
LGBTQ+ RIGHTS AND SAME-SEX MARRIAGE IN INDIA

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ABSTRACT

This paper examines the evolution of the rights of the LGBTQ+ community in India through a doctrinal study of constitutional law, significant legislation, and key decisions made by the Courts. The work begins by considering the decision reached by the High Court of Delhi in the case of Naz Foundation (2009) that was based on the doctrine of equality. Following that, it discusses the reversal of that opinion in Koushal (2013). NALSA (2014) then outlines a significant shift regarding the recognition of transgendered identities. Subsequently, it provides an indication of how this was recognised by the Supreme Court in Puttaswamy (2017) and the decriminalisation of consensual same-sex relationships in Navtej Singh Johar (2018). The authors critically evaluate the ruling of the Supreme Court of India on 17 October 2023 in Supriyo. Although the ruling did not give judicial recognition for same-sex marriage, it did ask for reforming the legislature. The first part evaluates how the Court has shifted its legal doctrine to favour marriage equality; in addition, it evaluates counter-arguments to this shift concerning the separation of powers as well as the rights that would be impacted by non-recognition (e.g., adoption rights, inheritance rights, spousal benefit rights, etc.). The paper concludes by presenting the authors' perspectives on the experience of other jurisdictions and recommendations for policies to establish legislative and administrative pathways toward achieving the full protection of rights for LGBTQ+ individuals in India.

Introduction

The institution of marriage in India represents the concurrent existence of civil and socio-legal institutions that provide numerous rights, protections, and social benefits including inheritance, succession, reduced tax burdens, spousal maintenance, adoption, and guardianship. However, same-sex couples experience significant negative consequences, both materially and symbolically, by not receiving legal recognition for their unions. They thereafter do not have access to any family law remedies available to hetero-normative couples; they cannot access spousal benefits established through statutory or private schemes; and they cannot create families through either adoption or assisted reproductive technologies. This cohesive exclusion is also a major contributor of social marginalisation. Indian constitutional jurisprudence has swung the pendulum of sexual and gender minorities' rights over the last ten years to include the principles of dignity, privacy, autonomy, and equality. Nevertheless, the question of marriage equality remains unanswered even after the passage of several progressive decisions acknowledging the existence of queer identities and relationships. This article delves into the legal context that has generated this stalemate and also considers the constitutional, judicial, and legislative routes to be taken for the full and substantial equality of LGBTQ+ persons in India to be realised.

Methodology and Scope

The research approaches this paper with the intention of using a doctrinal and policy-oriented methodology to study the constitutional, statutory, and judicial landscape that is regulating LGBTQ+ rights and same-sex marriage in India. Doctrinal analysis is the method employed in this research to interpret the reasoning, scope, and implications of important Supreme Court and High Court decisions with a special focus on Naz Foundation (2009), Suresh Kumar Koushal (2013), NALSA (2014), Puttaswamy (2017), Navtej Singh Johar (2018), and Supriyo @ Supriya Chakraborty (2023). This study seeks to assess how statutory materials such as the Special Marriage Act, 1954, the Indian Penal Code and provisions relating to adoption, inheritance and family law support or inhibit the legal recognition of queer relationships, using both legislative analysis and the following: Academic commentaries, jurisprudence chapters, Law Commission Reports, Policy Articles, and Global Trends that document India's progress in relation to the Global Trends of Change in the Legal Rights of LGBTQ+ people. The primary emphasis of this study is on the constitutional adjudication of cases and the Limited Doctrine

of Lawyers for LGBTQ+ people. Additionally, there is also a focus on potential Policy Alternatives and Legislative Pathways towards achieving Marriage Equality or Functional Equivalents. Finally, the study is limited to the analysis of Civil Marriage and Associated Rights only; therefore, it will not cite or examine Personal Law Religion Comprehensive treatments of Personal Law Religion. The purpose of this study is to integrate the Legal Analysis with the Normative Evaluation in order to articulate necessary Reforms in order to achieve Substantive Equality.

