

DIGNITY DEFERRED: SUPRIYO V. UNION OF INDIA AND LGBTQ RIGHTS

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In Supriyo v. Union of India, a five-judge bench of the Supreme Court declined to find that same-sex couples have a right to marry under India's Constitution. The various opinions in the case repeatedly recognised and affirmed the dignity of lesbian, gay, bisexual, transgender, and queer (LGBTQ) people, but ultimately found that exclusion from civil marriage did not run afoul of constitutional guarantees. In this Essay, I examine the limited understanding of dignity employed by the bench in Supriyo, juxtaposing this with both domestic and comparative LGBTQ rights decisions that embraced a more substantive understanding of dignity. I argue that the concept of equal dignity, which is attentive to the stigmatic harm of exclusion, illustrates why exclusion from civil marriage jeopardises the rights of same-sex couples and offers important insights for lawmakers and judges considering relationship recognition for same-sex couples in the years ahead.

On October 17, 2023, the Supreme Court of India handed down its judgement in *Supriyo v Union of India*, declining to find a right of lesbian, gay, bisexual, transgender, and queer (LGBTQ) couples to marry under the Indian Constitution.¹

The five-judge bench issued four separate opinions in the case, but ultimately ruled against the applicants. The justices not only found that the Indian Constitution does not guarantee a right to marry to same-sex couples, but that it does not guarantee a fundamental right to marry at all, leaving the legislature with significant discretion to structure civil marriage as it sees fit.² The majority also found that LGBTQ couples were not constitutionally entitled to civil unions or adoption rights, dealing a significant blow to LGBTQ rights as well as the protection of married and family life more generally.³

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¹ *Supriyo v Union of India* 2023 SCC OnLine SC 1348 (*hereinafter* Supriyo).

² *ibid*, opinion of Bhat, J, at para 149.

³ *ibid*.

Much has been written about *Supriyo*, with commentators variously criticising the logic and reasoning of the opinions, lamenting the justices' reluctance to embrace transformative constitutionalism, and situating the judgement in the Court's longstanding ambivalence about judicial interventions into family law.⁴ Another notable feature of *Supriyo*, however, is its seeming retreat from recent rulings that foregrounded dignity as a constitutional value and justification for judicial intervention around LGBTQ rights.

Despite ruling against the petitioners, the justices in *Supriyo* agreed, and indeed repeatedly emphasised, that LGBTQ people are rights-bearing members of the polity deserving of dignity.⁵ The vision of dignity ultimately set forth in the opinions, however, is a relatively toothless one, and falls short of the substantive understanding reflected in both the Court's recent decisions on LGBTQ rights and the decisions of other apex courts considering the partnership rights of LGBTQ people. Most notably, the opinions in *Supriyo* fail to seriously reckon with the relationship between equality and dignity, and the promise of equal dignity under the law. The Court's failure to appreciate that relationship significantly limits its understanding of the injury that LGBTQ couples suffer when they lack any avenue to have their relationships recognised by the state.

In this Essay, I consider dignity's role in the Supreme Court's ruling in *Supriyo* and reflect on what a more robust theory of equal dignity might add to jurisprudence on state recognition of same-sex relationships. In Part I, I examine the ascendance of dignity in the Supreme Court's previous rulings on LGBTQ rights, and the substantive understanding of dignity that has developed through these decisions. In Part II, I juxtapose this precedent with the puzzlingly inconsequential understanding of dignity reflected in the opinions in *Supriyo*. Finally, I consider scholarship on equal dignity as a constitutional value and the ways that apex courts in South Africa and the United States have reasoned from a more substantive theory of equal dignity in decisions about LGBTQ relationships. I conclude by considering what the Court in *Supriyo* might have said about the equal dignity of same-sex relationships, and how the Court might in the future clarify its understanding of the state's role in protecting the equal dignity of marginalised groups.

⁴ See, eg Akshat Agarwal, 'Supriyo and the Politics of Indian Family Law' Forthcoming (2024) <<https://ssrn.com/abstract=4952381>>; Shwetha Ramachandran, 'Supriyo and the Fundamental Right to Marry, Centre for Law and Policy Research (6 November 2023) <<https://clpr.org.in/blog/supriyo-and-the-fundamental-right-to-marry>>; Arvind Narrain, 'Marriage Equality Judgment: Overlooking Fundamental Rights' (2023) Sup Ct Observer <<https://www.scobserver.in/journal/marriage-equality-judgement-overlooking-fundamental-rights-justice-bhat-on-marriage-equality>>; Diksha Sanyal, 'Unpacking the Right to Intimacy in Supriyo' (2023) Sup Ct Observer <<https://www.scobserver.in/journal/unpacking-the-right-to-intimacy-and-relational-equality-in-supriyo>>; Danish Sheikh and Rupali Samuel, 'Beside Marriage Equality: Conversations on Supriyo' (2024) 20(1) Socio-Legal Rev 1.

