provide an LGBTI-responsive interpretation to solemnize and register their marriages. The court reasoned that doing so would disrupt the gender-specific provisions under the respective laws on succession to property. [120] In this context, recommendations by LBT collectives for introducing gender equality and recognition of the right to form diverse families by LGBTIQ+ persons in succession laws in order to remedy exclusion[121] are suitable for legislative advocacy.

[119] *Making Indian Laws LGBT+ Inclusive* (2019), Vidhi Centre for Law and Policy
[120] *Supriyo Chakraborty,* paras. 197-198, 420-421, 425
[121] Chayanika Shah et al, Response to the Law Commission on the Uniform Civil Code (2018). Available at: Response to Law Commission of India on Uniform Civil Code | orinam

2.4. Housing Rights

State-level laws which codify direct and indirect discrimination against LGBTIQ+ persons in renting and ownership of housing, thereby rendering them vulnerable to inadequacy of tenure and/or forced evictions, [122] must be assessed in light of the Supreme Court's declaration on Article 15 and the guarantee of anti-discrimination for LGBTIQ+ couples in access to publicly available goods, services and facilities in *Supriyo*. The import of the court's declaration is that lack of solemnization and/or registration of marriage shall not expose LGBTIQ+ couples to unfair treatment or denial of the right to reside in, rent and purchase any residential property.

In this context, transfer of property regulations as discussed in *Happy Together* (I), implicate the concern of LGBTIQ+ couples paying higher stamp duty compared to heterosexual couples solely on account of lack of marital status. If an LGBTIQ+ person transferred a residential property to their partner by a gift deed, they are liable to pay 5% stamp duty on the market value of the property, compared to a stamp duty of INR 200 for the same transaction for a heterosexual couple, solely on account of conferment of marital status on the latter.[123] The maintenance of this status quo in transfer of property laws imposes an unfair, unjust and unreasonable financial burden on LGBTIQ+ persons and families. The aforesaid declaration on Article 15 in *Supriyo* provides the opportunity to de-link marital status from seeking social and economic benefits for LGBTIQ+ families, as the court has indicated that denial of benefits on equal basis for unmarried LGBTIQ+ couples vis-à-vis a lawfully married heterosexual couple would be discriminatory.

On the other hand, state-level laws which require codification of morality clauses in tenancy agreements, including the authority to evict tenants who engage in sex work,[124]

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[122] Living with Dignity: Sexual Orientation and Gender Identity-based Human Rights Violations in Housing, Work and Public Spaces in India (2019), International Commission of Jurists, pg. 59. See also: Tripura Building (Lease and Rent Control) Act, 1975 and Arunachal Pradesh Building (Lease, Rent and Eviction) Control Act, 2014

[123] Article 34 of Schedule I, *Maharashtra Stamp Act, 1958*

[124] Section 2(13) read with Section 12(2), Schedule 2, Item 11(d) and Schedule 4, Item 10 of *Chhattisgarh Rent Control Act, 2011*; Section 22(2)(d) of the *Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968*

merit examination in light of the Supreme Court's declaration that adult persons who engage in sex work with consent are not liable for any civil or criminal liability as per law, including the *Immoral Traffic (Prevention) Act, 1956.*[125]

Supriyo's finding that transgender persons can seek legal redress against public and private authorities for anti-discrimination under the TP Act by approaching High Courts is pertinent in the context of the statute's guarantee of equality of opportunity in access to any goods, accommodation, service, facility, benefit, privilege that is available for the use of the general public as well as the specific guarantee of non-discrimination in relation to rent or purchase any property under the Act.[126]

The joint submissions made to the HPC in July-August 2024 recommended a series of measures to realize the right to adequate housing for LGBTIQ+ persons, including the availability of safe homes for LGBTIQ+ persons in conflict with natal families as well as assisted living facilities for ageing LGBTIQ+ people.[127]

2.5. Guardianship, Adoption and Assisted Reproductive Technology

As discussed earlier, *Supriyo* held that the right of unmarried LGBTIQ+ families to adopt a child must be determined by legislative means due to the multiplicity of laws governing the relationship between the parents and the child (maintenance, guardianship, succession to property etc.), which ensure protection of the best interests of the child.