3. Constitutional and Statutory Framework

The constitutional basis of LGBTQ+ rights in India lies on the whole in Articles 14, 15, 19, and 21 of the Constitution. The essence of Article 14 lies in the law's equality and the prohibition of arbitrary government action, which constitute the pretext for the differential treatment of same-sex couples to be legally challenged. Discrimination on the basis of sex is prohibited by Article 15 which has recently been interpreted broadly to cover sexual orientation and gender identity. Article 19 allows people to express their thoughts and opinions, and to form associations or join groups; and these are all relevant rights of a person to live in the way he/she wants and to be free to choose his/her partner. The right to live and flourish as a fully human being has been extended through jurisprudence to the basics of dignity, privacy, autonomy, and the like by Article 21. The provisions are thus bundled together to form the constitutional base for the reason of marriage and family-related rights being excluded from queer couples.

Legal-wise, the Special Marriage Act, 1954 (SMA) is the main law for civil marriages in India. Same-sex couples have been effectively barred and the litigation concentrated because of this law's gender-specific language of "male" and "female," "bride" and "bridegroom." The same "married" status of heterosexual couples hidden behind connections with the Hindu Adoption and Maintenance Act, the Guardians and Wards Act, succession laws, and tax laws, among other related laws. The Indian Penal Code's Section 377, which till the Navtej Singh Johar (2018) judgment stigmatized with criminality due to the criminalization of consensual same-sex intimacy, has been historically in place. These constitutional and statutory laws combined define the legal battleground where the Indian discussions on marriage equality take place.

Judicial Trajectory: Key Decisions

This section extracts key case law and lists Bluebook-style citations corresponding to each

important judgment that the paper relies on.

- a. **Naz Foundation v. Govt. of NCT of Delhi (Delhi High Court, 2009)¹**: The Delhi High Court invalidated Section 377 IPC concerning consensual sexual acts in private between adults, stating that such criminalization infringed the rights guaranteed under Articles 14, 15, and 21. *Naz Foundation v. Govt. of NCT of Delhi*, W.P. (C) No. 7455/2001 (Delhi H.C. July 2, 2009) (160 DLT 277).
- b. **Suresh Kumar Koushal v. Naz Foundation (Supreme Court, 2013)²**: A two-judge bench of the Supreme Court in the case of *Suresh Kumar Koushal v. Naz Foundation*, however, set aside the ruling of the Delhi High Court and consequently upheld the constitutional validity of Section 377. The judges conferred that it was not the judiciary's role to relax statutes but rather Parliament's prerogative to bring about such changes through legislation. Civil Appeal No. 10972 of 2013 (Sup. Ct. Dec. 11, 2013) *Suresh Kumar Koushal & Anr. v. NAZ Foundation & Ors.*
- c. **National Legal Services Authority (NALSA) v. Union of India (Supreme Court, 2014)³**: The Supreme Court recognised the rights of transgender persons to self-identify their gender and ordered affirmative measures for social and legal recognition. *National Legal Services Authority v. Union of India*, Writ Petition (C) No. 400 of 2012, (2014) 5 S.C.C. 438 (India).
- d. **Justice K.S. Puttaswamy (Retd.) v. Union of India (Supreme Court, 2017)⁴**: Right to Privacy A nine-judge Constitution Bench decided that the right to privacy is a fundamental right derived from Articles 14, 19, and 21. The privacy ruling has been a cornerstone in the subsequent queer rights jurisprudence. *Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors.*, Writ Petition (Civil) No. 494 of 2012, (2017) 10 S.C.C. 1.

¹ *Naz Foundation v. Govt. of NCT of Delhi & Ors.*, W.P. (C) No. 7455/2001 (Delhi H.C. July 2, 2009), 160 DLT 277.

² *Suresh Kumar Koushal & Anr. v. NAZ Foundation & Ors.*, Civil Appeal No. 10972 of 2013 (Sup. Ct. Dec. 11, 2013).

³ *National Legal Services Authority v. Union of India & Ors.*, Writ Petition (C) No. 400 of 2012, (2014) 5 S.C.C. 438, AIR 2014 SC 1863 (India).