⁵ *Supriyo* (n 1), opinion of Bhat, J, at paras 31-37.

I. DIGNITY IN INDIAN LGBTQ JURISPRUDENCE

In the post-war era, dignity has become a ubiquitous value in both international human rights law and domestic constitutional law.⁶ As George Kateb has suggested, the concept of human dignity fundamentally captures two propositions, that “all individuals are equal [and] no other species is equal to humanity.”⁷ These notions ground dignity in the qualities that make us intrinsically human and set us apart from non-human others, such that human dignity is “the humanity of a person as such,”⁸ and therefore is “shared equally by every person.”⁹

The notion of dignity has found a strong foothold in India’s constitutional jurisprudence, despite relatively limited references to dignity in the constitutional text itself. As Pritam Baruah has observed, “the Supreme Court of India has accorded an exceptionally high status to human dignity as a constitutional value,” and the Court has regularly located dignity alongside liberty and equality as cornerstones of India’s constitutional order.¹⁰ And while the precise contours of dignity in constitutional jurisprudence have been elusive in some respects, the Court has pointedly emphasised the linkages between discrimination and indignity.¹¹ As Baruah observes, the Court has framed dignity as “an anathema to social exclusion of identities including sexual orientation,” and has “employed dignity to articulate an ‘anti-exclusion principle’ that makes any form of social exclusion of identities constitutionally suspect.”¹² In this respect, dignity often has been wielded by the Court to underscore the importance of transformative constitutional interventions; Upendra Baxi describes the Court’s dignity jurisprudence as “impressive indeed, extending co-equally to state as well as non-state actors and

⁶ See Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press Daniel Kayros trans 2015) 49–65; Erin Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (University of Pennsylvania Press 2021) 12–13; Luís Roberto Barroso, ‘Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse’ (2012) 35 (B C Int’l and Comp L Rev 331); Doron Shulztiner and Guy E Carmi, ‘Human Dignity in National Constitutions: Functions, Promises, and Dangers’ (2014) 62 Am J Comp L 461, 464.

⁷ George Kateb, *Human Dignity* (2011) 6.

⁸ Barak (n 6) at 19.

⁹ Daly (n 6) at 21; see also Lata Mani, ‘Human Dignity and Suffering: Some Considerations’ (2011) 46 Econ and Pol Wkly 23 (questioning the prevailing understanding of dignity as something that can be violated rather than something inherent and irreducible).

¹⁰ Pritam Baruah, ‘Human Dignity in Indian Constitutional Adjudication in *Human Dignity in Asia: Dialogue Between Law and Culture*’ 21, 21 (Jimmy Chia-Shin Hsu (ed), Cambridge University Press 2022).

¹¹ At different times, for example, the Court has seemed to embrace a minimalist and maximalist approach to dignity, as subject to limitation and as absolute, and as an individual and a communal value, among other ambiguities. See Pritam Baruah, ‘(De)Valuing Dignity: Three Risks of Dignity’ (2020) 55 ECON AND POL WKLY 33.

¹² Baruah, supra note 10, at 33–34.

frameworks.”¹³ As a constitutional value, dignity has thus offered a powerful tool to remedy structures of exclusion and marginalisation.

The embrace of dignity in Indian jurisprudence dovetails neatly with a dignitary renaissance in LGBTQ cases internationally. Dignity has frequently been invoked by courts addressing LGBTQ claims, including the decriminalisation of same-sex activity, protection of freedoms of association, assembly, and expression, and recognition of the right to marry and form families.¹⁴

India’s LGBTQ rights jurisprudence is part of this trend. In *Naz Foundation v State (NCT of Delhi)*, decided in 2009, the High Court of Delhi read down Section 377 of the Indian Penal Code, which in part criminalised consensual same-sex activity between men. While the decision primarily invoked dignity as a component of the right to life and personal liberty under Article 21, the two-judge bench also observed that the indignity and stigma inflicted by Section 377 contributed to a violation of the rights to equality and nondiscrimination under Articles 14 and 15.¹⁵ The judges not only found that criminalisation of same-sex activity was arbitrary and unreasonable but underscored that the resulting discrimination “severely affects the rights and interests of homosexuals and deeply impairs their dignity.”¹⁶ Because the judges determined in their equality analysis that Section 377 “disproportionately impacts [gay men] solely on the basis of their sexual orientation,” they concluded that it offended “the notion of human dignity which is considered to be the cornerstone of our Constitution.”¹⁷

In 2013, when the Indian Supreme Court overturned *Naz Foundation v Suresh Kumar Koushal*, the two-judge bench did not substantively address the dignitary arguments set out in the Delhi High Court’s opinion. It instead adopted a more limited understanding of Article 21 and a more mechanical understanding of equality that allows classifications so long as they are not arbitrary.¹⁸ The justices on appeal concluded that Section 377 was neither

¹³ Upendra Baxi, The Place of Dignity in the Indian Constitution in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* 429, 433 (Marcus Düwell, Jens Braarvig, Roger Brownsword, and Dietmar Mieth (eds), Cambridge University Press 2014).

