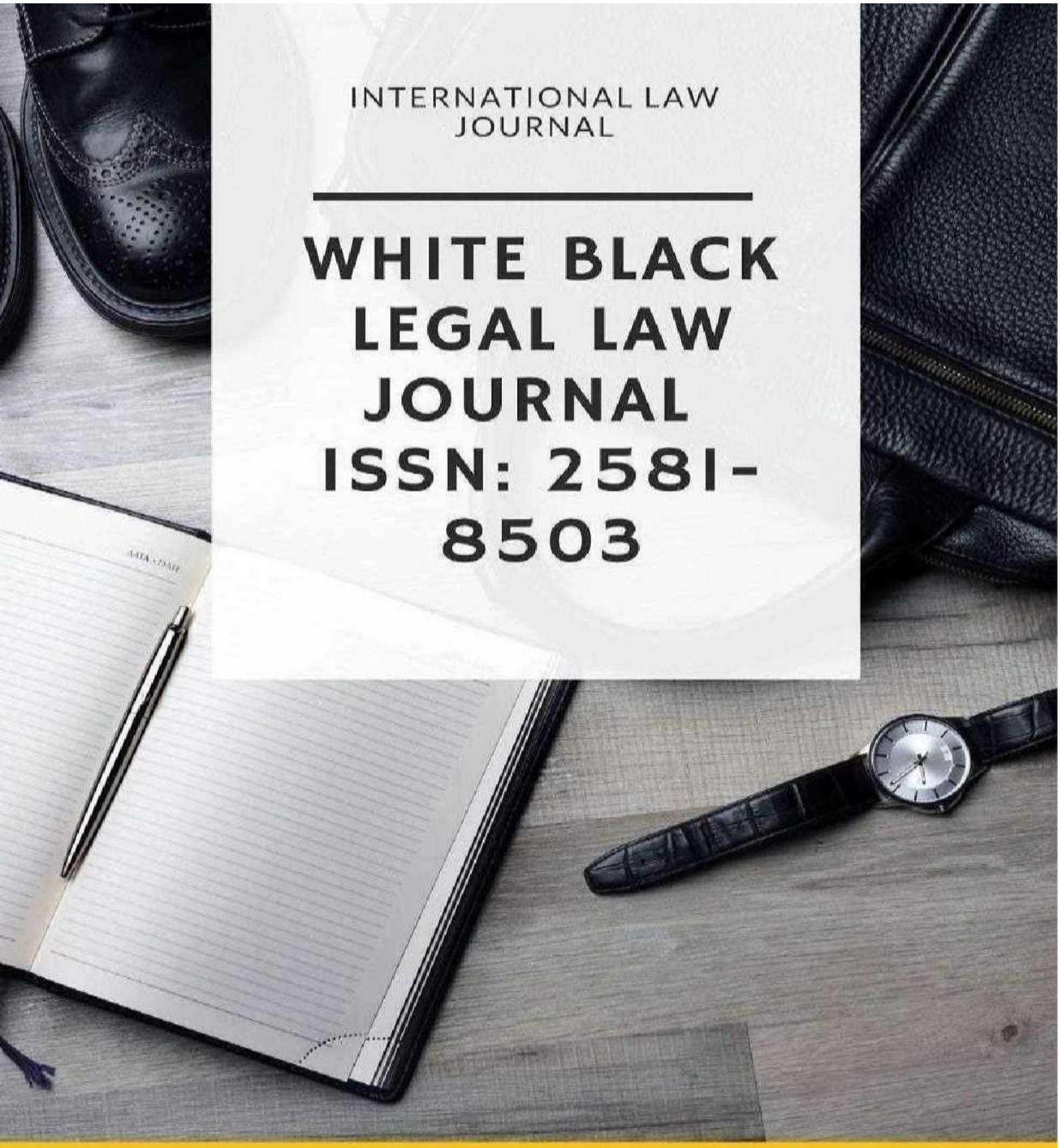

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With this thought, we hereby present to you