⁴ *Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors.*, Writ Petition (Civil) No. 494 of 2012, (2017) 10 S.C.C. 1, AIR 2017 SC 4161 (India).

- e. **Navtej Singh Johar v. Union of India (Supreme Court, 2018)**⁵: Decriminalisation A five-judge Constitution Bench overturned Koushal and interpreted Section 377 in such a way as to exempt consensual sexual acts between adults. The Court justified the ruling by referring to dignity, autonomy, equality and privacy. *Navtej Singh Johar & Ors. v. Union of India*, Writ Petition(s) (Criminal) Nos. 76–80/2016 etc., AIR 2018 SC 4321, (2018) 10 S.C.C. 1.
- f. **Supriyo @ Supriya Chakraborty & Ors. v. Union of India (Supreme Court, Oct. 17, 2023)**⁶: Same-Sex Marriage Petitions Disposed On October 17, 2023, a Constitution Bench (five judges) heard multiple petitions seeking recognition of same-sex marriage under the SMA and related statutes. The Court — by a majority — declined to extend constitutional protection to recognise same-sex marriage, concluding that the creation of marital law is principally a legislative function; however, the Court underlined the need for de-facto protections and recommended that the legislature address statutory lacunae to protect queer rights in family contexts. *Supriyo @ Supriya Chakraborty & Ors. v. Union of India*, Writ Petition (C) No. 1011 of 2022, Supreme Court of India, Oct. 17, 2023 (2023 INSC 920).

Legal Arguments for Recognition of Same-Sex Marriage

The constitutional case for recognising same-sex marriage in India is based on a set of interlocking guarantees of equality, non-discrimination, dignity, autonomy, privacy, and freedom of expression and association. These rights create a powerful framework to oppose excluding LGBTQ couples from the civil marriage institution.

One of the most important arguments is based on the equality provision of Article 14. The prohibition of marriage for same-sex couples is an arbitrary classification that is not connected in any way to the legitimate state purpose. Marriage, which is the entry point to many civil rights and entitlements such as succession, inheritance, maintenance, and so forth, cannot be denied without violating the principle of substantive equality. The petitioners in the *Supriyo* case stated that the exclusion of couples based on their sexual orientation only leads to a

⁵ *Navtej Singh Johar & Ors. v. Union of India*, AIR 2018 SC 4321, (2018) 10 S.C.C. 1 (India).

⁶ *Supriyo @ Supriya Chakraborty & Ors. v. Union of India*, Writ Petition (C) No. 1011 of 2022, Supreme Court of India, Oct. 17, 2023 (2023 INSC 920).

situation of disadvantage and the creation of a second-class citizenship for queer people.

Article 15 which prohibits discrimination on the ground of sex is very closely connected to the argument made above. Indian law, especially after the Navtej decision, has interpreted the word “sex” to include both sexual orientation and gender identity. The reason same-sex couples are not allowed to marry is sexual orientation, therefore it is direct discrimination. Even if the rule is presented as a gender neutral one (saying “man” and “woman”), it still causes an unequal burden on queer couples, and thus, is indirect discrimination too.

Article 21 maybe the most robust doctrinal support of all. Following Puttaswamy, the right to privacy along with the decisional autonomy, intimate choice and the power to define one’s personal relations has gradually been acknowledged as a vital part of dignity and freedom. The petitioners maintained that the selection of one’s partner is an essential part of this autonomy, as it has been illustrated through cases involving inter-caste and inter-faith marriages (Shafin Jahan, Shakti Vahini). If straight couples can rely on Article 21 to support their marital choice, then it is only rational that same-sex couples be granted the same liberty.

The argument also draws from Article 19, specially the rights of expression and association. Marriage, which is a public as well as a social declaration of commitment, is an associative act that ought not to be limited by the state in any unfair manner. The ban on same-sex couples centers the rejection of the identity and the social participation to the extent they are not allowed to affirm their existence as part of their network.