¹⁴ Many courts have invoked dignity in evaluating LGBTQ rights claims, and have often done so by citing each other and reasoning about dignity in similar ways. See Michèle Finck, ‘The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective’ (2016) 14 I-Con 26; Ryan Thoreson, ‘Dignifying Queerness’ (2024) 46 Cardozo L Rev 63.

¹⁵ *Naz Foundation v State (NCT of Delhi)* 2009 SCC OnLine Del 1762, para 132 (*hereinafter* Naz Foundation).

¹⁶ *ibid* at para 92.

¹⁷ *ibid* at para 113.

¹⁸ *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1, para 41 (*hereinafter* Koushal); Upendra Baxi, ‘Naz 2: A Critique’ (2014) 49 Econ and Pol W 12 (discussing the limitations of the *Koushal* ruling).

arbitrary nor an irrational classification, and thus reversed the Delhi High Court and recriminalised same-sex activity in India.¹⁹

The seeming indifference to dignity in *Koushal*, however, was short-lived. In tandem with global and domestic trends, the Indian Supreme Court's more recent LGBTQ rights jurisprudence has centred the constitutional value of dignity in powerful ways. It has done so to ensure that dignity is substantively respected, including by non-state actors. In two prominent recent decisions – *National Legal Services Authority v Union of India* and *Navtej Singh Johar v Union of India* – the Court took pains to emphasise the right to dignity and its relationship with other fundamental rights.²⁰

In *NALSA*, decided in 2014, a two-judge bench of the Supreme Court considered petitions from transgender applicants seeking legal recognition of their gender identity.²¹ In deciding their claims, the Court expressly recognised the dignity harm inflicted by the state's refusal to provide a path for legal gender recognition.²² In doing so, the justices underscored that the state's refusal fostered discrimination that violates both Article 14's right to equality and Article 21's right to life with dignity.²³ They affirmed the state's responsibility to proactively promote equality and dignity and underscored the relationship between the two values, observing that constitutional guarantees of equality can only be meaningful for transgender people "if facilities and opportunities are extended to them so that they can also live with dignity and equal status with other genders."²⁴ With this in mind, the Court ordered the state to take various measures to alleviate discrimination and undignified treatment of transgender people, including recognising a third gender category under the law; recognising transgender people's identification as male, female, or a third gender; setting aside public benefits and opportunities; addressing physical, mental, and sexual health concerns; and taking measures to improve public acceptance.²⁵

NALSA was a turning point, but it was not the end of the Court's growing appreciation of the dignity of LGBTQ litigants. Dignity similarly featured prominently in *Johar*, decided in 2018, which read down Section 377 of the Indian Penal Code and decriminalised same-sex activity between consenting adults.²⁶ In

¹⁹ *Koushal*, supra note 18, at para 42.

²⁰ *National Legal Services Authority v Union of India* (2014) 5 SCC 438 : AIR 2014 SC 1863 [*hereinafter* *NALSA*]; *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 : AIR 2018 SC 4321 [*hereinafter* *Johar*].

²¹ *NALSA*, supra note 20.

²² *ibid* at paras 20, 68.

²³ *ibid* at para 121.

²⁴ *ibid* at para 61; *see also* *ibid*, at paras 95-96 (recognising positive obligations under art 21).

²⁵ *ibid* at para 129; *see also* Katyayani Sinha, 'The Regulation, Reclamation, and Resistance of Queer Kinship in Contemporary India' (2022) 30 *Feminist Legal Stud* 281, 285 (describing how *NALSA* sought positive interventions from the state to address historical exclusion and marginalisation).