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# MARRIAGE EQUALITY AND CONSTITUTIONAL MORALITY: TRACING THE JURISPRUDENCE OF SAME SEX UNIONS IN INDIA

AUTHORED BY - SHIVIKA GOYAL

## Introduction-

Marriage is a legally recognized and socially sanctioned union between two individuals, typically based on love, mutual commitment, and the intention to build a life together. It is a culturally and historically significant institution that establishes a formalized partnership between spouses and often involves legal rights, responsibilities, and obligations.[1] Traditionally marriage involved two individuals, a man and a woman and the purpose of marriage was procreation of children and continuance of the family line.[2] Legally, marriage grants certain rights and benefits, such as property rights, inheritance rights, tax benefits, and the ability to make medical and financial decisions on behalf of one's spouse. It imposes legal responsibilities, such as fidelity, mutual support, and the obligation to maintain and provide for the welfare of any children born into the marriage.

The concept of marriage has evolved over time and varies across different cultures, religions, and legal systems. The understanding and definition of marriage continues to evolve and adapt to societal changes and evolving notions of equality and human rights.[3] In modern societies a variety of nontraditional arrangements or what can be called as 'A-Typical Family Arrangements' have emerged. Certain examples of the same are live in relationships, nonmarital childbearing, and interracial and interreligious relationships. They have become more common and accepted, especially in Western countries.[4] One such issue that has caught attention and has been the most prominent developments in this domain is the global demand for legal recognition of Same Sex Marriage. Same sex marriage would mean a legal wedlock

[1] Elizabeth Brake, Minimizing Marriage: Marriage, Morality, and the Law (Oxford University Press 2012) 1–3.
[2] Amita Dhanda, 'Marriage: An Institution of Patriarchy?' in Ratna Kapur (ed), Feminist Terrains in Legal Domains: Interdisciplinary Essays on Women and Law in India (Zubaan 2011) 94.
[3] Martha C Nussbaum, From Disgust to Humanity: Sexual Orientation and Constitutional Law (Oxford University Press 2010) 108.
[4] Flavia Agnes, 'Family Law: Issues of Divorce and Custody' (2011) 46(33) Economic and Political Weekly 78, 80.

between two man (gay couple) or between two women (lesbian couple).[5] Marriage was initially a union between a heterosexual couple but all around the world homosexual couples are demanding legal recognition in form of marriage.

The right to marry, deeply embedded in the human experience, is not merely a social institution but a fundamental component of personal liberty, dignity, and autonomy. In India, the discourse around marriage equality particularly for same-sex couples has evolved from a marginalised plea to a central constitutional debate. The historic judgment in Navtej Singh Johar v Union of India marked a decisive departure from a colonial morality that criminalised same-sex relationships, recognising the LGBTQIA+ community's right to dignity and privacy.[6] However, five years since that landmark decision, the Indian legal system continues to deny same-sex couples the right to enter into civil marriage, leaving them excluded from numerous legal, social, and economic protections that heterosexual couples enjoy.[7]

This article undertakes a critical examination of the evolving jurisprudence on same-sex unions in India. It traces the trajectory from the decriminalisation of homosexuality to the contemporary demand for full marriage equality. By foregrounding the concept of constitutional morality, the paper interrogates the judiciary's role in transforming entrenched social norms and delivering justice to historically marginalised groups. Further, through a comparative lens, it analyses international approaches to marriage equality and the implications for Indian constitutionalism. In doing so, the paper seeks to highlight not only the normative foundations of marriage equality but also the pressing need for a rights-affirming legal regime that transcends heteronormative boundaries.