Therefore, the *Hindu Adoption and Maintenance Act, 1956* ('HAMA') which governs Hindu families and the *Adoption Regulations, 2022* issued under the *Juvenile Justice (Care and Protection) Act, 2015* ('JJ Act') and implemented by the Central Adoption Resource Agency (CARA) which apply to Christian, Muslim and Parsi families[128] are now to be addressed through legislative advocacy to seek appropriate reforms in law. The Supreme Court has declared that continued exclusion of LGBTIQ+ families from

[125] *Budhadev Karmaskar v State of West Bengal*, Criminal Appeal Nos. 135/2010, order dated 19.05.2022
[126] Section 3, TP Act
[127] *Id* at 41
[128] Shabnam Hashmi v Union of India (2014) 4 SCC 1

eligibility to adopt a child as per law is discriminatory as per Article 15 and requires urgent intervention, albeit via the legislative route.[129]

The logical corollary of this declaration is that sexual orientation and/or gender identity of the prospective parents must not be treated as incompatible to the best interests of the prospective child in the decision-making process. In addition to the majority verdict's opinion, this finding is also supported by conclusions in the minority verdict, which discredited 'studies' relied upon by the Union of India (UOI) to defeat the claim of adoption by LGBTIQ+ petitioners. In order to defeat the claim for adoption the UOI submitted that children of LGBTIQ+ families are likely to suffer negative outcomes in terms of mental health, education and social development.

However, the judges abundantly clarify that a minority of studies, which in fact indicate the disadvantages experienced by children of LGBTIQ+ families are patently biased as they do not account for the contribution of social and political determinants in affirming or harming the rights of LGBTIQ+ families. The judges rely on a statement by the IPS to conclude that families, communities and educational institutions, among others, must be sensitized to promote the development of children of LGBTIQ+ families as they are at risk of stigma and discrimination.[130]

The requisite safeguards for LGBTIQ+ families and their children under the *Guardians and Wards Act, 1890* as well as the *Hindu Minority and Guardianship Act, 1956* would ostensibly require legislative amendments, as per the aforesaid rationale of the court on the law of adoption.

Similarly, the exclusion of LGBTIQ+ families from the *Assisted Reproductive Technology (Regulation) Act, 2021* and the *Surrogacy (Regulation) Act, 2021* requires intervention as these laws limit eligibility to heterosexual married couples and women who are divorced or widowed at present. Currently, the Supreme Court is adjudicating a batch of petitions which contest several provisions of the two laws, concerning the exclusion of single persons, unmarried couples, LGBTIQ+ families, eligibility criteria for the surrogate

[129] *Supriyo Chakraborty*, paras. 543, 546-550
[130] *Supriyo Chakraborty*, paras. 329, 334-335, 338-339

woman and the prohibition on commercial surrogacy.[131] While the rights of children born via surrogacy or ART to LGBTIQ+ families would be similarly situated as children who are adopted in terms of a vacuum of rights vis-à-vis the parents on account of non-recognition of the relationship under extant law, the court can avoid the adverse outcome of *Supriyo* by interpreting these laws affirmatively and highlight the HPC's obligation to remedy grievances associated with the complex web of laws governing the parent-child relationship.

In this context, the Kerala,[132] Madras[133] and Karnataka[134] High Courts are also dealing with regulatory barriers by directing the National and/or State Boards constituted under the ART and surrogacy laws to recommend increasing the upper age limit for prospective couples and constitution of District Medical Boards to certify the eligibility of prospective couples.

2.6. Reservation in Public Education and Employment

LGBTIQ+ persons are systematically discriminated in the world of work at every stage – recruitment, working conditions and job security.[135] While the TP Act provides for anti-discrimination in (public and private) education and employment on grounds of gender identity, the statute rolls back the promise of reservation for transgender persons in public education and employment on the basis of 'social and economic backward classes' (SEBC) status under Articles 15 (3-4) and 16(4) as per *NALSA*.

Pursuant to the *NALSA* verdict, transgender, intersex and gender non-binary persons have petitioned High Courts across India seeking enforcement of the guarantee of reservation in public education and employment on SEBC basis,[136] which has compelled State governments to take affirmative action.