²⁶ *Johar* (n 20).

their opinions, the five-judge bench of the Supreme Court leaned heavily on dignity, with the term appearing more than 210 times. Chief Justice Misra's opinion featured a particularly lengthy and focused discussion about human dignity, centring dignity as a core justification for decriminalising same-sex activity.²⁷

As in *NALSA*, dignity in *Johar* primarily functioned as a way to interpret the right to life and personal liberty, recognising that “respect for the conception of dignity has become a fundamental right under Article 21 of the Constitution.”²⁸ But the majority again underscored the linkages between dignity and equality, with Chief Justice Misra stressing that “discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual.”²⁹ The majority repeatedly invoked comparative and international judgments that explore the relationship between these twin constitutional values,³⁰ as well as the discussion of that relationship in the Delhi High Court's decision in *Naz Foundation*.³¹ Ultimately, the Court in *Johar* did not only rule on the fundamental right to life and personal liberty under Article 21 but also acknowledged that the criminalisation of same-sex activity ran afoul of Article 14 and Article 15's rights to equality and non-discrimination, insofar as it condemned LGBT people “to societal pariah and dereliction” and functioned as “an odious weapon for the harassment of the LGBT community by subjecting them to discrimination and unequal treatment.”³² The Court thus read down Section 377 as it pertained to consensual sexual activity between two adults, in a significant victory for LGBTQ rights.³³

II. DIGNITY IN *SUPRIYO*

While dignity and stigmatic harm powerfully informed equality guarantees in *NALSA* and *Johar*, they played a far more limited role in the Supreme Court's ruling in *Supriyo*. In *Supriyo*, the petitioners invoked the dignity of LGBTQ people and their relationships, among other rights at stake, in their challenges to provisions of the Special Marriage Act (SMA), Foreign Marriage Act (FMA), and other relevant laws and regulations.³⁴ The petitioners argued that exclusion from marriage both deprives same-sex couples of full participation in society and

²⁷ *ibid*, opinion of Misra, C J, at paras 125-138.

²⁸ *ibid* at para 129; *see also* *ibid* at para 132.

²⁹ *ibid* at para 163.

³⁰ *ibid* at paras 103, 133, 136, 199.

³¹ *ibid* at paras 67-68 (recalling that the High Court recognised “discrimination is the antithesis of equality and recognition of equality in its truest sense will foster the dignity of every individual”).

³² *ibid* at para 253(15).

³³ *ibid* at para 252.

³⁴ *Supriyo* (n 1), opinion of Chandrachud, C J, at para 20 (arguing that the SMA “violates the right to dignity and decisional autonomy of LGBTQIA+ persons and therefore violates art 21”); *see also* *ibid* at paras 21, 24, 26, 57.

sends a distinct public message that they are morally unequal to other members of society.³⁵

Like in *NALSA* and *Johar*, the five-judge bench made a point of emphasising that LGBTQ persons have inherent dignity that cannot be violated. Chief Justice Chandrachud took pains to alleviate any exclusionary undertones in his minority opinion, reiterating that LGBTQ people and practices are resolutely Indian and neither new nor foreign.³⁶ He rooted this recognition in the Court's own precedent, stressing that "the consequence of the judgment of this Court in *National Legal Services Authority* and *Navtej Singh Johar* is that the members of the queer community are no longer second-class citizens of our country."³⁷ In his opinion for the majority, too, Justice Bhat repeatedly underscored the dignity of LGBTQ people, and situated as central to the Constitution "the right and expectation to be accorded due respect, treated with dignity and equal worth."³⁸

Yet unlike *NALSA* and *Johar*, the Court in *Supriyo* concluded that, while the dignity of LGBTQ persons is sacrosanct, the discriminatory exclusion of LGBTQ people from civil marriage did not jeopardise that dignity in a way that would require the Court or lawmakers to act. Although the bench was divided, the Court collectively reached this conclusion by disclaiming any fundamental right to marry under India's Constitution, and minimising the discrimination and indignity that the exclusion from civil marriage exacts on LGBTQ couples who are denied recognition of their relationships.

The majority of the Court cast the state's marriage regime as merely failing to affirmatively accommodate the desires of LGBTQ couples rather than excluding and stigmatising LGBTQ couples because of their sexual orientation or gender identity, understood in prior cases to be discrimination based on sex.³⁹ Justice Bhat argued that some classifications are permissible and do not amount to discrimination, so long as they are reasonable and based on intelligible differentia related to the aim of the underlying law.⁴⁰ Focusing on the statement of objects and reasons for the Special Marriage Act, he concluded that the sole aim was to update prior legislation and to provide a vehicle for interfaith marriages, and therefore the resulting regime, though admittedly exclusionary of same-sex couples, did not amount to discrimination.⁴¹

Critics of the opinion have offered compelling analyses of the shortcomings in the Supreme Court's reasoning with regard to the fundamental rights at

³⁵ *ibid* at para 21.

³⁶ *ibid* at para 81-99; see also *ibid* opinion of Bhat, J, at para 2.

