

Lgbtiq+ rights and marriage equality in India: emerging legal trends and challenges

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Abstract

The recognition of LGBTIQ+ rights has become one of the most transformative developments in contemporary constitutional democracies. In India, the movement for equality and dignity for sexual and gender minorities has evolved through judicial activism, constitutional interpretation, human rights advocacy, and social reform movements. The decriminalization of consensual same-sex relations in *Navtej Singh Johar v. Union of India* (2018) marked a historic constitutional milestone by partially invalidating Section 377 of the Indian Penal Code. However, despite this progressive development, marriage equality and broader civil rights for LGBTIQ+ individuals remain legally unrecognized in India. The denial of legal recognition to same-sex unions continues to deprive queer couples of numerous social, economic, and legal entitlements available to heterosexual couples.

This article critically analyses the emerging legal trends and challenges relating to LGBTIQ+ rights and marriage equality in India. It examines the constitutional framework governing equality, dignity, liberty, privacy, and non-discrimination under Articles 14, 15, 19, and 21 of the Constitution of India. The paper also explores significant judicial pronouncements, including *NALSA v. Union of India*, *Puttaswamy v. Union of India*, *Navtej Singh Johar v. Union of India*, and *Supriyo @ Supriya Chakraborty v. Union of India*, which collectively shaped India's queer rights jurisprudence.

Further, the article analyses the legal consequences arising from the non-recognition of same-sex marriages, including issues relating to inheritance, adoption, guardianship, insurance, succession, taxation, and social security. Comparative legal perspectives from countries such as the United States, Canada, South Africa, Taiwan, and Nepal are also discussed to understand global trends in marriage equality jurisprudence.

The article argues that while judicial recognition of sexual orientation and gender identity has significantly advanced constitutional morality in India, the absence of comprehensive anti-discrimination legislation and marriage equality continues to perpetuate structural discrimination. The paper concludes that achieving substantive equality for LGBTIQ+ persons requires legislative reform, inclusive family laws, public awareness, and a stronger commitment to transformative constitutionalism and human rights principles.

Keywords: LGBTIQ+, Marriage Equality, Constitutional Morality, Same-Sex Marriage, Human Rights, Section 377, Transformative Constitutionalism

INTRODUCTION

The evolution of LGBTIQ+ rights in India reflects the broader constitutional journey toward equality, dignity, liberty, and social justice. For centuries, individuals belonging to sexual and gender minorities have experienced discrimination, exclusion, invisibility, and social stigma. Although Indian civilization historically recognized diverse gender identities and sexual orientations in mythology, literature, and cultural traditions, colonial legal frameworks imposed rigid Victorian morality upon Indian society. The enactment of Section 377 of the Indian Penal Code, 1860 criminalized “carnal intercourse against the order of nature” and institutionalized discrimination against queer communities.

The emergence of constitutional democracy after independence promised equality and liberty to all citizens. However, despite constitutional guarantees, LGBTIQ+ persons remained marginalized socially and legally for decades. Social prejudices, patriarchal structures, religious conservatism, and legal invisibility contributed to systemic discrimination against queer individuals.

The modern movement for queer rights in India gained momentum through activism, public health initiatives, human rights advocacy, and judicial interventions. The Delhi High Court’s judgment in *Naz Foundation v. Government of NCT Delhi* (2009) marked the first major judicial recognition of sexual orientation rights by declaring Section 377 unconstitutional insofar as it criminalized consensual same-sex relations among adults. Although the Supreme Court reversed this decision in *Suresh Kumar Koushal v. Naz Foundation* (2013), constitutional jurisprudence gradually evolved through subsequent landmark judgments.

The Supreme Court’s recognition of privacy as a fundamental right in *Justice K.S. Puttaswamy v. Union of India* (2017) fundamentally transformed constitutional discourse surrounding sexuality, identity, and dignity. Eventually, in *Navtej Singh Johar v. Union of India* (2018), the Supreme Court decriminalized consensual same-sex relations and affirmed that LGBTQIA+ persons possess equal constitutional rights.

