

Beyond Section 377: The Continuing Struggle for Marriage Equality in India

Yogendra Kumar Jain^{1*}, Prof. (Dr.) Mahendra Tiwari²

¹ Research Scholar, Jaipur school of law, Maharaj Vinayak Global University, Jaipur,
Rajasthan

advocateyogendrajain89@gmail.com

² Supervisor (Dean & Head), Jaipur school of law, Maharaj Vinayak Global University,
Jaipur, Rajasthan

Abstract

The decriminalization of consensual same-sex relations through the landmark judgment of *Navtej Singh Johar v. Union of India* (2018) marked a transformative moment in the constitutional history of India. By partially striking down Section 377 of the Indian Penal Code, the Supreme Court recognized the dignity, autonomy, equality, and privacy rights of LGBTQIA+ individuals. However, despite this judicial advancement, the legal recognition of same-sex marriages continues to remain absent in India. The refusal of the Supreme Court in *Supriyo @ Supriya Chakraborty v. Union of India* (2023) to legalize same-sex marriage under the Special Marriage Act, 1954 has reignited debates concerning constitutional morality, legislative inertia, human rights, and social justice. This article critically examines the continuing struggle for marriage equality in India beyond the decriminalization of homosexuality.

The paper explores the historical evolution of LGBTQIA+ rights in India, constitutional protections under Articles 14, 15, 19, and 21, and the role of transformative constitutionalism in shaping queer jurisprudence. It analyses the legal implications of denying marriage rights to same-sex couples, including the denial of inheritance, adoption, succession, insurance, taxation, and social security benefits. Further, the article evaluates the reasoning adopted by the Supreme Court in the 2023 marriage equality judgment and critiques the judiciary's reluctance to recognize marriage as a fundamental right for queer couples. Comparative legal developments from countries such as the United States, South Africa, Canada, Taiwan, and Nepal are also discussed to understand the global trajectory of marriage equality.

The article argues that the denial of marriage equality perpetuates structural discrimination against LGBTQIA+ persons and undermines constitutional guarantees of equality and dignity. It concludes that while Section 377's partial invalidation was a constitutional milestone, true equality remains incomplete without legal recognition of same-sex unions. Legislative reforms, anti-discrimination frameworks, and inclusive family laws are urgently required to realize substantive equality and human rights for queer communities in India.

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

INTRODUCTION

The recognition of human rights for sexual minorities has emerged as one of the most significant constitutional and social justice movements of the twenty-first century. Across the world, democratic societies increasingly acknowledge that sexual orientation and gender identity are intrinsic aspects of human dignity and liberty. In India, the struggle for LGBTQIA+ rights has evolved through decades of social resistance, legal activism, judicial interpretation, and constitutional transformation. The most prominent milestone in this journey was the Supreme Court's historic judgment in *Navtej Singh Johar v. Union of India* (2018), which partially struck down Section 377 of the Indian Penal Code and decriminalized consensual same-sex relations between adults.

The decision was celebrated nationally and internationally as a victory for constitutional morality, privacy, dignity, equality, and individual autonomy. The Court acknowledged that LGBTQIA+ persons are entitled to full constitutional protection and cannot be treated as "second-class citizens." Yet, despite the decriminalization of same-sex intimacy, the broader struggle for equal citizenship remains unresolved. One of the most contested and unresolved issues is the legal recognition of same-sex marriages in India.

Marriage in India is not merely a private relationship; it is a social institution carrying profound legal, economic, emotional, and cultural consequences. Marriage determines inheritance, maintenance, adoption, guardianship, pension rights, insurance benefits, taxation, medical decision-making, succession, and social legitimacy. The exclusion of same-sex couples from marriage laws therefore creates systemic discrimination and denies queer individuals access to numerous civil rights available to heterosexual couples.

The legal battle for marriage equality intensified after several LGBTQIA+ couples approached the Supreme Court seeking recognition under the Special Marriage Act, 1954. Petitioners argued that excluding same-sex couples from marriage violates Articles 14, 15, 19, and 21 of the Constitution. However, in *Supriyo @ Supriya Chakraborty v. Union of India* (2023), the Supreme Court declined to legalize same-sex marriage, holding that there is no fundamental right to marry and that such reform falls within the domain of Parliament.