³⁷ *ibid* opinion of Chandrachud, C J, at para 127.

³⁸ *ibid* opinion of Bhat, J, at para 37.

³⁹ *ibid* at para 49.

⁴⁰ *ibid* at paras 73-74.

⁴¹ *ibid* at para 81.

stake and the paucity of the Court's equality analysis.⁴² The majority's formalist approach to Articles 14 and 15, which narrowly focused on whether a particular statute or regulation was actually motivated by invidious discrimination, seems to license a wide range of laws that functionally exclude or demean protected classes. What is strikingly absent in this approach, especially compared to comparative jurisprudence on the right of LGBTQ people to marry, is the lack of attention to equal dignity and the reasonableness of being excluded from a marriage regime administered by the state based solely on one's sexual orientation or gender identity.⁴³ This careful attention to the relationship between equality and dignity has not only animated previous decisions like *NALSA* and *Johar*, but has been central to comparative jurisprudence on marriage equality. In the following Part, I consider how other courts have approached equal dignity to better appreciate the consequences of exclusion from the state's civil marriage regime.

III. DIGNITY IN COMPARATIVE PERSPECTIVE

The Supreme Court in *Supriyo* primarily invoked dignity in its analysis of whether there is a fundamental right to marry under India's Constitution, evaluating that claim under Article 21's right to life and personal liberty.⁴⁴ The majority's analysis of equality claims was more formalist, with little attention to the dignitary and stigmatic implications of excluding same-sex couples as a class from the civil marriage regime. Yet, like the reasoning in *NALSA* and *Johar*, other apex courts considering marriage equality claims have been far more attentive to the relationship between equality and dignity and the ways in which excluding same-sex couples from marriage inflicts a stigmatic injury against a class of people that is constitutionally significant. While the specifics of these cases are, of course, distinct in many respects, these comparative examples illuminate some of the dignitary injuries the Court's current approach fails to appreciate and address.

Among the most prominent rulings on the right of same-sex couples to marry are the South African Constitutional Court's decision in *Minister of Home Affairs v Marié Adriaana Fourie*, decided in 2005, and the United States Supreme Court's decisions in *United States v Windsor* and *Obergefell v Hodges*, decided in 2013 and 2015, respectively.⁴⁵ While a full analysis of the dignitary reasoning in

⁴² See, eg, Narrain (n 4); Sanyal (n 4).

⁴³ Because the majority in *Supriyo* recognised that transgender litigants have the right to enter into heterosexual marriages under existing law, I focus for the remainder of the essay on discrimination based on sexual orientation.

⁴⁴ Dignity has typically been located under the right to life in art 21, but as noted above, the Court has also employed dignitary reasoning to understand violations of the right to equality and freedom from discrimination. See Baruah, supra note 11 (noting that the Court has located dignity in art 21 but also characterised dignity as a value infused into all fundamental rights).

⁴⁵ *Minister of Home Affairs v Marié Adriaana Fourie* 2005 SCC OnLine ZACC 20: 2005 ZACC 19 : (2006) 1 SA 524 : (2006) 3 BCLR 355 (*hereinafter* Fourie); *United States v Windsor* 2013 SCC OnLine US SC 86 : 186 L Ed 2d 808 : 570 US 744 (2013) (*hereinafter* Windsor); *Obergefell v*

these opinions exceeds the scope of this Essay, a brief examination of their central reasoning is instructive. In contrast to the bench in *Supriyo*, the courts in these cases centred dignity and stigmatic harm in their equality analyses and reached very different conclusions about the injuries that litigants suffered as a result.

Recalling its previous cases dealing with the rights of same-sex couples, the South African Constitutional Court in *Fourie* underscored “the significance for our equality jurisprudence of the concepts and values of human dignity, equality and freedom,” ensuring that stigmatic harm was factored into its analysis of whether the civil marriage regime was discriminatory against same-sex couples who wished to marry.⁴⁶ It thus recognised, like the appellate court below had recognised, that “the sting of the past and continuing discrimination against both gays and lesbians” lies in the message it conveys, namely, that viewed as individuals or in their same-sex relationships, they “do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships.”⁴⁷ In its opinion in *Fourie*, the Constitutional Court thus reiterated that the failure to include same-sex couples in the civil marriage regime violated their rights to both equality and dignity, and did so in part because “the exclusion to which same-sex couples are subjected manifestly affects their dignity as members of society.”⁴⁸ In this and other cases, the South African judiciary has been particularly attentive to the need to go beyond a formalist approach to equality guarantees, due in part to the country’s history with apartheid and a recognition that laws enacted for otherwise valid purposes could nevertheless serve in practice to enshrine or entrench a system of subordination and dehumanisation.⁴⁹