Despite this historic progress, legal recognition of same-sex marriages remains absent in India. The constitutional challenge seeking marriage equality under the Special Marriage Act, 1954

culminated in *Supriyo @ Supriya Chakraborty v. Union of India* (2023), where the Supreme Court declined to legalize same-sex marriage and deferred the issue to Parliament.

The continuing denial of marriage equality raises fundamental constitutional questions regarding equality, dignity, liberty, and non-discrimination. Marriage is not merely a social institution but also a gateway to legal rights, social legitimacy, inheritance, maintenance, taxation benefits, insurance, adoption, succession, and healthcare decision-making. Excluding same-sex couples from marriage laws therefore perpetuates structural discrimination and unequal citizenship.

This article critically analyses the emerging legal trends and challenges concerning LGBTIQ+ rights and marriage equality in India. It explores constitutional principles, judicial developments, legislative gaps, international perspectives, and human rights implications in the context of queer rights.

HISTORICAL EVOLUTION OF LGBTIQ+ RIGHTS IN INDIA

Pre-Colonial Recognition of Sexual Diversity

Contrary to the perception that homosexuality and gender diversity are Western concepts, Indian cultural traditions historically reflected varying degrees of acceptance toward sexual and gender diversity. Ancient Indian texts, temple carvings, and mythological narratives contain references to same-sex relationships, transgender identities, and non-binary expressions. Texts such as the *Kamasutra* discuss same-sex attraction and sexual practices. Mythological stories involving figures like Shikhandi and Ardhanarishvara also demonstrate recognition of gender fluidity and duality.

Colonial Criminalization under Section 377

The British colonial administration introduced Section 377 of the Indian Penal Code in 1860 based on Victorian morality. The provision criminalized “unnatural offences” and became a tool for policing sexuality and reinforcing heteronormative social structures.

Section 377 enabled harassment, extortion, blackmail, and violence against LGBTQIA+ persons. Fear of criminal prosecution forced queer individuals into invisibility and social marginalization.

Rise of LGBTQIA+ Activism

The HIV/AIDS epidemic in the 1990s highlighted the harmful consequences of criminalization. Organizations such as Naz Foundation began advocating for public health reforms and decriminalization of homosexuality. The legal battle against Section 377 eventually became a broader human rights movement focused on equality, dignity, and constitutional rights.

CONSTITUTIONAL FRAMEWORK PROTECTING LGBTIQ+ RIGHTS

Article 14: Equality Before Law

Article 14 guarantees equality before law and equal protection of laws. The exclusion of LGBTQIA+ persons from legal recognition and protection violates the constitutional commitment to equality. The Supreme Court has repeatedly held that arbitrary discrimination violates Article 14. Denying marriage rights solely based on sexual orientation constitutes unreasonable classification lacking constitutional justification.

Article 15: Non-Discrimination

Article 15 prohibits discrimination on grounds of sex. Judicial interpretation has increasingly expanded the meaning of “sex” to include sexual orientation and gender identity. In *NALSA v. Union of India* (2014), the Supreme Court recognized transgender persons as a “third gender” and affirmed their constitutional protection under Articles 14, 15, 16, and 21.

Article 19: Freedom of Expression

Sexual orientation and gender identity constitute integral aspects of personal expression and identity. Restrictions upon queer relationships and identities therefore affect freedom of expression under Article 19.

Article 21: Right to Life and Personal Liberty

Article 21 protects dignity, privacy, autonomy, and personal liberty. The Supreme Court has interpreted Article 21 expansively to include the right to choose one’s partner and live with dignity. The recognition of sexual autonomy forms a crucial part of constitutional liberty.

