



Same-Sex Marriages in India: A Constitutional Perspective

Dr. Santosh Kumar

Advocate, High Court of Judicature at Allahabad

ARTICLE DETAILS	ABSTRACT
Research Paper	
Keywords :	
Same-sex marriage, procreation, tradition, family, rights.	<i>Marriage has long been recognized as a social, religious, and legal institution in India, deeply embedded in traditions, customs, and personal laws. However, the question of whether same-sex couples should have access to the institution of marriage has emerged as one of the most pressing constitutional debates in recent years. The decriminalization of homosexuality through the landmark judgment in Navtej Singh Johar v. Union of India (2018) marked a watershed moment in the recognition of LGBTQ+ rights, yet the denial of marriage rights continues to create a legal vacuum. In 2023, the Supreme Court in Supriyo Chakraborty v. Union of India refused to legalize same-sex marriage, leaving the matter to the legislature, but it emphasized the rights of queer couples to live with dignity.</i> <i>This paper examines same-sex marriage in India through a constitutional lens, focusing on Articles 14, 15, 19, and 21, as well as the doctrine of constitutional morality. It critically analyzes judicial pronouncements, compares global jurisprudence, and evaluates legislative challenges. The paper argues that the denial of same-sex marriages violates fundamental rights guaranteed under the Indian Constitution and proposes reforms to align Indian law with the evolving global understanding of equality, dignity, and liberty.</i>

Introduction

Marriage is not merely a private relationship between two individuals but also a legal recognition of a union that entails a range of rights, duties, and privileges. In India, marriage is governed by a complex



interplay of personal laws based on religion and secular laws such as the Special Marriage Act, 1954. These laws, however, are framed on a heteronormative understanding of marriage—between a man and a woman. The LGBTQ+ movement in India has gained visibility and recognition in the last two decades. While the decriminalization of consensual same-sex relationships in *Navtej Johar* (2018) was celebrated as a victory for human rights, the struggle for full legal equality remains unfinished. Marriage equality is at the center of this struggle because marriage in India is tied to inheritance, adoption, maintenance, succession, medical decision-making, taxation, and numerous other legal benefits. The denial of marriage rights to same-sex couples perpetuates systemic exclusion and second-class citizenship.

The issue reached its peak in *Supriyo Chakraborty v. Union of India* (2023), where petitioners argued for recognition of same-sex marriage under the Special Marriage Act, 1954. The Supreme Court, while acknowledging the dignity of queer couples, refrained from granting marriage equality, citing separation of powers and the need for legislative action. The judgment reignited debates on constitutional morality, the transformative nature of the Indian Constitution, and the role of the judiciary in advancing social justice. This paper explores same-sex marriages in India from a constitutional perspective. It evaluates the scope of fundamental rights, the role of judicial interpretations, comparative jurisprudence, legislative challenges, and future prospects.

Constitutional Framework and Fundamental Rights

The Constitution of India guarantees a set of fundamental rights which form the bedrock of democracy and individual liberty. The question of same-sex marriage intersects with four key provisions—Articles 14, 15, 19, and 21.

Article 14: Right to Equality

Article 14 guarantees equality before the law and equal protection of the laws. This implies that the State cannot deny to any person equality of status or arbitrarily discriminate. The Supreme Court in *E.P. Royappa v. State of Tamil Nadu* (1974) held that arbitrariness is antithetical to equality. Denying same-sex couples access to marriage constitutes unreasonable classification. The classification between heterosexual and homosexual couples fails the twin test of reasonable classification:

1. The intelligible differentia (sexual orientation) is not constitutionally valid.
2. The classification does not bear a rational nexus with the object of marriage, which is companionship and social security.

Therefore, exclusion of same-sex couples from marriage is discriminatory and arbitrary.