In addition, the petitioners put forward a plea for a remedy: the Court possesses the right to “interpret down” or give a gender-neutral reading of the Special Marriage Act that would be in consonance with the constitution. They referred to instances when the courts overruled the majorities’ interpretations of laws to protect the rights of the minorities. The SMA being a secular law, unconnected with the teachings of any particular religion, makes it easy and necessary from both a constitutional and theological point of view to apply a gender-neutral interpretation of the Act. All these arguments, collectively, constitute a robust constitutional basis for the recognition of same-sex marriages as a fundamental right under the Indian legal system.

Counter-Arguments and Limits of Judicial Action

Recognizing same-sex marriage, strong constitutional arguments, and counter arguments

regarding institutional design, statutory complexity, and democratic legitimacy are some of the main propositions that were presented before the Supreme Court in *Supriyo @ Supriya Chakraborty* (2023). The objections of the minority were, in fact, the basis for the majority opinion of the Court that marriage equality must be pursued primarily through legislative, rather than judicial, processes.

A principal counter-argument concerns separation of powers. The Indian legal framework understands marriage to be both a social and legal institution and, as a result, has developed a plethora of laws (like the Special Marriage Act or SMA) covering all aspects of marriage, including personal laws (adoption, succession, taxation), welfare issues, etc. Furthermore, the Union of India stated that to change the marriage laws to be inclusive of all genders, the legislative process would require many new laws and would have significant implications for all areas of law that are related to marriage, as well as for all the administrative structures that are associated with marriage. It was argued that courts do not have the power or the institutional structure to effectively develop such broad legislation. While most feel that courts can strike down unconstitutionally discriminatory statutory provisions, courts cannot create a new legal system by extensively altering statutes. The court indicated that judicial activism should not extend to the legislative process.

Polycentricity refers to the idea that one legal action may have many different types of unexpected consequences in multiple policy areas. According to the Supreme Court, recognizing homosexual marriages under laws regarding same-sex marriage will lead to changes in how all of the above-mentioned areas operate, including adoptions, guardianships, inheritance, matrimonial remedies, and possibly all personal law. Many of these policy areas involve complex moral and political decisions, and thus, the Court decided that only the legislature and appropriate specialized agencies would be equipped to deal comprehensively with those changes.

The other side of the argument is to look at the "Legislative Authority" and the "Democratic Authority". This has been done in relation to the laws regarding marriage by way of Statutes since centuries via public consultation and political debate. Supporters of the Judicial Recognition of Marriage Equality have asserted that the Legislative Authority should determine when Marriage Equality is accepted by society as being a valid form of relationship through the Democratic Process and not by the Judicial Authority through Judicial Decree. The

Supreme Court in a few earlier cases such as *Navtej Singh Johar*, has intervened and ruled that certain Criminal Statutory Provisions are unconstitutional. However, the majority of the Court in *Supriyo vs the State of West Bengal* concluded that although the process is called Decriminalization, there is a distinct difference between Decriminalization of Criminal Statutes and the Legislative Enactment of Laws. Decriminalization, they argued, removes the possibility of any further Government involvement, whereas the Enactment of Laws creates an extensive Legal Framework which should, in their view, only be established by Parliament.

The Court noted with concern the limited ability of the interpretive modification of these types of statutes, particularly in this case, where the Petitioners argued that the SMA—through the addition of a gender-neutral term replacing "male" and "female" with the word "persons"—could be interpreted as gender-free. Their objection, however, was that this approach amounted to a re-drafting of the statute's language, rather than a simple interpretive approach. In the case of the SMA, therefore, the arrangement of the statute consisted of implicit relationships between the heterosexual couple, and provided for notice and remedies to heterosexual couples. The majority of the Court believed it was both outside the scope of the judiciary's power to attempt such an extensive redrafting and that it could lead to either inconsistencies in the statute or create a vacuum.

Ultimately, the Court emphasised that when it comes to correcting solutions, limits still apply. Should the Court officially recognise the right to marry, it will undoubtedly enforce strict regulatory guidelines on Registration, Spousal Rights, and Compliance. These areas normally fall to the Executive and Legislatures, and Courts do not play an active role in them. The Court then chose to take a narrower route and called the state to protect the discriminated queer couples and think of administrative reforms. These disparaging arguments together were the reason why the Court reached the conclusion that marriage equality, although being of constitutional importance, will still have to come through legislation rather than through the judiciary's creativity.