Landmark Judicial Developments

- **Naz Foundation v. Government of NCT Delhi (2009):** The Delhi High Court declared Section 377 unconstitutional insofar as it criminalized consensual same-sex relations between adults. The Court held that the provision violated Articles 14, 15, and 21. The judgment emphasized constitutional morality and inclusiveness.
- **Suresh Kumar Koushal v. Naz Foundation (2013):** The Supreme Court reversed the Delhi High Court judgment and upheld Section 377. The Court controversially observed that LGBTQIA+ persons constituted a “minuscule minority.” The judgment was widely criticized for undermining constitutional rights.
- **NALSA v. Union of India (2014):** The Supreme Court recognized transgender persons as a third gender and affirmed their right to self-identification. The judgment acknowledged gender identity as an aspect of dignity and autonomy.
- **Justice K.S. Puttaswamy v. Union of India (2017):** The Supreme Court recognized privacy as a fundamental right. The judgment significantly advanced constitutional jurisprudence concerning sexual orientation and personal autonomy. The Court observed that sexual orientation forms an essential attribute of privacy and dignity.
- **Navtej Singh Johar v. Union of India (2018):** The Supreme Court partially struck down Section 377 and decriminalized consensual same-sex relations between adults. The judgment emphasized dignity, equality, autonomy, and constitutional morality. The Court recognized that LGBTQIA+ persons possess equal constitutional rights and cannot be treated as second-class citizens.

MARRIAGE EQUALITY IN INDIA

Meaning and Importance of Marriage Equality

Marriage equality refers to the legal recognition of marriages irrespective of gender or sexual orientation. Marriage is not merely symbolic; it confers numerous civil, economic, social, and legal rights.

The denial of marriage equality excludes same-sex couples from:

- Inheritance rights
- Adoption rights
- Insurance benefits
- Taxation benefits
- Pension and gratuity
- Medical decision-making
- Succession rights
- Social legitimacy

The Special Marriage Act, 1954

The Special Marriage Act provides a secular framework for civil marriage. Petitioners seeking marriage equality argued that terms such as “husband” and “wife” should be interpreted in gender-neutral ways. However, the government opposed such interpretation, claiming that marriage traditionally exists only between a biological man and woman.

Supriyo @ Supriya Chakraborty v. Union of India (2023)

The Constitution Bench of the Supreme Court heard petitions seeking legal recognition of same-sex marriages under various marriage statutes.

Key Arguments of Petitioners

- Exclusion from marriage violates Articles 14, 15, 19, and 21.
- Marriage equality is essential for dignity and equal citizenship.
- Constitutional morality must prevail over societal prejudice.

Government’s Arguments

- Marriage is a socio-cultural institution rooted in heterosexual relationships.

- Legislative reforms should be left to Parliament.
- Courts should avoid judicial legislation.

Supreme Court's Decision

The Court declined to legalize same-sex marriage and held that there is no fundamental right to marry under the Constitution.

However, the Court acknowledged discrimination faced by queer couples and directed the government to consider administrative measures for their welfare.

Critical Analysis

The judgment has been criticized for judicial restraint and inconsistency with earlier constitutional principles established in *Navtej Johar* and *Puttaswamy*. Critics argue that denying marriage equality undermines dignity, autonomy, and substantive equality.

Emerging Legal Trends in India

- **Recognition of Queer Identity:** Indian courts increasingly recognize sexual orientation and gender identity as protected constitutional characteristics.
- **Expansion of Privacy Jurisprudence:** Privacy jurisprudence has expanded to include bodily autonomy, sexual orientation, and decisional freedom.
- **Growth of Transformative Constitutionalism:** Transformative constitutionalism seeks to dismantle historical oppression and ensure substantive equality.
- **Judicial Recognition of Non-Traditional Families:** Courts have increasingly acknowledged diverse family structures beyond heterosexual marriage.
- **Increased Public Visibility:** Media representation, pride movements, and digital activism have improved public discourse concerning LGBTQIA+ rights.

Challenges Facing Marriage Equality in India

- **Social Conservatism:** Religious orthodoxy and patriarchal norms continue to shape public attitudes toward same-sex relationships.

- **Legislative Inaction:** India lacks comprehensive anti-discrimination legislation protecting sexual minorities.
- **Heteronormative Family Laws:** Indian personal laws are structured around heterosexual marriage and gender binaries.
- **Lack of Social Acceptance:** Many LGBTQIA+ persons continue to face violence, family rejection, and workplace discrimination.
- **Mental Health Challenges:** Social exclusion and stigma significantly impact mental health among queer individuals.