Article 15: Prohibition of Discrimination

Article 15 prohibits discrimination on grounds of religion, race, caste, sex, or place of birth. In *Navtej Johar* (2018), the Supreme Court expanded the interpretation of “sex” to include sexual orientation. Hence, denying marriage rights to same-sex couples amounts to discrimination on the basis of sexual orientation, which is unconstitutional.

This interpretation aligns with the principle that the Constitution must be read in light of its transformative spirit rather than static traditional norms.

Article 19: Freedom of Expression and Association

The right to freedom of expression includes the right to express one’s identity and sexual orientation. Choosing a life partner is one of the most intimate decisions, falling within personal autonomy. Denying same-sex marriage curtails the right to freely associate with a partner of choice, thereby infringing Article 19(1)(c) and 19(1)(a).

The Supreme Court in *Shafin Jahan v. Asokan K.M.* (2018) recognized the right to marry a person of choice as intrinsic to liberty. By extension, the same principle must apply to same-sex couples.

Article 21: Right to Life and Dignity

Article 21 guarantees the right to life and personal liberty, which has been expansively interpreted to include dignity, privacy, and choice. In *K.S. Puttaswamy v. Union of India* (2017), the right to privacy was held to include the right to sexual orientation. Denial of marriage rights undermines the dignity and liberty of same-sex couples by depriving them of the legal recognition enjoyed by heterosexual couples.

The principle of *constitutional morality* emphasized in *Navtej Johar* further underscores that the Constitution protects minority rights even against prevailing social morality.

Judicial Pronouncements in India

1. Naz Foundation v. Government of NCT of Delhi (2009)

The Naz Foundation case was the first significant breakthrough for LGBTQ+ rights in India. The Delhi-based NGO Naz Foundation, working primarily on HIV/AIDS awareness, filed a public interest litigation to challenge Section 377 of the Indian Penal Code, 1860. This provision, a colonial-era law, criminalized “carnal intercourse against the order of nature” and was historically used to persecute LGBTQ+ persons. The petitioners argued that Section 377 violated Articles 14, 15, and 21 of the Constitution. The Delhi High Court agreed and in a groundbreaking decision read down Section 377 to exclude consensual sexual

acts between adults in private. The Court emphasized that constitutional protections could not be denied to a minority simply because they were unpopular or stigmatized. It held that criminalization of homosexual acts violated Article 14 because the classification was arbitrary and unreasonable. By interpreting “sex” under Article 15 to include “sexual orientation,” the Court acknowledged that discrimination on grounds of homosexuality was unconstitutional. Further, by invoking Article 21, it recognized that privacy, dignity, and autonomy were integral to life and liberty. The Court’s reliance on the doctrine of constitutional morality was especially significant—it stressed that constitutional values must triumph over social prejudices. The judgment was hailed as a watershed in LGBTQ+ rights, although it was later challenged by conservative groups. Its limitation was that being a High Court decision, it was binding only within Delhi, and its authority across India was left uncertain until the Supreme Court could weigh in.

2. Suresh Kumar Koushal v. Naz Foundation (2013)

The Supreme Court’s decision in Suresh Kumar Koushal reversed the progress made by Naz Foundation and represented a sharp setback for LGBTQ+ rights. Several appeals were filed challenging the Delhi High Court’s ruling, and the Supreme Court delivered its verdict in 2013. The Court held that Section 377 was constitutionally valid and reinstated the criminalization of consensual homosexual acts. In its reasoning, the Court emphasized that Section 377 did not target any particular class of people, since it applied to all persons equally. The most criticized part of the judgment was the observation that LGBTQ+ persons constituted only a “minuscule fraction” of the population, implying that the limited number of people affected by the law was insufficient reason to strike it down. This reasoning reflected a fundamental misunderstanding of the role of fundamental rights, which exist to protect minorities and individuals, not just majorities. The Court further held that such social and moral issues should be addressed by Parliament rather than by judicial intervention. The judgment faced intense criticism from legal scholars, activists, and international human rights bodies. It revived fear and harassment for LGBTQ+ individuals, with police and society emboldened to use Section 377 as a tool of intimidation. Yet, paradoxically, the backlash against this regressive ruling galvanized LGBTQ+ activism in India, creating momentum for a more forceful constitutional challenge that eventually led to the decision in Navtej Johar.

