



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL
ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

THE CONSTITUTIONAL VALIDITY OF DENIAL OF SAME SEX MARRIAGES - A STUDY UNDER ARTICLE 14, 15, AND 21

AUTHORED BY - R. S. AYESHA ZIYA

CHAPTER I - MARRIAGE, MORALITY AND THE CONSTITUTIONAL IMAGINATION

INTRODUCTION

Marriage as an institution in India is not only a personal or cultural bond, but also a legal contract that distributes the rights, obligations, and duties of social legitimacy. In the current scenario, heterosexual couples benefit from a wide range of protections and rights under personal as well as secular laws. Whereas, on the contrary, same-sex couples remain excluded from this very framework. Despite the constitutional advances in recognising sexual orientation as an aspect of identity.¹

The issue that emerges in the Constitution concerns Articles 14, 15, and 21 of the Indian Constitution. The reasonable classification doctrine holds that legislative differentiation should be based on intelligible differentia and has to have a reasonable nexus to the object that is intended to be attained. The marriage exclusion of same sex couples, however, forms a classification which is not based on constitutional morality but rather prejudice in society and therefore subject to challenge under Article 14². Moreover, the ban on discrimination in Article 15³ based on grounds of sex has been adjudicatively applied to consist of sexual orientation and gender identity, which means that the refusal to recognise same-sex marriage is an indirect discrimination that is constitutionally impermissible.⁴

Article 21⁵, in its broad interpretation of cases, including *K.S. Puttaswamy v. Union of India* (2017) and *Navtej Johar*, goes further than just survival into autonomy, dignity and privacy.

¹ Satchit Bhogle, *The Momentum of History – Realising Marriage Equality in India*, NUJS Law Review 12 (2019)

² INDIA CONST. Art 14

³ INDIA CONST. Art 15

⁴ Naveen Talawar, *Beyond the Bench: Implications of the Supreme Court's Ruling on Marriage Equality in India*, Int'l J. Pub. Policy Law & Dev. 2 (2025)

⁵ INDIA CONST. Art 21

The freedom to marry and create a family is inherent in the right to life, and any restriction on marital status is a violation of this constitutional right. The transformative constitutionalism structure has been theorised in the case of Navtej Johar and in the NALSA v. Union of India (2014), which goes on to assert that the Constitution shall be interpreted as a living document whose goal is to eradicate historical injustice and substantive equality of the marginalised groups. The denial of same-sex marriages, therefore, is a denial of adherence to the transformative promise of the Constitution.

So the real question of this study becomes whether the denial of marital rights to same-sex couples is constitutionally valid or not under Articles 14,15, and 21 of the Indian Constitution, to be specific. To answer this very question, this study will bring out the legal and conceptual evolution of marriages in India and the state's role in their regulation. Thereby defining the key doctrines under the said articles (14,15, and 21).

It is in this regard that the constitutionality of the denial of same-sex partners to the right to marry is not just a statutory interpretation matter, but a great challenge to India's promise of equality, dignity and democratic inclusivity. It is not about the acceptance of marriage equality as a matter of culture, but about the possibility of the Constitution as the ultimate manifestation of normative values to allow the perpetuation of an exclusion of persons.⁶

STATEMENT OF PROBLEM

The denial of marriage rights to same-sex couples in India creates a contradiction between the constitutional guarantees of equality, non-discrimination, and dignity under Articles 14, 15, and 21. This exclusion leaves queer partners legally invisible, depriving them of protections inherent in the institution of marriage.

RESEARCH OBJECTIVES

1. To discuss the constitutional basis of equality, non-discrimination, privacy, and dignity as provided in Articles 14, 15, and 21 when it comes to same-sex marriage.
2. To examine the doctrine of reasonable classification and how it applies to the process of same-sex couples being excluded from civil marriage frameworks.
3. To determine the cracks in between the protections of the Constitution and the inaction

⁶ Showkat Ahmad Wani, *Legal Recognition of LGBTQIA+: A Tussle Between Popular Morality and Constitutional Morality*, GLS Law J. 6 (2023)

of legislation, with legislative solutions to the gaps.