Comparative International Perspectives

- **United States:** In *Obergefell v. Hodges* (2015), the U.S. Supreme Court recognized same-sex marriage as a constitutional right.
- **Canada:** Canada legalized same-sex marriage nationwide in 2005 under the Civil Marriage Act.
- **South Africa:** South Africa recognized same-sex marriage under the Civil Union Act, 2006.
- **Taiwan:** Taiwan became the first Asian country to legalize same-sex marriage in 2019.
- **Nepal:** Nepal's judiciary has adopted progressive positions supporting LGBTQIA+ rights and same-sex unions.

Comparative developments demonstrate a global shift toward inclusive constitutionalism and marriage equality.

Human Rights Perspective

International human rights instruments increasingly recognize LGBTQIA+ rights as integral human rights.

- **Universal Declaration of Human Rights:** The UDHR emphasizes equality, dignity, and non-discrimination.

- **Yogyakarta Principles:** The Yogyakarta Principles provide international guidance concerning sexual orientation and gender identity rights.

United Nations Human Rights Council

The UNHRC has repeatedly condemned discrimination based on sexual orientation and gender identity. India's constitutional commitments align with these international human rights principles.

Need for Legislative Reform

- **Gender-Neutral Marriage Laws:** Marriage laws should adopt inclusive terminology recognizing same-sex couples.
- **Anti-Discrimination Legislation:** Comprehensive legislation is necessary to prohibit discrimination in employment, housing, healthcare, and education.
- **Adoption and Surrogacy Rights:** Same-sex couples should receive equal parenting and guardianship rights.
- **Healthcare and Insurance Benefits:** Queer couples should receive equal access to healthcare benefits and insurance protections.
- **Educational Reforms:** Awareness and sensitization programs are essential for combating prejudice.

Role of Judiciary in Advancing Queer Rights

The Indian judiciary has played a transformative role in recognizing LGBTQIA+ rights. Landmark judgments have expanded constitutional protections and challenged majoritarian morality.

However, the judiciary also faces institutional limitations concerning separation of powers and legislative policymaking.

The tension between judicial activism and restraint remains central to the marriage equality debate.

Constitutional Morality versus Social Morality

Dr. B.R. Ambedkar emphasized that constitutional morality must prevail over social prejudices and majoritarian morality. Opposition to marriage equality often relies upon religious beliefs and cultural traditions. However, constitutional democracies are obligated to protect minority rights irrespective of popular opinion. The Indian Constitution envisions an inclusive and pluralistic society based upon dignity and equality.

Future of Marriage Equality in India

Although the Supreme Court declined to legalize same-sex marriage in 2023, the constitutional conversation remains open.

Several factors may shape future developments:

- Legislative advocacy
- Judicial reinterpretation
- Civil society activism
- Public awareness campaigns
- International human rights pressure
- Generational shifts in social attitudes

The trajectory of Indian constitutional jurisprudence suggests gradual expansion of rights over time.

CONCLUSION

The journey of LGBTIQ+ rights in India reflects the broader struggle for equality, dignity, and constitutional justice. Landmark judgments such as *NALSA*, *Puttaswamy*, and *Navtej Johar* significantly transformed India's constitutional landscape by recognizing sexual orientation and gender identity as protected constitutional characteristics.

However, despite decriminalization of homosexuality, substantive equality remains incomplete without legal recognition of same-sex marriages and comprehensive anti-

discrimination protections. The denial of marriage equality perpetuates structural discrimination and excludes queer individuals from essential civil, economic, and social rights.

The *Supriyo* judgment highlighted the continuing tensions between constitutional morality, social morality, judicial restraint, and legislative authority. While the Court acknowledged discrimination faced by queer couples, its refusal to recognize marriage equality underscores the unfinished project of transformative constitutionalism in India.

The future of marriage equality in India will depend upon sustained legal reform, judicial evolution, public awareness, and social transformation. A truly constitutional democracy cannot deny equal citizenship and dignity based on sexual orientation or gender identity. The realization of substantive equality for LGBTIQ+ persons requires not only decriminalization but also affirmative recognition, inclusion, and protection under law. The constitutional promise of justice, liberty, equality, and fraternity remains incomplete until queer individuals enjoy equal rights and equal dignity within family, society, and the legal system.

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