The judgment generated widespread debate. Supporters viewed it as judicial restraint and respect for legislative supremacy, while critics considered it a missed opportunity to advance

constitutional equality. The Court's refusal highlighted the continuing tension between constitutional morality and societal morality in India.

This article critically analyses the continuing struggle for marriage equality in India after Section 377. It examines constitutional principles, judicial trends, comparative perspectives, and human rights implications. It further explores whether the denial of marriage equality is compatible with constitutional guarantees of equality, dignity, and non-discrimination.

Historical Background of LGBTQIA+ Rights in India

The existence of diverse sexual orientations and gender identities is not alien to Indian civilization. Ancient Indian texts, temple sculptures, mythological narratives, and literary traditions reveal that pre-colonial Indian society acknowledged sexual diversity in varying forms. Historical references to same-sex relationships and gender fluidity can be found in texts such as the *Kamasutra*, *Mahabharata*, and regional folklore traditions.

However, colonial rule fundamentally altered attitudes toward sexuality. The British introduced Victorian moral standards and enacted Section 377 of the Indian Penal Code in 1860, criminalizing "carnal intercourse against the order of nature." The provision became a tool of moral policing, harassment, social exclusion, and institutional discrimination against LGBTQIA+ persons.

For decades, Section 377 reinforced stigma and invisibility. Individuals faced violence, blackmail, police harassment, and social ostracization. The HIV/AIDS crisis in the 1990s further highlighted the harmful effects of criminalization on public health and human rights.

The legal challenge to Section 377 began with the Naz Foundation in the Delhi High Court. In *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. However, this victory was short-lived. In *Suresh Kumar Koushal v. Naz Foundation* (2013), the Supreme Court reversed the Delhi High Court's judgment, holding that LGBTQIA+ persons constituted only a "minuscule minority."

The reasoning in *Koushal* attracted severe criticism for undermining constitutional rights and equality principles. Subsequently, the Supreme Court's recognition of privacy as a fundamental right in *Justice K.S. Puttaswamy v. Union of India* (2017) laid the groundwork

for reconsidering Section 377. Finally, in *Navtej Singh Johar v. Union of India* (2018), the Supreme Court overruled *Koushal* and held that criminalization of consensual same-sex intimacy violated constitutional rights to equality, dignity, privacy, and freedom of expression. The judgment marked a paradigm shift from tolerance to constitutional acceptance.

CONSTITUTIONAL FRAMEWORK FOR MARRIAGE EQUALITY

Article 14: Equality Before Law

Article 14 guarantees equality before law and equal protection of laws. Denying marriage rights to same-sex couples creates an unreasonable classification based on sexual orientation. Since marriage laws confer legal rights and benefits, excluding queer couples amounts to discriminatory treatment.

The Supreme Court in *Navtej Johar* recognized that sexual orientation is an intrinsic characteristic protected under constitutional equality. Consequently, denying marriage equality raises serious constitutional concerns.

Article 15: Prohibition of 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. Therefore, exclusionary marriage laws may violate Article 15 by discriminating against individuals based on sexual orientation.

Article 19: Freedom of Expression and Association

Marriage represents emotional expression, companionship, and social identity. Restricting same-sex couples from entering legally recognized unions affects freedom of expression and association under Article 19.

Article 21: Right to Life and Personal Liberty

The Supreme Court has interpreted Article 21 expansively to include dignity, autonomy, privacy, and choice of partner. In cases such as *Shafin Jahan v. Asokan K.M.* and *Lata Singh v. State of Uttar Pradesh*, the Court affirmed the right to choose one’s life partner.

The exclusion of same-sex couples from marriage recognition undermines these constitutional guarantees.

Navtej Johar Judgment and Constitutional Morality

The *Navtej Johar* judgment transformed Indian constitutional jurisprudence. The Court emphasized constitutional morality over majoritarian morality and recognized that societal prejudice cannot justify discrimination.

Justice Chandrachud observed that history owed an apology to LGBTQIA+ persons for centuries of discrimination. The Court held that sexual orientation forms an essential attribute of privacy and identity.