Comparative Perspectives

The worldwide trend of marriage equality reveals three main routes: judicial recognition based on constitutional rights, legislative change through parliaments, and step-by-step administrative measures that give people almost the same rights as married couples without leading to formal recognition. Looking at these different models together not only points out

the wide range of ways adopted but also sheds light on the Indian scenario the lessons coming from the models.

Over and above the courts' actions to integrate LGBTQ rights into society through the judicial approval road, a considerable number of jurisdictions have based their legalization of same-sex marriage on the constitutional rights to equality, dignity, and due process. The landmark U.S. Supreme Court decision in *Obergefell v. Hodges* (2015) ruled out that same-sex couples have the right to marry as a matter of principle, arguing that banning the same marriage violated both the liberty and equal protection clauses of the Fourteenth Amendment. In a similar judicial manner, courts in South Africa, Brazil, and Taiwan declared marriage for homosexuals as a right, referring to the constitutional guarantees of treating people equally and with respect as well as the notion of non-discrimination. These rulings portray the judicial dyad's proficiency in protracting rights even when the regard is to a politically disputed issue, particularly when driving legislative routes are either blocked or delayed. One of the learning aspects from these regions is that "the constitution rights being to slowly" society being 'ready' or in political agreement with the ruling" was the emphasis the courts gave to their intervention by talking about the rights of the citizens being withheld.

On the other hand, numerous nations have legalised same-sex marriage via extensive legislative reforms. In regions like Canada, Spain, Argentina, Australia and most of Western Europe, marriage equality was the result of parliamentary discussions and statutory changes. Instead of retaining the previous marriage definition and then changing to a gender-neutral marital definition, legislators have created new gender-neutral marital definitions under the Family Law/Adoption/Taxation/Inheritance Areas. By doing this, lawmakers have been able to create a stable framework for all of these laws in addition to providing stability and even predictability because, as lawmakers continue to modify the Marriage Laws Accord, they are continuously improving the overall Health of the Legal Regime. The legislative process itself provides for democratic legitimacy, which backs up the views expressed by some courts (ie., The Indian Supreme Court in the case of *Supriyo*, 2023, found that this aspect of democracy provides additional support for challenges to Established Social Norms that have persisted for centuries).

The third category consists of hybrid or incremental models, wherein the jurisdictions initially created civil partnerships, domestic partnerships or registered cohabitation regimes before the full marriage equality was achieved. The United Kingdom, Germany, and New Zealand were

among those countries that first set up partnership frameworks recognised by law which granted many rights of marriage, but not all. Eventually these frameworks turned into full marriage equality as the society and political environment became more accepting. Though occasionally accused of establishing a "separate but equal" situation, these transitional models often contributed significantly to the movement towards consensus.

India's approach is to be careful and take its time as opposed to these international trends which are already moving fast. The court ruling has on one hand acknowledged the rights of queer people but on the other hand stopped the marriage reform by the judiciary and passed it onto the legislature. Looking at the differences, it seems that courts can pave the way for the change but eventually, marriage equality that is long-lasting, and inclusive will come only through legislative action incorporating all related family-law systems and administrative frameworks

Policy Recommendations and Legislative Pathways

Due to the Supreme Court's ruling of 2023 in the case of *Supriyo @ Supriya Chakraborty*, which did not accept the judicial acknowledgment of same-sex marriages but highlighted the duty of the legislature, comprehensive reforms have to be taken through Parliament along with the corresponding administrative measures. The following recommendations serve as the outline for both legislative and policy strategies for the queer persons in India to attain substantive equality.

1. Legislative Amendment of the Special Marriage Act (SMA): The most effective and permanent solution is to make changes to the SMA by changing the gender-specific terms to gender-neutral ones, such as "parties to a marriage," and also to clearly allow marriages between consenting adults of any sex, gender or sexual orientation. The drafting should reference other related statutes that govern inheritance, succession, taxation, adoption, guardianship, and spousal benefits so as to realize legal coherence and prevent gaps that could lead to inconsistencies in the application of the laws.