4. To study marriage equality as a part of transformative constitutionalism, and to discuss the idea of whether the refusal to grant recognition will lead to the continuation of structural injustice against the LGBTQIA+ communities.

RESEARCH METHODOLOGY

The methodology of the study will consist of doctrinal research into the law, which is organised based on the analysis of the constitutional articles, judicial precedents and case laws and important legislative deliberations. The primary the Constitution, the amendments and case laws will be the sources. The secondary sources will include books, articles or commentaries to furnish historical background and legislative history.

CORE LEGAL ISSUE

The main question in this scenario is whether denying same sex couples the right to marriage is fundamentally an infringement of Articles 14,15, and 21. When the right to marry as a statutory privilege can be extended to heterosexual couples, it begs the question of why not same sex couples. This raises the question of similar treatment of people before the law in aspects of marriages and how the constitution treats differently the classes (heterosexual and homosexual individuals) and the nexus of rationality.

REVIEW OF LITERATURE

1. The Constitutional Morality of Love: Decriminalisation and Beyond⁷

Karan, through this piece contends that the decision made in Navtej Singh Johar v. Union of India, is a factor that signifies the transition of societal or social morality into the much higher ground of constitutional morality. By endorsing personal independence, privacy, and dignity, the Supreme Court has made it clear that issues related to sexuality are the belongings of personal liberty, which are safeguarded in Article 21. Tripathi argues that the logical extension of suchan argument should be the acknowledgement of the right to marry as an important element of personal choice and identity. The argument presented by Tripathi in this work serves as the constitutional foundation to the argument by enabling to establish the same-sex marriage as a social

⁷ Karan Tripathi, "The Constitutional Morality of Love: Decriminalisation and Beyond," 11 NUJS L. Rev. 1 (2018)

imperative but a constitutional right based on equality and dignity in Articles 14, 15, and 21 of the Indian Constitution.

2. Queer Rights and the Politics of Recognition in India⁸

This extensive research study provides a sociological and political emphasis on queer legal struggles. 2 Narrain insists that the legal reforms, as much as they are symbolically effective, cannot be adequate in the absence of social transformation on a larger scale, which would break down the well-established heteronormative hierarchies. He places marriage equality in the spectrum of struggle retaining recognition, citizenship, and right to live with dignity. It enhances the discussion of the resistance in the society, demonstrating that the culture of silence in legislation is often the reflection of the underlying unease in the face of queer visibility and equality.

3. Reading Section 377: Judicial Reasoning and the Politics of Sexuality⁹

Danish beautifully offers an in-depth discussion of the judicial discourse of Section 377 to evolve in the case of Navtej Johar. Sheikh notes that the language of equality, judgement, and privacy by the Court is a jurisprudential conduit to the future acceptance of same-sex unions. Nevertheless, he criticizes the fact that the Court did not explicitly acknowledge marriage equality, but views it as an institutional reluctance and not a constitutional impossibility. His writing argues in favor of the position that the constitutional rationale that the policy of Navtej Johar is based on has to be applied to the rights of marriage, against judicial warnings.

4. After Navtej, the Road to Marriage Equality¹⁰

covers the events since the 2018 ruling, including the petitions pending in the Delhi High Court and Supreme Court to legalize same-sex marriages. he states that the judiciary is walking a fine line between progressive speechmaking and institutional conservatism, and the courts are not ready to advise the legislature about the moral or family law issues. This piece of work has played a significant role in putting into perspective the theme of judicial restraint or self-restraint in the context of this study as it tends to postpone the fulfilment of the constitution. It helps justify the point that even though restraint maintains the separation of powers, it should not be used as a justification to stay stagnant in the constitution.

⁸ Arvind Narrain, "Queer Rights and the Politics of Recognition in India," 50 *Econ. & Pol. Weekly* 10 (2015).