3. National Legal Services Authority (NALSA) v. Union of India (2014)

While NALSA v. Union of India did not deal directly with homosexuality, it played a vital role in expanding the constitutional recognition of gender identity. The petition, brought by the National Legal Services Authority along with transgender activists, sought legal recognition of transgender persons and



protection of their rights. The Supreme Court delivered a historic judgment affirming that transgender persons had the fundamental right to self-identify their gender. It declared that they must be recognized as a distinct third gender and be entitled to the same constitutional protections as other citizens. The Court relied heavily on Articles 14, 15, 16, 19, and 21, holding that transgender persons should not face discrimination in employment, education, and healthcare. It also recognized the importance of dignity and autonomy, linking them with the freedom to decide one's own gender identity. Importantly, the Court directed governments to implement affirmative action measures, including reservations in education and employment. Though implementation of these directives has been uneven, the NALSA ruling was transformative in expanding the scope of constitutional equality. It marked a departure from the rigid gender binary and laid the jurisprudential foundation that supported the decriminalization of homosexuality in later cases. The case showed that the Indian judiciary was willing to engage in bold, progressive interpretations of the Constitution when it came to gender and identity.

4. Navtej Singh Johar v. Union of India (2018)

The turning point for LGBTQ+ rights came with the judgment in Navtej Singh Johar. After the regressive Koushal ruling, a group of petitioners including dancer Navtej Johar and journalist Sunil Mehra once again challenged Section 377 before a constitutional bench of the Supreme Court. The case was heard against the backdrop of the Supreme Court's decision in Puttaswamy v. Union of India (2017), which recognized privacy as a fundamental right. Building on this precedent, the Court in Navtej Johar unanimously struck down Section 377 to the extent that it criminalized consensual sexual acts between adults. The judgment was sweeping in its reasoning. It held that Section 377 violated Article 14 because it created an arbitrary and unreasonable classification. By reaffirming that "sex" under Article 15 included "sexual orientation," it extended non-discrimination protections to LGBTQ+ persons. Article 21 was interpreted to encompass dignity, privacy, and autonomy, affirming that sexual orientation was an integral aspect of one's identity. The Court also invoked Article 19(1)(a), recognizing that the expression of one's sexuality is a form of free expression. Perhaps most importantly, the Court emphasized constitutional morality over social morality, insisting that constitutional principles of liberty and equality cannot be subordinated to prevailing public prejudices. The individual opinions within the judgment were also remarkable. Justice Chandrachud highlighted that denial of sexual autonomy amounted to denial of humanity itself. Justice Indu Malhotra memorably stated that "history owes an apology" to LGBTQ+ persons for centuries of discrimination. The judgment was celebrated across India and internationally as a landmark recognition of human rights. However, it stopped short of addressing related issues such as same-sex marriage,



adoption, or inheritance, leaving the LGBTQ+ community legally equal in criminal law but still disadvantaged in family law.

5. Shafin Jahan v. Asokan K.M. (2018)

Although not directly concerning LGBTQ+ rights, the case of *Shafin Jahan v. Asokan K.M.* has important implications for the recognition of same-sex relationships. The case involved Hadiya, a young Hindu woman who converted to Islam and married Shafin Jahan. Her father challenged the marriage, alleging that it was a case of “love jihad” and sought annulment. The Kerala High Court annulled the marriage, but on appeal, the Supreme Court reversed the decision and upheld Hadiya’s right to choose her partner. The Court ruled that the right to marry a person of one’s choice is a fundamental part of liberty under Article 21 of the Constitution. It stressed that an adult’s decision to choose their spouse lies within the sphere of individual autonomy and cannot be interfered with by the state or society. This case, though about interfaith marriage, strongly reinforced the principle that partner choice is constitutionally protected. For LGBTQ+ persons, this principle is crucial because if heterosexual couples have the fundamental right to choose their partner, then denying this right to homosexual couples amounts to unconstitutional discrimination. Thus, *Shafin Jahan* indirectly strengthens the case for recognition of same-sex marriage in India.