The judgment relied heavily on transformative constitutionalism, which seeks to dismantle oppressive social structures through constitutional interpretation. The Court affirmed that the Constitution is a living document aimed at protecting marginalized communities.

However, while *Navtej Johar* decriminalized homosexuality, it did not address civil rights such as marriage, adoption, or inheritance. Consequently, LGBTQIA+ individuals continue to face structural exclusion from family law institutions.

Marriage Equality Litigation in India

Following *Navtej Johar*, several petitions were filed before the Supreme Court seeking recognition of same-sex marriages under the Special Marriage Act, Hindu Marriage Act, and Foreign Marriage Act.

Petitioners argued that exclusionary language such as “husband” and “wife” could be interpreted in gender-neutral terms. They contended that marriage equality is necessary to secure constitutional guarantees of dignity and equality.

The Union Government opposed the petitions, arguing that marriage is a socio-cultural institution rooted in heterosexual relationships and that legal recognition should be determined by Parliament rather than courts.

The Supreme Court constituted a Constitution Bench to hear the matter. The hearings generated nationwide discussion concerning constitutional morality, family values, and LGBTQIA+ rights.

Supriyo Judgment: Judicial Restraint or Missed Opportunity?

In *Supriyo @ Supriya Chakraborty v. Union of India* (2023), the Supreme Court declined to legalize same-sex marriage.

The Court unanimously held that there is no fundamental right to marry under the Constitution. It further ruled that reading same-sex marriage into the Special Marriage Act would amount to judicial legislation.

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

Critics argue that the judgment represents inconsistency in constitutional reasoning. While *Navtej Johar* recognized dignity and autonomy, *Supriyo* refused to extend these principles to marriage equality. The judgment has been criticized for excessive judicial restraint and deference to legislative authority.

Supporters of the judgment maintain that marriage laws involve complex policy considerations better suited for Parliament. The decision reflects ongoing tensions between constitutional rights and institutional limitations.

Legal Consequences of Non-Recognition of Same-Sex Marriage

The absence of marriage equality creates numerous practical hardships:

- **Inheritance and Succession:** Same-sex partners lack automatic inheritance rights available to married couples. Property disputes become legally uncertain.
- **Adoption Rights:** Indian adoption laws primarily recognize heterosexual married couples. Same-sex couples face barriers in joint adoption and guardianship.
- **Medical Decision-Making:** Hospitals often deny partners authority to make medical decisions or access critical information.
- **Insurance and Tax Benefits:** Marriage-based benefits such as health insurance, pensions, gratuity, and tax exemptions remain inaccessible.
- **Social Legitimacy:** Legal non-recognition reinforces social stigma and invisibility.

International Perspectives on Marriage Equality

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

Comparative developments demonstrate a global trend toward inclusive recognition of marriage equality.

Constitutional Morality versus Social Morality

One of the central debates in the marriage equality discourse concerns the conflict between constitutional morality and social morality.

Constitutional morality requires protection of minority rights irrespective of popular opinion. Dr. B.R. Ambedkar emphasized that constitutional morality must prevail over social prejudices.

Opposition to same-sex marriage often relies on religious beliefs, traditional family structures, and cultural conservatism. However, constitutional democracies cannot deny fundamental rights solely because certain social groups disapprove of them. The Supreme Court itself has repeatedly emphasized constitutional morality in cases involving privacy, gender justice, and personal liberty.

Role of Legislature and Need for Reform

The absence of comprehensive anti-discrimination legislation remains a major obstacle for LGBTQIA+ rights in India.

Legislative reforms should include:

- Gender-neutral marriage laws
- Anti-discrimination protections
- Adoption and surrogacy rights
- Equal inheritance rights
- Recognition of civil unions
- Workplace protections
- Healthcare accessibility

Parliamentary action is essential to achieve substantive equality.

Societal Challenges and Cultural Resistance

Despite increasing urban acceptance, LGBTQIA+ individuals continue to face social exclusion, violence, and family pressure.