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[131] Arun Muthuvel v Union of India, WP (C) No. 756/2022; Dr. Abhinaya Vijayan v Union of India, WP (C) No. 164/2023; Dr. Aqsa Shaikh v Union of India, WP (C) No. 380/2024

[132] *Nandini K & Anr. v Union of India*, WP (C) No. 24058/2022, order dated 19.12.2022

[133] Priya Dharshani & Anr. v State of Tamil Nadu 2023 SCC Online Mad 2005

[134] H. Siddaraju & Anr. v Union of India 2023 SCC Online Kar 16

[135] *Id* at 122

[136] *Reshma Prasad v Union of India & Ors.*, Writ Petition No. 13861 of 2015 disposed of by Patna High Court by final order dated 18.09.2017; *Queerala v State of Kerala*, Writ Petition 20056 of 2018 disposed

On similar lines in a contempt petition before the Supreme Court, transgender groups are seeking implementation of reservation for transgender persons on the basis of SEBC status by all State governments.[137] The Central government's response indicates that transgender persons would be eligible to seek reservation under existing categories of Scheduled Caste/Scheduled Tribe, SEBC and Economically Weaker Section (EWS) categories.[138]

In 2023, an application for clarification before the Supreme Court sought a declaration that *NALSA's* direction on reservation be interpreted as 'horizontal reservation' for transgender persons, as already done for women and persons with disabilities who are represented in the general category and existing reserved categories on account of their gender and disability-based marginality (in contrast to the caste and class-based

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of by final order dated 09.01.2018; *Grace Banu v Chief Secretary, Government of Tamil Nadu*, 2016 SCC Online Mad 15973; *S. Tharika Banu v Secretary to Govt., Health & Family Welfare Department*, 2017 SCC Online Mad 10220; *Rano & Ors. v State of Uttarakhand*, Writ Petition No. 1794 of 2018 disposed of by final order dated 28.09.2018; *Veera Yadav v Chief Secy., Govt. of Bihar*, Civil Writ Jurisdiction Case No. 5627/2020, by order dated 18.01.2021; *Mx Sumana Pramanik v Union of India*, WPA 9187/2020, by order dated 01.02.2021; *Sangama and Nisha Gulur v State of Karnataka*, Writ Petition No. 8511 of 2020, *Mx. Sumana Pramanik v Union of India & Ors*., final order dated 02.02.2021 in WPA No. 9187 of 2020; *Sangeeta Hijra v State of Bihar*, 2017 SCC Online Pat 1040, *Anjali Sanjana Jaan v State of Maharashtra*, Writ Petition No. 104 of 2021, disposed of by final order dated 02.01.2021; *Faizan Siddiqui v Sashastra Seema Bal*, (2011) 124 DRJ 542; *Jackuline Mary v Superintendent of Police*, 2014 SCC Online Mad 987; *T. Thanusu v Secretary to Govt. of Tamil Nadu*, (2014) 6 Mad LJ 93; *Atri Kar v Union of India*, 2017 SCC Online Cal 3196; *G. Nagalakshmi v Director General of Police, State of Tamil Nadu*, (2014) 7 Mad LJ 452; *K. Annapoornam v Secretary to Govt., Personnel and Administrative Reforms Department*, 2016 SCC Online Mad 15928; *K. Prithika Yashini v Chairman, Tamil Nadu Uniformed Services Recruitment Board*, 2016 (4) LW 594; *Ganga Kumari v State of Rajasthan*, Writ Petition No. 14006 of 2016, disposed of by Rajasthan High Court by final order dated 13.11.2017; *Tamil Nadu Uniformed Services Recruitment Board v Aradhana*, Writ Appeal No. 330 of 2018 disposed of by final order dated 22.02.2018; *S. Mithra v Secretary to Govt.*, 2019 SCC Online Mad 8617; *Shanavi Ponnusmy v Ministry of Civil Aviation*, Writ Petition 1033 of 2017 (sub-judice), *Hina Haneefa @ Muhammed Ashif Ali v State of Kerala*, final judgment dated 15.03.2021 in WP(C) No. 23404/2020; *Mx. Alia Sk v State of West Bengal*, Writ Petition No. 21587 of 2019, interim order dated 27.11.2019