6. Supriyo Chakraborty v. Union of India (2023)

The most recent and perhaps the most significant case in the context of same-sex marriage is *Supriyo Chakraborty v. Union of India*. This case involved petitions by queer couples seeking legal recognition of same-sex marriages. They argued that the Special Marriage Act, 1954 should be read in a gender-neutral manner or otherwise declared unconstitutional for excluding same-sex couples. The Union Government strongly opposed the petitions, contending that marriage was a social institution rooted in Indian tradition and that recognition of same-sex marriages was within the exclusive domain of Parliament. The Supreme Court delivered a unanimous verdict rejecting the plea for marriage equality. The majority held that while the right to choose a partner was constitutionally protected, there was no fundamental right to marry. It further observed that the Court could not legislate in areas involving complex social policy and must defer to Parliament. At the same time, the Court acknowledged the dignity and rights of queer couples to cohabit and directed governments to ensure they are not discriminated against in employment, housing, and access to services. Two judges, Chief Justice Chandrachud and Justice Kaul, delivered minority opinions favoring recognition of civil unions for same-sex couples, with associated legal rights. However, this view did not carry the majority. The judgment has been criticized for excessive judicial restraint and for



effectively deferring equality to an uncertain legislative future, especially in a political climate where Parliament is unlikely to act. Nonetheless, the recognition of the dignity and autonomy of queer couples marks an important step, even if it falls short of full equality.

The journey of LGBTQ+ rights in Indian jurisprudence thus reflects both progress and hesitation. From the groundbreaking recognition of dignity in *Naz Foundation* to the regressive reversal in *Koushal*, and then the sweeping constitutional affirmation in *Navtej Johar*, the courts have oscillated between bold constitutional interpretation and cautious restraint. *NALSA* expanded the scope of gender rights, *Shafin Jahan* reaffirmed the freedom to choose one's partner, and *Supriyo Chakraborty* demonstrated the judiciary's reluctance to take the final step toward marriage equality. The trajectory reveals that while decriminalization has been achieved, the constitutional question of full equality—including marriage, adoption, and family rights—remains unresolved, leaving the LGBTQ+ community in a liminal space between recognition and denial.

Comparative Jurisprudence

The global legal landscape provides valuable insights.

- **United States:** In *Obergefell v. Hodges* (2015), the U.S. Supreme Court legalized same-sex marriage nationwide, holding it as a fundamental right under the Due Process and Equal Protection Clauses.
- **South Africa:** The Constitutional Court recognized same-sex marriage in *Minister of Home Affairs v. Fourie* (2005), interpreting equality and dignity provisions.
- **Nepal:** In a landmark ruling, the Supreme Court of Nepal directed the government to recognize same-sex marriages, making it the first South Asian country to do so.
- **Taiwan:** Became the first Asian country to legalize same-sex marriage in 2019, following a Constitutional Court judgment.

These global examples demonstrate a growing recognition of marriage equality as an essential component of human rights.

Legislative Challenges in India

The legislative framework in India poses several obstacles:

1. **Personal Laws:** Hindu, Muslim, and Christian marriage laws are inherently heteronormative, assuming unions between men and women.



2. **Special Marriage Act, 1954:** Although secular, it too uses gender-specific terms, making its application to same-sex couples difficult.
3. **Parliamentary Reluctance:** Lawmakers often cite cultural and religious traditions to resist recognition of same-sex marriage.
4. **Lack of Political Will:** Issues concerning LGBTQ+ rights are often marginalized in legislative debates due to fear of social backlash.