⁹ Danish Sheikh, "Reading Section 377: Judicial Reasoning and the Politics of Sexuality," 5 *Indian L. & Soc'y Rev.* 16 (2019)

¹⁰ V. Venkatesan, "After Navtej, the Road to Marriage Equality," *The Hindu* (Dec. 10, 2022), <https://www.thehindu.com/opinion/op-ed/after-navtej-the-road-to-marriage-equality/article66245017.ece>

CHAPTER 2 - RIGHT TO LIFE, DIGNITY AND THE PARADOX OF AUTONOMY

The Right to Intimate Association and Choice of Partner

The Indian constitution jurisprudence progressively recognises the liberty guaranteed under Article 21, which encompasses not only the right to physical existence but also the right to intimate association, choice of partner, cohabitation and intimate personal decision making. In the *Shakti Vahini v. Union of India* (2018)¹¹, the court held the rights of an individual to marry by choice. Although this case was regarding the condemnation of honour killing as a violation of personal liberty, it brought out a vital concept of 'right to marry' and its significance. The personal liberty and autonomy here are upheld to be supreme and as a paramount concept.¹²

The Supreme Court in *Maneka Gandhi v. Union of India*¹³, 1978, held that the procedure for depriving personal liberty must be fair, reasonable and just. Adding on, the court emphasised how the protection under Article 21 also extends to the right to live with human dignity and manage one's affairs with personal autonomy and no interference in personal decisions. Here stems the paradox of personal autonomy under Article 21.¹⁴

On one hand, the Supreme Court holds, through the case of *K S Puttaswamy v. Union of India*, 2017¹⁵, how entrenching decisional autonomy over one's personality comes under the part of right to life and personal liberty. But whereas on the stark other side, the court, through the case of *Supriyo v. Union of India*, 2023¹⁶, limits the reasonable extension of Article 21 by holding certain intimate or relational rights, such as the formal right of marriage per se, cannot be automatically considered as fundamental rights under Article 21.¹⁷

The controversy in *Supriyo v. Union of India*

In the case of *Supriyo v. Union of India*¹⁸, the Supreme Court discussed the 'right to marry' as

¹¹ *Shakti Vahini v. Union of India*, (2018) 7 SCC 192 (India).

¹² Same-Sex Marriage and LGBTQ+ Rights: Constitutional and Human-Rights Issues, Lawway with Lawyers J., (2023)

¹³ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (India).

¹⁴ Rohit Kumar & Shruti Jha, *LGBTQIA+ Unequal Diversity: Same Sex Marriage*, 7 Int'l J. L. Mgmt. & Hum. ("IJLMH") 3769 (2024), <https://doi.org/10.1000/IJLMH.117432>

¹⁵ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

¹⁶ *Supriyo v. Union of India*, (2023) 9 SCC 1 (India).

¹⁷ Harmeet Kaur, *Same-Sex Marriages, its Legality, and Social Justice in India*, 7 IJLMH 2114 (2024), <https://doi.org/10.1000/IJLMH.118827>

¹⁸ *Id.* 6, 10-19

a fundamental right that should extend to couples in non-heterosexual relationships. This sparked a huge controversy in the contemporary era, which led to many debates and protests. The Bench pronounced its verdict on petitions seeking marriage equality for LGBTQIA+ persons. The Bench unanimously held that there was no fundamental right to marry, and the Court could not recognise LGBTQIA+ persons' right to marry under the Special Marriage Act, 1954¹⁹

The majority of justices found that expanding the SMA to recognise and include same-sex marriage would be considered judicial legislation and would go beyond the institutional constraints of the court. This interpretation was considered inconsistent with the court's prior progressive rulings, including *Navtej Singh Johar v. Union of India* (2018) and *K.S. Puttaswamy v. Union of India* (2017)²⁰, in which the court took an expansive view of rights of fundamental significance.

The consideration of marriage as a right by the court was quite controversial, bearing in mind that marriage is a right under the international human rights law. This right to marry is a fundamental right as provided under the Universal Declaration of Human Rights (UDHR) and under Article 23(2) of the International Covenant on Civil and Political Rights (ICCPR). When the Supreme Court decided that the right to marry was not a right of fundamental nature, it was regarded to be contrary to its formulated doctrines.²¹

In the Supreme Court case in *Supriyo v. Union of India*, the Court, in recognising the rights of the LGBTQIA+ population, failed to comment on the disputable issue of same-sex marriage. This left it to the legislature to strive to bring about the legal changes that are required to manage this long-term requirement. The proponents of the LGBTQIA+ and the legal scholars have called upon the legislature to take an active part in the process of passing comprehensive legal frameworks under which same-sex marriages and civil unions will be recognised and regulated. This would introduce legal sanity and would provide equal protection before the law to every citizen, irrespective of his or her sexual orientation or gender identity.²²

¹⁹ *The Special Marriage Act*, No. 43 of 1954, § 4 (India)

²⁰ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1 (India).