[137] Kamlesh & Ors. v Niten Chandra, Conmt. Pet. (C) 952/2023

[138] *Transgender persons can avail SC/ST/OBC/EWS reservation; no separate quota: Centre tells Supreme Court* (2023), LiveLaw. Available at: https://www.livelaw.in/top-stories/supreme-court-blanket-reservation-policy-transgender-persons-centre-contempt-petition-233687

'vertical reservation' of SC/ST/SEBC/EWS categories). Apart from seeking concessions in age, cut-off marks and physical criteria for reservation in education and employment, the application also sought reservation in allotment of public goods, services and facilities like housing, schemes and local governance bodies. Although the court has dismissed the application on procedural grounds, transgender persons have the liberty to agitate the concern of horizontal reservation in fresh petitions as the issue is undecided on merits at the national level.[139]

As the Andhra Pradesh High Court held in 2022 that *NALSA*'s direction to treat transgender persons as SEBC must be construed as obliging State governments to promote vertical reservation, [140] the issue of horizontal reservation for transgender persons is clearly open for adjudication by the Supreme Court.

However, the victory of Karnataka-based trans communities in achieving 1% horizontal reservation across SC/ST, other backward classes (OBC), most backward (MBC) and open categories in civil services through a public interest litigation (PIL) in 2021[141] is instructive of High Courts' powers to apply *NALSA*'s direction purposively to advance horizontal reservation for transgender persons. Again, in 2024 the Madras High Court affirmed the position that horizontal reservation for transgender persons is a preferred route of promoting equity in education and employment as this takes into account their marginality on account of gender, in addition to caste and class-based exclusion.[142]

The joint submissions to the HPC on behalf of LGBTIQ+ communities recommended providing horizontal reservations in employment (public and private sectors) and livelihood schemes for LBTI persons, in addition to the following measures based on the National Education Policy (NEP, 2020):

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[139] *Horizontal reservation for transgender persons: Supreme Court refuses to entertain plea to clarify NALSA judgment* (2023), LiveLaw. Available at: https://www.livelaw.in/top-stories/horizontal-reservation-for-transgender-persons-supreme-court-refuses-to-clarify-nalsa-judgment-224932; Miscellaneous Application No. 396/2023 filed in *National Legal Services Authority v Union of India,* WP (C) No. 400/2012, order dated 27.03.2023

[140] Mata Gangabhavani v State of Andhra Pradesh, 2022 SCC Online AP 200

[141] Notification No. DPAR 179 SRR 2020, dated 06.07.2021 passed by Government of Karnataka in response to orders passed in *Sangama and Anr. v State by its Chief Secretary and others*, WP No. 8511/2020(GM-PIL)

[142] Rakshika Raj v State of Tamil Nadu, 2024 SCC Online Mad 1624

- Creation of a Gender Inclusion Fund for all girls and transgender individuals to facilitate access to education, including providing adequate sanitation facilities, bicycles, conditional cash transfers, etc. and to release funds for community interventions to this effect;
- Horizontal reservation in education (public and private sectors) to remedy the disparity in secondary and higher education among LBTI persons, similar to the Babasaheb Ambedkar Open University, Ahmedabad which offers freeeducation to transgender persons. Such measures shall include providing hostel facilities.[143]

2.7. Access To Justice

The joint submissions made to the HPC recommended several measures for fulfilling the duty of the Central and State governments under domestic law and international human rights law to prevent, prohibit and punish gender-based violence (GBV) against LGBTIQ+ individuals,[144] which are discussed below.

In General Recommendation (GR) No. 28 of the Convention on Elimination of All Forms of Discrimination against Women (CEDAW), the committee notes that women belonging to minority groups, rural women, women with disabilities, among others, are particularly vulnerable to violence. The recognition of more than one aspect of identity and/or socio-economic factor's role in compounding the vulnerability and impact of violence on women leads CEDAW to recommend an intersectional approach in adequately remedying inequalities of women, including on grounds of sexual orientation and gender identity.[145]

The United Nations Independent Expert on Sexual Orientation and Gender Identity (UNIE-SOGI) recommends that States adopt gender-based and intersectional approaches to effectively remedy all forms of discrimination and violence against women and LGBT+ people alike. This can include providing victim-neutrality in violence