In its jurisprudence on the right to marry, the United States Supreme Court similarly underscored this relationship between equality and dignity. In *Windsor*, the Court concluded that the Defense of Marriage Act (DOMA),

Hodges 2015 SCC OnLine US SC 6 : 192 L Ed 2d 609 : 576 US 644 (2015) (*hereinafter* Obergefell). In both South Africa and the United States, the use of equal dignity was not novel in the marriage context, but was preceded by decriminalisation decisions that – like the Indian Supreme Court in *Jobar* – were attentive to the relationship between dignity and equality and the stigmatic message that exclusion sends. *See, eg, National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 SCC OnLine ZACC 15 : 1998 ZACC 15 : (1999) 1 SA 6 : (1998) 12 BCLR 1517; *Lawrence v Texas* 2003 SCC OnLine US SC 73 : 156 L Ed 2d 508 : 539 US 558 (2003).

⁴⁶ *Fourie* (n 45) at para 48.

⁴⁷ *Fourie* (n 45) at para 15 (citing *Fourie v Minister of Home Affairs* (2005) 3 SA 429 : (2005) 3 BCLR 241, at para. 15 (citing *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 SCC OnLine ZACC 17 : (2000) 2 SA 1 (CC), at para 42); *see also* Comment, Michael W. Yarbrough, ‘South Africa’s Wedding Jitters: Consolidation, Abolition, or Proliferation?’ (2006) 18 Yale J L and Feminism 497, 503-507 (describing the Supreme Court of Appeals and Constitutional Court’s consistent and substantive attention to the stigmatic harm of exclusion).

⁴⁸ *Fourie* (n 45) at para 114.

⁴⁹ *See* Erin Daly, ‘The H Albert Young Distinguished Lecture in Constitutional Law: Constitutional Comparisons: Emerging Dignity Rights at Home and Abroad’ (2014) 20 Widener L Rev 199, 204; Kate O’Regan, ‘Undoing Humiliation, Fostering Equal Citizenship: Human Dignity in South Africa’s Sexual Orientation Equality Jurisprudence’ (2013) 37 NYU Rev L and Soc Change 307.

which had limited federal and state recognition of same-sex marriages, was specifically intended to interfere “with the equal dignity of same-sex marriages.”⁵⁰ In *Obergefell*, the Court went further in its analysis and found more generally that constitutional liberty and equality guarantees precluded states from limiting marriage only to heterosexual couples.⁵¹ Writing for the majority, Justice Kennedy detailed the significant stigmatic harm inflicted on same-sex couples and their families when they were refused the opportunity to participate in a civil marriage regime,⁵² and framed the claim at issue as one of “equal dignity in the eyes of the law.”⁵³ He observed that “against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm,” and that “the imposition of this disability on gays and lesbians serves to disrespect and subordinate them.”⁵⁴ It was not only the irrational exclusion of a particular group of people from the material benefits attached to civil marriage that mattered to the Court, but the sense of humiliation and degradation of same-sex relationships that such an exclusion invited.

A striking feature of the *Supriyo* opinions is the extent to which the justices sought to distinguish the case at hand from this comparative jurisprudence finding a right to marry.⁵⁵ Their reasoning at times rests on somewhat superficial distinctions. After acknowledging the strong similarities between *Fourie* and *Supriyo*, for example, Chief Justice Chandrachud observed that *Fourie* involved a marriage act with only one reference to heterosexuality while the statutes at issue in *Supriyo* contained multiple references and that *Fourie* was preceded by litigation establishing benefits for same-sex couples in South Africa while similar precedents did not yet exist in India to guide the outcome in *Supriyo*.⁵⁶ Justice Bhat echoed these arguments, engaging with *Fourie* only to note that Indian courts should be mindful of context when engaging with judgments in other jurisdictions.⁵⁷ But the number of references to sex classifications does not make the civil marriage regime any more or less violative of the petitioners’ equality or dignity, nor is it clear why the lack of precedent should affect the outcome of the petitioners’ claims even if it

⁵⁰ *Windsor* (n 45) at 770. The majority in *Supriyo* would likely find that this kind of exclusion, if enacted in India, would fail the formalist test set out in its analysis.

⁵¹ *Obergefell* (n 45).

⁵² *ibid.*

⁵³ *ibid* at 681.

⁵⁴ *ibid* at 675.

⁵⁵ *Supriyo* (n 1) opinion of Bhat, J, at para 106.

⁵⁶ *ibid* opinion of Chandrachud, C J, at para 197.