²¹ Harmeet Kaur, *Same-Sex Marriages, its Legality, and Social Justice in India*, 7 *IJLMH* 2114 (2024), <https://doi.org/10.1000/IJLMH.118827>

²² Rohit Kumar & Shruti Jha, *LGBTQIA+ Unequal Diversity: Same Sex Marriage*, 7 *Int'l J. L. Mgmt. & Hum. ("IJLMH")* 3769 (2024), <https://doi.org/10.1000/IJLMH.117432>

The role of the legislature is essential to fill the gap that the court decision created, and the legal environment corresponds to the principles of equality, non-discrimination, and the autonomy of the individual, which are embedded in the Indian Constitution. It is possible to bring together the legislature, the judiciary, and the civil society to follow a collaborative approach that would open the path to a more and more inclusive and progressive legal system, which would indeed protect the rights of the LGBTQIA+ community.²³

Thus, while autonomy is fundamental, its expressive and institutional realisation is nevertheless dependent on it, which is to say that Article 21 empowers individual liberty while still subjecting it to law and state recognition. This dynamic of positive and negative rights under Article 21 is at the core of how same-sex couples are excluded from marriage.²⁴ Their autonomy in forming the union they wish to form is protected, yet without state recognition, their autonomy is marginalised to a space of dignity without standing, an autonomy differentiated by status that Article 21's promise seeks to address.

CHAPTER 3: ARTICLE 14: EQUALITY, ARBITRARINESS AND CLASSIFICATION IN THE EXCLUSION

Equality as perceived and judicially interpreted in Indian jurisprudence is as 'non-discrimination' and 'non-arbitrariness'. The on discrimination prohibits unreasonable classifications that create inequality, and by 'non-arbitrariness', the essence of forbidding arbitrary and irrational state action, which can potentially undermine fairness and justice, is highlighted.²⁵ The Supreme Court observed in *E. P. Royappa v. State of Tamil Nadu, 1974*²⁶, 'equality as antithetical to arbitrariness', and that any arbitrary act of the state necessarily violates Article 14. Subsequently, in the *Maneka Gandhi v. Union of India*, the Court reiterated the concept of striking down Arbitrariness in state action and ensured that every law must be fair, just and non-discriminatory in nature.²⁷

Coming to the denial of marriage to the same-sex couple here raises a failure of both limbs as promised under Article 14. By excluding a whole class of citizens to form a civil institution

²³ Harmeet Kaur, *Same-Sex Marriages, its Legality, and Social Justice in India*, 7 IJLMH 2114 (2024), <https://doi.org/10.1000/IJLMH.118827>

²⁴ Satchit Bhogle, *The Momentum of History – Realising Marriage Equality in India*, NUJS Law Review 12 (2019)

²⁵ Nayan Varsha, *At a Legal Crossroad: Trans Rights, Section 377, and Same-Sex Marriage in India*, SSRN Paper (2024)

²⁶ *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3 (India).

²⁷ Akshat Agarwal, *Supriyo and the Politics of Indian Family Law*, Indian Law Rev. (2024) (forthcoming)

solely based on sexual orientation, the state here imposes a form of legal segregation that fails to withstand reasonable scrutiny under the anti-arbitrariness principle. While in the *Navtej Singh Johar v. Union of India, 2018*²⁸, the court emphasised that constitutional morality requires the state to treat sexual minorities with the same equal dignity as provided to heterosexual individuals, and not to perpetuate majoritarian notions of morality. But with the withholding of the legal status of marriages of same-sex couples, the states continue to act on heteronormative assumptions and contradict the substantive equality which is guaranteed by Article 14, adding to the homophobic nature of arbitrariness.²⁹

It is the anti-arbitrariness doctrine that therefore serves as an intermediary between formal equality and substantive justice. It requires that the State's action should not merely be homogeneous but also sensible and accommodating. To deny same-sex couples the right to marry is arbitrary since the denial of the benefits of marriage and the denial of social recognition are done without a constitutionally valid basis. This discrimination based on old-fashioned ideas of morality instead of objective public purpose fails under the Article 14 standard of fairness and reasonableness.