[143] *Id* at 41
[144] *Id* at 41
[145] General Recommendation No. 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, para. 18

against women (VAW) laws, as this approach does not lead to under-prioritization of the challenges, discrimination and violence suffered by women on account of sex in policy and practice. The UNIE-SOGI has observed that facilitating access to justice for LGBT+ people is not incompatible with women's rights.[146]

A faithful practice of the gender-based and intersectional approach can focus on the structures of power, rather than identities *per se*, to adequately take cognizance of the relationship of domination and insubordination. In terms of interpretation of Indian statutes and the Constitution, this means that references to particular grounds must not be read as delineating a group with fixed boundaries. Rather, they must be understood as seeking to regulate relationships of power.[147] As an illustration, a reference to gender or women must focus on all relationships of power based on gender, including LGBTIQ+ persons.

Hence, the adoption of gender-based and intersectional approaches is imperative to ensure effective prosecution of GBV against LGBT+ survivors under Indian laws on online gender-based violence, hate speech, domestic violence, sexual harassment, rape, custodial violence and other aspects.[148] In pursuance of this goal, Central and State governments should either adopt fresh GBV laws for LGBTIQ+ survivors or amend existing VAW laws and re-introduce them as GBV laws with victim-neutrality to ensure access to justice for women and LGBTIQ+ survivors. Notably, legislative efforts must maintain a distinction between a targeted approach of seeking victim-neutrality as the preferred route, in contrast to the broader approach of 'gender-neutrality' which must be eschewed. As *Supriyo* holds, the latter strategy can lead to undesirable consequences of women being duty-bearers to men under laws that were framed as special measures for women.[149]

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[146] *Id* at 78, para. 14

[147] Fredman, S. (2016), Intersectional discrimination in EU gender equality and non-discrimination law, European Commission, pages 35-36

[148] An in-depth review of the procedural and substantive barriers under the body of law on violence against women and it's application to LGBTIQ+ survivors in reported cases will be published in a forthcoming report by C-HELP.

[149] Supriyo Chakraborty, para. 510-511

In the event of introducing fresh GBV laws for LGBTIQ+ survivors, such legislation must ensure proportionality in terms of severity of punishmentfor offences against LGBTIQ+ survivors and women survivors. In this context, the inequality under Section 18 of the TP Act must be remedied by amending the provision to provide for proportionality of punishment of offences against transgender survivors and women survivors.

Notwithstanding the need for such an amendment to the TP Act, police, lawyers and judges must purposively apply Rule 11(4) of the *Transgender Persons (Protection of Rights) Rules, 2020* (TP Rules) to recognize transgender women's right to decide whether to seek a remedy for GBV under the TP Act or existing VAW laws. In case transgender women choose to seek remedies under VAW laws, their access to justice must not be conditional on medical transition, as 5 judges of the Supreme Court have unanimously affirmed the rule of law on self-determination of gender.

Central and State governments should also ensure similar accountability mechanisms under laws and regulations governing police conduct, as demonstrated by the amendments to the *Tamil Nadu Subordinate Police Conduct Rules, 1964* which provide for disciplinary action against police officials found guilty of harassment of LGBTIQ+ persons.[150]

As Tamil Nadu, [151] Rajasthan, Arunachal Pradesh, Chhattisgarh [152] and Telangana [153] have already done, all State governments must constitute Transgender Protection Cells under the Directorate General of Police in accordance with the TPR.[154]

GBV against LGBTIQ+ survivors must be treated as a public health concern. Survivors must receive care, support and treatment on equal terms as women survivors, including access to Hepatitis B and HPV vaccines and post-exposureprophylaxis (PEP) to prevent risk of sexually transmitted infections in the aftermath of sexual assault, in accordance to the MOHFW 2014 guidelines. As revealed during the COVID-19 pandemic, the

[150] Sushma and Seema v Commissioner of Police & Ors., WP No. 7284/2021, order dated 18.02.2022
[151] Sushma and Seema v Commissioner of Police & Ors., WP No. 7284/2021, order dated 23.12.2021
[152] Sushma and Seema v Commissioner of Police & Ors., WP No. 7284/2021, order dated 08.04.2022
[153] Vyjayanti Vasanta Mogli v State of Telangana, 2023 SCC Online TS 1688
[154] Rule 11(5), TP Rules

ecosystem of support services for survivors of GBV (including helplines, legal services authorities, one-stop crisis centres, special cells etc.) established by state and non-state actors must be made responsive to the needs of LGBTIQ+ survivors.[155]