2. Interim Administrative Measures: During the time Parliament is in debate, the Union and State governments can take the step of issuing binding administrative orders to cohabiting same-sex couples to give them the protection and benefits that are of the first need. The measures discussed may include visitation privileges in the case of hospitalization, recognition of tenancy and housing, and spousal benefits in the case that the partner is employed in a

government job, and that person is considered a family member for the purposes of participation in social welfare programs. Administrative interventions provide immediate relief without the need for formal legislative change.

3. Reform of Family Formation Laws: It is necessary to amend the regulations of adoption and assisted reproductive technology to such an extent that same-sex couples and single queer parents have access to these practices without being discriminated against, but under the condition of child welfare safeguards. Centralization of adoption rules through uniformity of central and state laws will be a measure that prevents the occurrence of exclusionary practices that deter family formation.

4. Anti-Discrimination Statutes: It is very important that the main public service sectors, such as healthcare, education, employment, housing, and social security, not only protect but also explicitly state sexual orientation and gender identity as the bases of discrimination that they will not tolerate. To achieve this, either changes to the present equality legislation or new provisions can be created that will empower again the legal recourse for LGBTQ+ persons who are subjected to systemic barriers.

5. Stakeholder Engagement and Public Consultation: A legislative change should be enforced along with the consultations organized with civil society, LGBTQ+ advocacy groups, legal scholars, and the relevant administrative agencies. The methods of evidence-based policymaking, sensitisation programs, and public education campaigns can all be employed to win people's acceptance, remove misunderstandings, and create social support for reform by granting democratic legitimacy.

6. Model Provisions for Personal Laws: The way to make personal laws about religion-based marriages has to be considering many different factors, but the Universal Civil Marriage Law does not need to prevent individuals from marrying according to their own religious beliefs. Either Law Commissions or expert panels could develop model provisions to enable the recognition of same-sex unions under the personal laws to balance the competing interests of equal treatment and constitutional protection of religious liberty.

7. Monitoring and Implementation: To ensure the correct implementation of both legislative changes and interim administrative measures, a mechanism for statutory or administrative oversight should be established. Some examples of this could be establishing obligations to

report, establishing systems for the resolution of complaints, or conducting regular evaluations of results.

Conclusion

India has made significant progress in recognizing the rights of sexual and gender minorities through its constitutional law. Through landmark judgements like NALSA (2014), Puttaswamy (2017), and Navtej Singh Johar (2018), the Courts have established the rights to dignity, privacy, autonomy, and equality as being among fundamental rights of individuals. These decisions have changed the law with respect to same-sex relationships based on mutual consent, recognized individuals' rights to identify their own gender, and provided a legal basis for challenging laws and practices that are discriminatory in nature against sexual and gender minorities. However, the question of legalising same-sex marriage remains unresolved. In the 2023 case of *Supriyo @ Supriya Chakraborty*, the Supreme Court stated that it could not facilitate Same-Sex Couples' right to marry through a judicial process as it is too complicated for the courts to determine what a legally binding marriage consists of; therefore, this matter will require the legislature's attention to create an appropriate framework with respect to the legal definition of marriage and its extensive implications (i.e., statute, social status, etc.) on the Indian society. While the court observed the need to protect individuals from discrimination as well as grant rights to gay couples, there is still an intermediate step needed to achieve full equality through legislative action. In addition to creating a gender-neutral description of relationships in the Special Marriage Act and other related legislation, taking appropriate interim actions, such as implementing additional administrative protections for gay couples and more comprehensive anti-discrimination measures, will ensure that they receive both formal and substantive equality. This will enable India to move from merely decriminalising homosexuality to providing legal recognition, social acceptance, and access to all aspects of family, financial, and civil rights for same-sex couples.

References:

- Constitution of India, Arts. 14, 15, 19, 21.
- Special Marriage Act, 1954 (India).
- Indian Penal Code, 1860, § 377 (as read down in *Navtej Singh Johar*).