⁵⁷ *ibid*, opinion of Bhat, J, at para 106. As Siddharth Narrain notes, the Supreme Court looked to these jurisdictions as relevant comparative examples in *Johar*, including on questions of systemic inequality. In *Johar*, the justices “rely heavily on judgments by the South African Supreme Court, and the United States, juxtaposing the struggle for racial equality in the United States and South Africa, with the Indian experience of struggles against caste-based oppression, and the larger fight for equality.” See Siddharth Narrain, ‘A Co-Traveler in the Long Road to Decriminalisation: Upendra Baxi’s Engagement with the Queer Movement in India’ (2018) 9 Jindal Global L Rev 299, 305.

may present a greater number of questions of first impression to the bench.⁵⁸ Even in light of distinctions among the cases, the justices' reluctance to engage with the substantive insights of other apex courts is uncharacteristic, particularly for a Court that extensively emphasised the utility of comparative jurisprudence in both *NALSA* and *Johar*.

The Court's scant engagement with the doctrinal insights of *Fourie*, in particular, is disappointing because that decision takes the equal dignity of same-sex couples quite seriously. Moreover, it does so in a way that obviates many of the bench's arguments about whether or not the right to marry is fundamental and instead foregrounds the substantive inequality and indignity that exclusion from a marriage regime inflicts on same-sex couples. As Erin Daly writes, the Constitutional Court in *Fourie* recognised that:

*"It is not enough for the state to get out of the way (because, as the marriage example indicates, it never really is out of the way); rather, dignity is fulfilled only if the state acts affirmatively to acknowledge and embrace – or at least to respect."*⁵⁹

Even as the Court in *Supriyo* ultimately declined to find that the right to live with dignity encompasses a fundamental right to marry, it is notable that it declined to meaningfully grapple with the dignitary implications of discriminating against historically subordinated groups in the civil marriage scheme that the state has in fact opted to create and administer, as well as the material and normative consequences of that exclusion.

The question of equal dignity also haunts the *Supriyo* Court's attempts to distinguish *Obergefell* in declining to find a fundamental right to marry.⁶⁰ Chief Justice Chandrachud distinguished *Obergefell* by noting that the Concurrent List in Article 246 specifically allocates authority over marriage and adoption to the legislatures of both the Union and the various states, such that marriage is reserved to them and cannot be a fundamental right.⁶¹ But like in India, courts in the United States have readily recognised that civil marriage is generally a prerog-

⁵⁸ Because the Court in *Supriyo* expressed deep reluctance to fashion a remedy itself, it is perhaps worth noting that the Court in *Fourie* merely ordered the legislature to fix the constitutional deficiency as it saw fit within certain parameters, giving it a year to do so. See *Fourie*, supra note 45.

⁵⁹ DALY (n 6) at 124.

⁶⁰ *Supriyo* (n 1) opinion of Chandrachud, C J, at paras 181-182. Justice Bhat similarly offers an incomplete analysis of *Obergefell*. He notes that *Obergefell* recognised the traditional importance of marriage to society, but claims that US courts have understood its importance to be part of the orderly pursuit of happiness recognised by the Declaration of Independence. *ibid*, opinion of Bhat, J, at para 48. To my knowledge, however, no US court has grounded the right to marry in this way, and *Obergefell* is instead based both on the right to marry as a fundamental liberty under the Fourteenth Amendment's Due Process Clause and constitutional equality guarantees under the Fourteenth Amendment's Equal Protection Clause. See *Obergefell* (n 45) at 675.

⁶¹ *Supriyo* (n 1) opinion of Chandrachud, CJ, at para 181.

ative of the legislative branch, and is typically regulated by the legislatures of the several states. The more apposite insight from the marriage cases in the United States is their insistence that lawmakers cannot create and extend a statutory right to marry to some and then irrationally withhold it from others in a way that stigmatises their relationships and violates their equal dignity.⁶² As Connor Ewing observed:

*“The use of dignity by the Obergefell majority thus painted a picture in which government could not originate dignity but could most certainly disparage, deny, and even damage it by failing to recognise the differential enjoyment of dignity-bearing interests among similarly situated individuals.”*⁶³

In *Obergefell*, the dignity of same-sex couples and their relationships was not bestowed by the state, but this did not mean that the state played no role in respecting and protecting it. On the contrary, that inherent dignity bounded decisions that were made by lawmakers, requiring them to exercise their legislative discretion in a way that did not unduly exclude or demean disfavored groups.