The prevalence of stigma, discrimination and violence against LGBTIQ+ youth in Indian educational settings[156] compels the implementation of the *Right of Children to Free and Compulsory Education Act, 2009,* the TP Act and the NEP, 2020 to adopt several LGBTIQ+ affirming measures. These include teacher training manuals for sensitization of teachers, administrative staff, students etc. to foster an affirming learning environment, early mitigation of gender dysphoria, and prevention of incidence of drop-outs of LGBTIQ+ students, as recommended by the National Council of Educational Research and Training (NCERT) in 2021[157] - which stands withdrawn.

As per *Supriyo*, Central and State governments shall monitor, evaluate and supervise implementation of the *Shakti Vahini* apparatus in a manner that is responsive tothe needs of inter-caste, inter-faith and LGBTIQ+ couples who are in conflict with state or non-state actors. Steps to be taken include adopting preventive, remedial and punitive measures and establishing district-level safe homes for these vulnerable groups. The Delhi High Court has provided access to safe homes under the *Shakti Vahini* apparatus to a lesbian couple.[158]

In March 2024, the Supreme Court issued guidelines to be followed as a mandatory minimum measure by judges, police and lawyers in cases of LGBTIQ+ persons in conflict with state and/ or non-state actors (including natal families).[159] They lay down that:

[155] At Home, At Risk: A rapid survey series across 7 states on the domestic violence redressal ecosystem during
Covid-19 outbreak (2020), Lam-lynti Chittara Neralu
[156] Experiences of sexual and gender minority youth in Tamil Nadu schools (2019), Sahodaran & UNESCO
[157] Inclusion of transgender children in school education: Concerns and roadmap (2021), Department of Gender Studies, NCERT
[158] Dhanak of Humanity & Ors. v State of NCT & Anr. WP (Crl)1321/2021
[159] Devu G Nair v State of Kerala & Ors., 2024 INSC 228

a. In evaluating the *locus standi* of a partner or friend, the court must not make a roving enquiry into the precise nature of the relationship between the appellant and the person;
b. The court must ensure that the wishes of the detained/missing person are not unduly influenced by the court, police or lawyers representing the natal family during the course of the proceedings. In particular, the court must ensure that the individual(s) alleged to be detaining the individual against their volition are not present in the same environment as the detained/missing person. Similarly, in petitions seeking police protection from the natal family of the parties, the family must not be placed in the same environment as the petitioners;
c. Upon securing the environment and inviting the detained/missing person in-chambers, the court must make active efforts to put the detained /missing person at ease. The preferred name and pronouns of the detained/ missing person may be asked. The person must be given comfortable seating, access to drinking water and a washroom. They must be allowed to take periodic breaks to collect themselves. The judges must adopt a friendly and compassionate demeanour and make all efforts to defuse any tension or discomfort. The court must ensure that the detained/missing person faces no obstacles in being able to express their wishes to it;
d. While dealing with the detained /missing person the court may ascertain the age of the party. However, the minority age of the person must not be used, at the threshold, to dismiss a habeas corpus petition against illegal detention by the natal family;
e. The judges must be empathetic to the case of the detained/missing person. Homophobic or transphobic views or any personal beliefs of the judge or sympathy for the natal family must be avoided. The court must ensure that the law is followed in ascertaining the free will of the detained/missing person;
f. If a detained/missing person expresses their wish not to go back to the alleged detainer or the natal family, then the person must be released immediately without further delay;
g. The court must recognise that some intimate partners may face social stigma, and a neutral stand of the law would be detrimental to the fundamental freedoms of the petitioner. Therefore, a court while dealing with a petition for police protection by intimate partners on the grounds that they are a same-sex, transgender, inter-

faith or inter-caste couple must grant this protection as an interim measure, before establishing the threshold requirement of being at grave risk of violence and abuse, in order to maintain their privacy and dignity;

h. The court shall not pass any directions for counselling or parental care when the detenu is produced before it. The role of the court is limited to ascertaining the will of the person. It must not adopt counselling as a means to changing the mind of the appellant, or the detained/missing person;

i. During the interaction with the detenu to ascertain their views the judge must not attempt to change or influence the admission of the sexual orientation or gender identity of parties. The court must act swiftly against any homophobic, transphobic or otherwise derogatory conduct or remark by the alleged detainers, court staff or lawyers;