The failure of the Reasonable Classification Test

The court, through the landmark judgement of *Anwar Ali Sarkar v. State of West Bengal, 1975*³⁰, established the test of reasonableness and allowing of differential treatment if it's based on an intelligible differentia and if that differentia bears a rational nexus with the object which was sought to be achieved through the distinction.

The so-called classification of heterosexual and homosexual couples is based on an irrelevant and inadmissible premise. Sexual orientation is an inborn and unchangeable trait, which is reflected by the case of *Navtej Singh Johar* as an inherent identity. The classification made on such a personal characteristic cannot be declared as constitutional unless the State proves that there is an extraordinary cause based on the legitimate interest of the people.³¹

There is no justification of this kind. The State cannot rely, nor is it logically consistent to rely,

²⁸ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

²⁹ Rohit Kumar & Shruti Jha, *LGBTQIA+ Unequal Diversity: Same Sex Marriage*, 7 Int'l J. L. Mgmt. & Hum. ("IJLMH") 3769 (2024), <https://doi.org/10.1000/IJLMH.117432>

³⁰ *State of W.B. v. Anwar Ali Sarkar*, AIR 1952 SC 75 (India)

³¹ Abhishek Sharma, *Same-Sex Marriage in India: A Journey towards Equality and Inclusion in the Global Context*, 5 Trinity L. Rev. 16 (2025), <https://doi.org/10.48165/tr.2025.5.1.4>

on procreation, cultural tradition or administrative convenience. The Special Marriage Act, 1954, as an example, permits heterosexual couples who do not have the intention of having children to marry, and this proves that procreation is not the basis on which people can be excluded.

Intelligible Differentia and Scope of Classification

For a reasonable classification to be valid under Article 14, the differentia must be intelligible and relevant to the legislative objective. In the present study's point of contention, which is marriage exclusion, the purported differentia is sexual orientation, does not serve any rational connection to the objectives of the Special Marriage Act or allied personal laws, which aim to regulate voluntary unions of consenting adults.³² As per the *Indra Sawhney v. Union of India, 1992*³³, the reasonable classification should be based on 'reasonable substantive distinction' and not on any 'artificial or evasive grounds'.

But here the exclusion creates a very superficial distinction which is unsupported by empirical or any moral reasoning. Moreover, the scope of classification cannot extend to deny dignity or essential rights. Here, the classification itself undermines the personhood of an entire class, dignity, and it exceeds the permissible limits of legislative discretion. Thus, the differentiation based on sexual orientation is not only unintelligible but unconstitutional.

Is there really a rational Nexus with a legitimate purpose?

Even granting, for argument's sake, that heterosexual and homosexual partners form distinct groups, the distinction must still show a reasonable connection to a valid government aim. The aims of marriage law, such as fostering social cohesion, mutual support, and legal safeguards, are just as effectively met by same-sex partnerships. Exclusion, here, fails to establish a logical link to these valid objectives.³⁴

Any assertion that limiting marriage to heterosexual pairs safeguards "traditional family structures" cannot qualify as a valid governmental objective in a constitutional democracy. In

³² Pratham Malhotra & Pravertna Sulakshya, *The Mehndi of Judicial Review in Same-Sex Marriages: Infusing the Hues of Basic Structure on the Judiciary's Palms*, NUJS Law Review 16 (2023)

³³ *Indra Sawhney v. Union of India*, 1992 Supp. (3) SCC 217 (India)

³⁴ Abhishek Sharma, *Same-Sex Marriage in India: A Journey towards Equality and Inclusion in the Global Context*, 5 Trinity L. Rev. 16 (2025), <https://doi.org/10.48165/tr.2025.5.1.4>

the case of Navtej Singh Johar³⁵, the court clearly stated that moral opposition to homosexuality cannot serve as a lawful foundation for legal distinctions. Thus, the exclusion lacks a constitutionally acceptable nexus and must be invalidated as unreasonable under Article 14.