Of course, Indian jurisprudence differs from South African and American jurisprudence in countless ways, and *Fourie*, *Windsor*, and *Obergefell* are only relevant insofar as they are informative or persuasive as a matter of comparative law. But as I suggest above, one conceptual contribution those decisions might make is to powerfully illustrate how other apex courts have come to appreciate that dignity for same-sex couples is not only a facet of life and liberty, but can and should be meaningfully read into equality guarantees as well.⁶⁴ This insight counsels a deeper understanding and appreciation of the stigmatic effects of state laws and policies that functionally exclude a marginalised group without a good reason for doing so. Even in contested fields such as family law, where the judiciary has at times been reluctant to intervene, one can at least imagine what it might look like for jurists to craft a more robust doctrine of equal dignity – for example, applying equality guarantees to be attentive to the dignitary harm inflicted by arbitrary exclusion from a legislative scheme, or to look beyond the original rationale for a law and considers whether its practical effect is to entrench the subordination of

⁶² See Laurence H Tribe, ‘Equal Dignity: Speaking its Name’ (2015) 129 Harv L Rev F 16. While Tribe uses “equal dignity” to refer to the interplay of the Due Process Clause and the Equal Protection Clause of the United States Constitution, I use the term in this Essay in a more general sense to highlight the equal dignity that all persons enjoy by virtue of being human, which is threatened by laws that systemically disparage or devalue marginalised groups. See Kateb (n 7) at 6.

⁶³ Connor M Ewing, ‘Dignity Disputed’ (2023) 13 J L and Cts 1.

⁶⁴ Other authors have observed the importance of a harmonious reading of liberty, equality and dignity guarantees, both in comparative constitutionalism and in particular domestic contexts. See, eg, Susanne Baer, ‘Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism’ (2009) 59 U Toronto LJ 417, 457; Kenji Yoshino, ‘The New Equal Protection’ (2011) 124 Harv L Rev 747.

historically marginalised groups.⁶⁵ In the absence of such developments, comparative jurisprudence may counsel India's Supreme Court to be more candid about the limits of dignity as a constitutional value in their own jurisprudence and to provide greater clarity about the kinds of indignity and exclusion that they feel the judiciary is not in a position to remedy.

There is some cause for optimism in the fact that the insights of equal dignity are neither new nor foreign to Indian jurisprudence, including jurisprudence on the rights of LGBTQ persons. In *NALSA*, the Court described the Constitution as having "its own internal morality based on dignity and equality of all human beings."⁶⁶ Similarly, in *Johar*, the Court identified liberty, equality, dignity, and privacy as "the cardinal four corners of our monumental Constitution forming the concrete substratum of our fundamental rights."⁶⁷ In both decisions, the Court infused dignitary considerations into their equality analysis. A purely formalist analysis of constitutional equality guarantees neglects these relationships, however, and fails to appreciate why even unintentional or incidental exclusion of a marginalised group can be deeply injurious to equal dignity and the exercise of constitutional rights.

IV. CONCLUSION

It is unlikely that *Supriyo* will be the Supreme Court's last word on marriage equality. As the long journey from *Naz Foundation* to *Johar* suggests, courts may come to appreciate the significance of exclusion and subordination more deeply over time. Indeed, in other contexts, the use of dignity as a concept has been attentive to shifts in democratic debates and public opinion, reflecting growing social recognition that certain kinds of exclusion and stigmatisation are no longer consistent with constitutional guarantees.⁶⁸ Here too, the bench in *Supriyo* offered something of a hopeful note for the future. Throughout the varied opinions, the justices offered powerful rhetorical support for the dignity of LGBTQ persons, underscoring how the existing marriage regime disadvantages LGBTQ couples and urging lawmakers to act to remedy its discriminatory effects.⁶⁹ One hopes that lawmakers take the Court's words to heart, and act quickly to remedy longstanding patterns of disadvantage and stigmatic harm inflicted by the current marriage regime. In doing so, they might consider the question of whether civil unions or other alternatives to marriage for same-sex couples are, in fact, equal

⁶⁵ As other authors have observed, equal dignity has often served in practice to recognise changing social mores and context, such that indignities that courts once deemed tolerable are no longer considered to accord with constitutional equality guarantees. Note, 'Equal Dignity – Heeding its Call' (2019) 132 Harv L Rev 1323, 1330–1333; Finck (n 14) at 45.

⁶⁶ *NALSA* (n 20) at para 123.

⁶⁷ *Johar* (n 20) at para 3.

⁶⁸ 'Equal Dignity – Heeding its Call' supra note 65.

⁶⁹ *Supriyo* (n 1) opinion of Bhat, J, at para 149.

in dignity to marriage or instead convey a kind of stigma in their own right. In the event that lawmakers fail to heed the Court's call and the Court is once again approached by petitioners seeking the ability to marry, equal dignity offers a powerful doctrinal vehicle to understand the unique harm that exclusion from civil marriage exacts on LGBTQ people and the kind of remedy that such a harm might demand.