These directions provided valuable guidance to Delhi, Kerala and Madras High Courts in restraining natal families from undermining LGBTI people's autonomy, [160] overruling mental healthcare practitioners who pathologize them[161] and affirming their choice to cohabit with partners.[162]

2.8. Marital or Partnership Benefits

In *Supriyo* the Supreme Court has declared that under the Constitution, [163] the Parliament and/or State Legislatures are competent to enact laws to regulate marriages of lesbian, gay and non-binary transgender persons. Amendments to existing laws or enactment of fresh laws on marriage/divorce, guardianship, children, adoption, succession etc., to safeguard the right to form a family and execute affairs as members of such a family unit by lesbian, gay and non-binary transgender persons, therefore, falls in the legislative domain which can be addressed by the HPC. The following is an illustrative list of existing laws that merit examination in this regard:

- Special Marriage Act, 1954

[160] *Jennifer Thomas v Govt. of NCT of Delhi*, WP (Crl.) No. 1763/2024, order dated 30.05.2024

[161] Shereena Hakkim v State Police Chief 2024 KER 44816

[162] *M.A. v. Superintendent of Police & Ors*., HCP No. 990/2025, order dated 22.05.2025

[163] Articles 245-246 read with Entry 5 of the Concurrent List in Schedule VII of the Constitution.

- Hindu Marriage Act, 1955
- Muslim Personal Law (Shariat) Application Act, 1937
- Dissolution of Muslim Marriages Act, 1939
- Parsi Marriage and Divorce Act, 1936
- Indian Christian Marriage Act, 1872
- Indian Divorce Act, 1869
- Foreign Marriage Act, 1969
- Hindu Succession Act, 1956
- Indian Succession Act, 1925
- Assisted Reproductive Technology (Regulation) Act, 2021
- Surrogacy (Regulation) Act, 2021
- Guardians and Wards Act, 1890
- Hindu Minority and Guardianship Act, 1956
- Hindu Adoption and Maintenance Act, 1956
- Juvenile Justice (Care and Protection of Children) Act, 2015:
    - Enabling adoption by LGBTI families by revising the *Adoption Regulations, 2022*
    - Enabling foster care for LGBTQIA+ minors by revising the *Model Guidelines for Foster Care, 2024*

A gender-just review of existing statutes that govern marital relations must also repeal provisions on the restitution of conjugal rights,[164] review the law on rape to penalize marital rape[165] and repeal the framework of notice, domicile and objections under the SMA.[166] These provisions of law violate the right to equality and non-discrimination on basis of sex, bodily integrity and dignity of women and LGBTIQ+ persons alike.

As the finding in *Supriyo* with respect to amendments/introduction of fresh laws to recognize the right to solemnize and register marriages of lesbian, gay and non-binary transgender persons is not a binding direction, the HPC, Central and State governments are not mandated to take action. However, the court's declaration on Article 15 in the

[164] T. Sareetha v T. Venkata Subbaiah 1983 (2) APLJ HC 37

[165] The opinion of Rajiv Shakhder, J in *RIT Foundation v Union of India* 2022 SCC Online Del 1404

[166] *Safiya Sultana v State of Uttar Pradesh*, Habeas Corpus Petition No. 16907/2020, order dated 12.01.2021

context of indirect discrimination resulting from denial of the bouquet of rights for lesbian, gay and non-binary transgender partners in non-marital relationships is an operative direction, the appropriate authorities are legally bound to review existing laws or introduce fresh laws to this effect.