Arbitrary Application of Scrutiny

The Indian courts have started to embrace contextual or increased scrutiny of the cases that deal with fundamental rights and vulnerable groups. The Court in the case of Anuj Garg demanded that gender stereotypes and classifications should face scrutiny. Likewise, the judiciary is required to exercise a higher standard of review when the State action applies to a historically marginalised group - e.g. the queer community.³⁶

However, in *Supriyo v. Union of India*, the majority has used a deferential scrutiny in the Union of India, where they have shielded the matter, leaving it to the decision of the legislature. This strategy weakened the anti-arbitrariness requirement. Thus, the denial of same-sex couples the right to marry is an arbitrary and unconstitutional act of denying equality, and is essentially violating Article 14, not only in theory, but also in the process of judicial review.³⁷

CHAPTER 4: ARTICLE 15 - NON DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION

Evolution of 'sex' as an expanding category under Article 15

Article 15(1) of the Indian Constitution creates a ban against the State against discrimination based on religion, race, caste, sex, place of birth or any of them. Initially, the framers had the idea that sex was mainly a biological difference between sexes because men and women needed to be safeguarded against patriarchal discrimination.³⁸ But with time, the interpretation of the judicial system, as well as the changing constitutional philosophy, has broadened the concept of sex beyond biological determinism to encompass sexual orientation and gender identity as inherent elements of identity and personhood. The watershed case was with the *National Legal Services Authority v. Union of India*, (2014)³⁹, which is the case in which the Supreme Court

³⁵ Pratiksha Gupta, *Navtej Singh Johar v. Union of India: An In-Depth Analysis of the Landmark Indian Supreme Court Case on LGBTQ+ Rights*, Legal Service India Law Artic. (2022)

³⁶ *From Banned to Beloved – The Legal Journey of LGBTQ+ Marriage Rights in India*, Jus Corpus Law J. (2024)

³⁷ Rayna Joshi, *Same-Sex Marriages in Contemporary Society*, 7 IJLMH 2038 (2024), <https://doij.org/10.1000/IJLMH.118476>

³⁸ Dalliandeep K. Tiwana & Seethal Kuttappan, *The Future of Same-Sex Marriage in India – an Analysis with Other Countries*, SSRN Paper (2024)

³⁹ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 (India)

admitted transgender people as the third gender.

Judicial recognition of sexual Orientation and Gender Identity

The second constitutional breakthrough was after the NALSA case in the case of Navtej Singh Johar v. Union of India, (2018). In a case of decriminalisation of consensual same-sex relations, the five-judge bench interpreted and read down Section 377 of the Indian Penal Code, 1860. The Court specifically concluded that sexual orientation should not be discriminated against based on the same grounds since sexual orientation is an indispensable characteristic of privacy, dignity, and identity.⁴⁰ The concurring opinion by Justice Chandrachud focused on the terms of sexual orientation and highlighted the fact that the term sex should be understood broadly to encompass sexual orientation, as heteronormative based discrimination is discrimination based on sex.⁴¹

The role of constitutional Morality in Discrimination

The Indian judiciary has always referred to constitutional morality as a principle of interpretation that is used to examine the soundness of laws that are contrary to deep-seated social biases. The idea, based on the vision of the Constituent Assembly of Dr B.R. Ambedkar, assumes that reason, justice, and equality should be the guiding principles of constitutional interpretation as opposed to majoritarian moralities. The Court once again, in Navtej Singh Johar, affirmed that the Constitution safeguards the people against the tyranny of social morality and that the action of the State should be evaluated about constitutional morality and not to the popular will.⁴²

In this doctrine, the discrimination against sexual orientation will not only be a breach of the textual guarantee of Article 15, but also the promise of transformation by the Constitution. Justice Nariman, who agreed with the Navtej Johar judgment, observed that constitutional morality required that the basic rights of even a small minority should not be denied. Similarly, in *Shakti Vahini v. Union of India (2018)*, applied constitutional morality to defend the right of consenting adult people to intermarry regardless of caste and religion, which supports the notion that autonomy of intimate relationships is constitutionally upheld.