Religious conservatism, lack of awareness, and patriarchal norms contribute to resistance against marriage equality. Media representation and educational initiatives are necessary to combat prejudice.

The younger generation, however, demonstrates growing support for LGBTQIA+ inclusion, suggesting gradual societal transformation.

Human Rights Perspective

International human rights principles increasingly recognize LGBTQIA+ rights as fundamental human rights.

The Universal Declaration of Human Rights emphasizes equality and dignity for all individuals. International bodies including the United Nations Human Rights Council have condemned discrimination based on sexual orientation. India, as a constitutional democracy committed to human rights, bears responsibility to ensure equal treatment of sexual minorities.

Transformative Constitutionalism and the Future of Marriage Equality

Transformative constitutionalism seeks to use constitutional interpretation as a mechanism for social transformation. The Indian Constitution was designed to dismantle social hierarchies and protect marginalized communities. The recognition of same-sex marriage aligns with constitutional goals of equality, dignity, liberty, and fraternity.

Although the *Supriyo* judgment delayed marriage equality, it did not close the constitutional conversation. Future litigation, legislative advocacy, and social movements may continue pushing for recognition. The trajectory of constitutional jurisprudence suggests gradual expansion of rights over time.

CONCLUSION

The decriminalization of homosexuality through the *Navtej Johar* judgment represented a monumental victory for constitutional rights and human dignity in India. However, the struggle for equality did not end with the partial invalidation of Section 377. The refusal to legally recognize same-sex marriages reveals the continuing gap between formal constitutional promises and substantive equality for LGBTQIA+ persons.

Marriage equality is not merely about symbolic recognition; it concerns access to civil rights, social legitimacy, economic security, and personal dignity. Denying same-sex couples the right to marry perpetuates exclusion and reinforces structural discrimination.

The *Supriyo* judgment reflects judicial caution and legislative deference, yet it also highlights the unfinished project of constitutional transformation. The Constitution of India guarantees equality, liberty, dignity, and non-discrimination to all citizens irrespective of sexual orientation. True constitutional morality demands that these principles extend fully to queer relationships and family structures.

The future of marriage equality in India will depend upon legislative reform, judicial evolution, civil society activism, and societal awareness. While the road remains challenging, the constitutional journey toward inclusivity and justice continues beyond Section 377.

References

1. Ambedkar, B. R. (1949). *Constituent Assembly Debates*. Government of India.
2. Baxi, U. (2016). *The Future of Human Rights*. Oxford University Press.
3. Chandrachud, A. (2017). *Republic of Rhetoric: Free Speech and the Constitution of India*. Penguin Random House.
4. Gautam Bhatia. (2019). *The Transformative Constitution*. HarperCollins.
5. Human Rights Watch. (2018). *India: Supreme Court Strikes Down Section 377*.
6. International Commission of Jurists. (2007). *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*.
7. Joshi, Y. (2021). LGBTQ rights and constitutional morality in India. *Indian Journal of Constitutional Law*, 15(2), 45–68.
8. Katju, M. (2019). Constitutional morality and LGBTQ rights in India. *Journal of Indian Law and Society*, 10(1), 78–95.
9. Kumar, A. (2024). Same-sex marriage and constitutional interpretation in India. *Indian Law Review*, 8(1), 112–138.
10. Narrain, A. (2004). The articulation of rights around sexuality and health: Subaltern queer cultures in India. *Health and Human Rights*, 7(2), 142–164.
11. Narrain, A., & Gupta, A. (2011). *Law Like Love: Queer Perspectives on Law*. Yoda Press.
12. Obergefell v. Hodges, 576 U.S. 644 (2015).
13. Puttaswamy v. Union of India, (2017) 10 SCC 1.
14. Shafin Jahan v. Asokan K.M., (2018) 16 SCC 368.
15. Supriyo @ Supriya Chakraborty v. Union of India, 2023 SCC OnLine SC 1348.
16. Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.

17. The Constitution of India, 1950.
18. Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
19. Universal Declaration of Human Rights, 1948.
20. Yadav, R. (2023). Marriage equality and LGBTQ rights in India: A constitutional analysis. *Journal of Human Rights Law and Practice*, 5(3), 201–229.