The following is an illustrative list of existing laws that merit examination in order to safeguard social and economic rights of lesbian, gay and non-binary transgender persons in non-marital relationships:

- Chapter IX of the *Criminal Procedure Code, 1973* (now Chapter X of the *Bhartiya Nyaya Suraksha Sanhita, 2023*) is a social security measure[167] to prevent the destitution of wives, children and parents by guaranteeing a statutory right to maintenance. The concerned provisions must be suitably amended to provide for the obligation of lesbian, gay and non-binary transgender partners in non-marital relationships to be governed by the framework;
- The said chapter also safeguards the economic security of a child who has attained majority but is unable to maintain themselves due to disability. A child who has attained majority, is LGBTIQ+ and dependent on the father shall be likewise entitled to the right to claim economic security under the concerned provision, as LGBTIQ+ adults are vulnerable to dispossession by the natal family;
- *Supriyo* declaration that amendments to the law on adoption must facilitate eligibility of LGBTIQ+ families to adopt children without treating the sexual orientation and/or gender identity of parents as incompatible with the best interests of the child shall be applied in principle to govern the issue of custody of children in divorce cases. For instance, lesbian, bisexual women and trans-masculine persons seeking divorce in “heterosexual” marriages that they were coerced into by natal families, shall be treated as fit for assuming custody of minor children arising from such marriages;
- As adult gay and bisexual men are also vulnerable to forced evictions by their natal families, their right to residence in natal homes must be statutorily protected as available for cis women,[168] transgender persons[169] and people living with

[167] Capt. Ramesh Chander Kaushal v Veena Kaushal AIR (1978) SC 1807

[168] Section 19, Protection of Women from Domestic Violence Act, 2005 (PWDVA)

[169] Section 12, Transgender Persons (Protection of Rights) Act, 2019

HIV[170] under special laws in recognition of their vulnerability to conflict with the natal family;

- The *Maintenance and Welfare of Parents and Senior Citizens Act, 2007* must be amended to provide that the parent/senior citizen shall not be entitled to claim any maintenance from their children who are LGBTIQ+ adults in case such parent/senior citizen has subjected them to violence on account of their identity. This basic principle of law of curtailing a right in the event of a violation already applies in relation to marital parties, where a wife forfeits any claim to maintenance against the husband if she is proven to have committed a violation like adultery;[171]
- As discussed in *Happy Together* (I), the body of law on marital/partnership benefits accruing from employment, including pension, gratuity, medical benefits etc. are premised on a relationship through marriage, blood or adoption which constitutes a 'family' as per extant Indian law. In the absence of a statutory framework which provides evidence of marriage and chosen families of LGBTIQ+ persons, the HPC, Central and State governments must evolve an appropriate method to facilitate access to these benefits. In this context, the concerned authorities may consider the viability of LGBTIQ+ partners executing a 'deed of familial association' to safeguard their rights, which is under consideration by the Tamil Nadu government.[172]

[170] Section 29, HIV/AIDS (Prevention and Control) Act, 2017

[171] Section 37(3) of *Special Marriage Act, 1954*; Section 25(3) of *Hindu Marriage Act, 1955*; Section 40(3), *Parsi Marriage and Divorce Act, 1936*; Section 125 (4-5) of the CrPC (now Section 144 (4-5) of the BNSS)

[172] Sushma and Seema v Commissioner of Police, WP No. 7284/2021, order dated 17.11.2023

3. CONCLUSION

In the review petitions and/or future cases, it is necessary to contend with the ruling in *Supriyo* which rolled back well-settled jurisprudence under the Constitution, particularly with respect to the unanimous declaration that the right to marry and form a family, is not protected by Articles 14, 15, 19 and 21 and the majority verdict's manner of determination of validity of a statute based on legislative intent by ignoring its impact on rights.

A key takeaway of *Supriyo* for LGBTIQ+ communities is assessing the propriety of adopting legislative, executive and/or judicial interventions for future legal efforts. The court's declaration on Article 15 in the context of the discriminatory impact of denial of benefits to lesbian, gay and non-binary transgender persons in long-term relationships due to lack of marital status certainly opens doors for litigation strategies. However, such efforts must be mindful of the court's refusal to undertake judicial review of the SMA and the JJ Act on account of their likelihood to disrupt a body of family law they share interlinkages with, and the possibility of such judicial conservatism trickling down to High Courts.

The concerns related to healthcare, social security, housing, reservation in education and employment, succession to property, guardianship/adoption/ART, access to justice and marital or partnership benefits discussed in this policy brief are illustrative of the wide-ranging law and policy concerns for undertaking a multiplicity of efforts through research, parliamentary advocacy and litigation-based interventions. This includes advocacy with the HPC and ensuring that its final report is implemented in letter and spirit by Central and State governments.

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