⁴⁰ Mohit K. Manderna & Kritika Vatsa, *Advocating Same-Sex Marriages through Constitutional Morality*, SSRN Paper (2024).

⁴¹ Siddharth Sundar, *LGBTQ+ Rights in India: The Legal Struggles of Same-Sex Marriage*, Intl. J. (2025)

⁴² *Challenging Heteronormativity: A Comparative Constitutional Analysis of LGBTQ+ Marriage Equality and Family Law Reform in India*, 2025 (?) Ind. J. L. & Legal Res. (ISSN 2582-8878) (open access) ("IJLLR")

Constitutional morality, therefore, serves as a guide to normativity: it changes Article 15, which is a mere prohibition, into an active constitutional command. It entails the State to safeguard individuals against social prejudices and create an atmosphere within which sexual minorities will have the chance to practice equality both in the social and personal domains.⁴³

CHAPTER 5: TRANSFORMATIVE CONSTITUTIONALISM AND THE WAY FORWARD

Judicial self-restraint as a hindrance to constitutional obligational

Although judicial self-restraint is rooted in this matter in India in the doctrine of separation of powers, it often becomes a barrier in fulfilling the judiciary's constitutional duty of upholding fundamental rights. So when courts adopt any deferential stance, especially towards the legislature or executive on sensitive issues, like here in this case, the matter of denial of same-sex marriages, gender equality and minority rights. They risk undermining the transformative nature of the constitution. In the Indian jurisprudence, excessive restraint has at times prevented the judiciary from expanding the scope of the said matter. Thus, while restraint preserved institutional balance, it can also dilute the court's role as the guardian of the constitutional promises, allowing certain social prejudices and legislative inaction to persist unchallenged.

Since India's judiciary has decided to exercise self-restraint in this matter, adopting certain progressive features from foreign constitutional models can help bridge the reform gap, wherein the rights of the minority are also not violated, and at the same time, the autonomy of the pre-existing laws, like the Special Marriage Act, is retained. In the Interim, the Supreme Court could issue guidelines similar to the *Vishaka v. State of Rajasthan* or the *PUCL v. State of Maharashtra* to protect the same-sex couple's rights until an exclusive comprehensive legislation is enacted or formed.

Expansion of horizons of 'equality' in Indian jurisprudence and comparative lessons

Various nations focus on a more progressive and transformative constitution; if not for constitutions, some states have established judicial interpretations, administrative guidelines and human rights frameworks. India can draw comparative lessons from such cases to live up

⁴³ Gitanjali Ghosh & Shishir Tiwari, *Realizing Marriage Equality in India vis-à-vis Mizo Customary Marriage Laws*, *NLUA Law Rev.* 7 (2023)

to the transformative changes of the contemporary era.⁴⁴

The South African model of Judicial expansion through interpretative equality. The case of *Minister of Home Affairs v. Fourie* (2005)⁴⁵ was a landmark case of the Constitutional Court of South Africa, which decided that prohibiting same-sex couples from marrying contravened all the constitutional rights and provided gays and lesbians with the legal privilege to marry. The court ruled that the common-law meaning of marriage, as well as the existing Marriage Act violated the right to equality since it discriminated on sexual orientation. The parliament was given a period of twelve months to amend the law.

The case originated from a same-sex pair, Fourie and Bonthuys, who sought to marry but were hindered by existing statutes limiting marriage to a union strictly between a man and a woman. The court subsequently deferred its ruling for a year to allow Parliament to draft new laws. Should Parliament not comply, the Marriage Act would be revised by default to encompass same-sex unions. Consequently, South Africa adopted the Civil Union Act in 2006, implementing it a day before the court's cutoff and fully recognising same-sex marriage.⁴⁶

Recommendation: the India Courts can use a similar structured remedial interim order recognising the invalidity of exclusion but granting time-bound guidance to the legislature.