Thus, legal reform requires not only constitutional commitment but also political courage.

Critical Analysis

The constitutional principles of equality, dignity, and liberty clearly mandate recognition of same-sex marriages. Yet, the judiciary in *Supriyo Chakraborty* chose restraint, reflecting institutional deference to the legislature. This raises questions about whether courts should wait for legislative action when fundamental rights are at stake.

Moreover, the absence of legal recognition has severe consequences for same-sex couples. They are denied rights relating to inheritance, adoption, taxation, pensions, spousal medical decision-making, and social legitimacy. This perpetuates systemic disadvantage and violates the Constitution's promise of equal citizenship.

Social opposition, rooted in conservative traditions, is often cited as a barrier. However, constitutional morality requires that rights of minorities are protected irrespective of majoritarian views. Just as the Constitution dismantled untouchability despite social resistance, it must also secure marriage equality.

Conclusion and Suggestions

The debate on same-sex marriage is not merely a legal question but a test of India's constitutional commitment to equality, liberty, and dignity. While *Navtej Johar* marked a milestone in decriminalizing homosexuality, the denial of marriage rights leaves LGBTQ+ persons in a state of incomplete citizenship. The traditional object of marriage has often been understood as procreation and the continuation of the family lineage. In this perspective, critics of same-sex marriage argue that it fundamentally departs from the institution's natural and societal role. Since two persons of the same sex cannot biologically conceive a child, such unions are seen as incapable of fulfilling the essential purpose of marriage. Many religious and cultural traditions in India define marriage as a sacred union ordained for the birth and upbringing of children, thereby reinforcing the heteronormative structure. Critics contend that recognizing same-sex



marriages would weaken this foundational link between marriage and family, potentially destabilizing established social structures. They argue that while companionship, love, and intimacy are important aspects of marriage, they cannot replace its reproductive dimension, which ensures the survival of society through successive generations. In this view, civil unions or other contractual arrangements might safeguard the rights of same-sex couples without altering the traditional definition of marriage. From this standpoint, extending marriage to same-sex couples is seen as inconsistent with the historic, cultural, and biological rationale of the institution, which has always been tied to the natural capacity for procreation and the upbringing of children within a family framework. The judiciary has laid the foundation, but legislative reform is essential. Parliament must enact gender-neutral amendments to the Special Marriage Act, 1954 and ensure that same-sex couples enjoy the same legal benefits as heterosexual couples.

Suggestions

1. **Amend the Special Marriage Act, 1954** to use gender-neutral terms like “persons” instead of “man and woman.”
2. **Recognize ancillary rights** such as adoption, succession, inheritance, and healthcare for same-sex couples.
3. **Public awareness campaigns** to combat stigma and build social acceptance.
4. **Constitutional Commission** to review LGBTQ+ rights in India and recommend comprehensive reforms.
5. **Judicial vigilance** to ensure that constitutional morality is not compromised by legislative inertia.

Recognizing same-sex marriages is not just about equality for a minority group; it is about reaffirming the transformative spirit of the Indian Constitution.

References

1. *Naz Foundation v. Government of NCT of Delhi*, (2009) 160 DLT 277.
2. *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.
3. *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.
4. *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.
5. *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.
6. *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368.



7. *Supriyo Chakraborty v. Union of India*, (2023) SCC Online SC 1495.
8. *Obergefell v. Hodges*, 576 U.S. 644 (2015).
9. *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC).
10. Gautam Bhatia, *The Transformative Constitution* (2019).
11. International Commission of Jurists, *LGBT Rights and the Law* (2021).
12. Human Rights Watch, *Marriage Equality and Human Rights* (2020).
13. UN Human Rights Council Reports on Sexual Orientation and Gender Identity.
14. Articles from *Indian Journal of Constitutional Law*, *Economic and Political Weekly*, and *NUJS Law Review*.