Personal Law Neutrality and Secular Options (US Obergefell Framework)

In *Obergefell v. Hodges* (2015)⁴⁷, the US Supreme Court ruled that same-sex marriage is unlawful because it infringes on liberty and equal protection, which is its basic right. The petitioner and several other petitioners filed suit, claiming that such state bans violated the constitutional fundamental rights of equal protection and due process of law. Subsequently, in a 5:4 majority opinion delivered by Justice Anthony Kennedy, the Supreme Court held that the new amendment guarantees same sex couples both the fundamental right to marry and the right to have their marriages recognised across states.

⁴⁴ Gitanjali Ghosh & Shishir Tiwari, *Realizing Marriage Equality in India vis-à-vis Mizo Customary Marriage Laws*, NLUA Law Rev. 7 (2023)

⁴⁵ *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC) (S. Afr.).

⁴⁶ *Challenging Heteronormativity: A Comparative Constitutional Analysis of LGBTQ+ Marriage Equality and Family Law Reform in India*, 2025 (?) Ind. J. L. & Legal Res. (ISSN 2582-8878) (open access) ("IJLLR")

⁴⁷ *Obergefell v. Hodges*, 576 U.S. 644 (2015)

Recommendation: Rather than revising all the personal laws, one can have Indian courts revise Section 4 of the Special Marriage Act, 1954, to take out gender-specific language - acknowledge, in place of man and woman, persons. This would uphold the independence of the personal law and guarantee a non-religious path to equality. Courts can also formulate Queer Equality Guidelines to be applied to the lower judicial and administrative courts, similar to the Vishaka Guidelines model (1997).

CONCLUSION

The constitutional discussion regarding the refusal of same-sex marriage in India sits at the crossroads of fairness, freedom, and respect, the three pillars of India's constitutional framework. By analysing articles 14, 15 and 21, the prohibition of queer couples to marry perpetuates the existing inequity system and denies gay couples the full citizenship rights guaranteed by the Constitution.

Article 14, which contains the equality and anti-arbitrariness principles, provides that any distinction must be logical, clear and linked to a valid and reasonable state interest. The exclusion of same-sex couples in the legal form of marriage does not fit any of these requirements. It places a rift that is based purely upon sexual orientation, which is an unalterable factor not pertinent to the objectives of marital law. This is an impediment devoid of a consistent explanation, as well as promoting any allowable constitutional cause. As rulings in *E.P. Royappa v. State of Tamil Nadu (1974)* and in *Maneka Gandhi v. Union of India (1978)*, Injustice as stated is against equality. Therefore, a denial of marriage equality will indicate the unwarranted state practice that violates constitutional commitments to equity and inclusion.

In *Navtej Singh Johar v. Union of India (2018)* Article 15, which prohibits prejudice against sex, the Supreme Court expands the concept of sex to relate to sexual orientation. This move is to recognise that discrimination based on orientation or identity is as unconstitutional as gender prejudice. Through denying same-sex couples their marital rights, the state imposes an indirect stamp of discrimination by orientation, which is an institutional discrimination that goes against constitutional morals.

The most expansively interpreted one, which is Article 21, ensures the right to life and personal freedom, which has been by courts always to mean the right to dignity, privacy and autonomy.

The judicial precedents assert privacy as being the entitlement to make highly personal choices, especially those touching on sexuality and relationships, and it goes ahead to affirm that the freedom to love and have intimate relationships is at the core of individual autonomy. Nevertheless, in the most recent court decision in *Supriyo v. Union of India (2023)*, there is a contradiction in the constitution. Even though the Court agreed to the fundamental right of choice in selecting a life partner, it did not recognise the right to marry as a part of that freedom. This brings about a distinction between recognition and accomplishment, between the right to establish relationships and the legal right to bond those relationships.

Transformative constitutionalism, which was identified in *NALSA v. Union of India, 2014*, and restated in the *Navtej Singh Johar Case*, requires that the judiciary interpret the constitution as motionless, but instead it is a living document that is responsive to the moral consciousness of the society. The same-sex couples that remain outside the current marital law technology are not just a legislative failure but also a failure to comply with such changes in the constitution.