## Evolution of Same-Sex Marriage: A Constitutional and Global Perspective.

The institution of marriage has historically been confined to heterosexual unions that were primarily constructed around patriarchal, religious and reproductive imperatives. On the contrary, same-sex relationships, have often existed in the shadows of legality and social acceptance, criminalised and morally condemned across much of the world. However, the latter half of the twentieth century and the beginning of the twenty-first century witnesses a

[5] Obergefell v Hodges 576 US 644 (2015); Carlos A Ball, After Marriage Equality: The Future of LGBT Rights (NYU Press 2016) 1–6.
[6] Navtej Singh Johar v Union of India (2018) 10 SCC 1.
[7] Sourav Mandal, "Marriage Equality in India: A raod Map for Inclusive Lawering, Activism, and Policymaking (58) 35 Economic and Political Weekly.

significant transformation in the global legal landscape, marked by a growing recognition of LGBTQIA+ rights, including the right to marry.

## I. Historical Marginalisation of Same-Sex Unions

In many legal systems, same-sex relationships were not merely denied recognition but criminalised. Colonial-era laws such as Section 377 of the Indian Penal Code, 1860, mirrored Victorian morality and deemed same-sex acts as "against the order of nature".[8] These laws did not merely prohibit conduct but symbolised systemic exclusion and moral disapproval. The idea of same-sex marriage, therefore, was inconceivable in such legal and cultural contexts.

## II. Global Shift Toward Legal Recognition

The modern movement for same-sex marriage began to gain momentum in the late twentieth century. The Netherlands became the first country to legalise same-sex marriage in 2001, establishing a global precedent for equality. Though the first country to recognize same sex partnership was Denmark in 1989, followed by Norway in 1993, Sweden in 1995, Iceland in 1996, Netherlands in 1998 and France in 1999. Twelve years later in 2001, Netherlands became the first country to permit same sex couples to marry legally.[9] As of the year 2023, around 30 countries allow gay and lesbian couples to marry legally. These countries include the United States, New Zealand, Australia, Germany, Scotland, England and Whales and most European nations. This was followed by progressive developments in jurisdictions such as Canada, Spain, South Africa, and eventually the United States in Obergefell v Hodges (2015), where the U.S. Supreme Court held that same-sex couples have a constitutional right to marry under the Fourteenth Amendment.[10] These developments were underpinned by a growing judicial consensus that the denial of marriage to same-sex couples violated principles of equality, dignity, and non-discrimination. International human rights bodies also played a crucial role in encouraging states to adopt more inclusive family laws.[11]

[8] Arvind Narrain, Queer: Despised Sexuality, Law and Social Change (Yoda Press 2004) 22.
[9] David Masci, Elizabeth Podrebarac Sciupac and Michael Lipka, 'Same-Sex Marriage Around the World' (Pew Research Center) https://www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world/ accessed 5 June 2025.
[10] Obergefell v Hodges 576 US 644 (2015)
[11] UN Human Rights Council, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (UN 2012).

## III. The Indian Journey: From Criminalisation to Constitutional Recognition

India's legal trajectory has been complex and transformative. In Naz Foundation v Government of NCT of Delhi (2009), the Delhi High Court decriminalised consensual same-sex relations, marking a constitutional turn towards privacy and dignity.[12] However, this judgment was overturned in Suresh Kumar Koushal v Naz Foundation (2013), reinstating Section 377 and pushing the LGBTQIA+ community back into legal uncertainty.[13]

A watershed moment came with Navtej Singh Johar v Union of India (2018), wherein a five-judge Constitution Bench of the Supreme Court unanimously struck down Section 377, recognising the right to sexual orientation and personal autonomy as fundamental rights under Articles 14, 15, and 21 of the Indian Constitution.[14] Justice Chandrachud, in his concurring opinion, invoked the idea of constitutional morality a principle that requires the State and its institutions to uphold individual dignity and equality, even against prevailing social prejudices.[15]

Despite this progressive decriminalisation, same-sex marriage remains outside the purview of Indian family law. The recent decision in Supriyo @ Supriya Chakraborty v Union of India (2023) was a missed opportunity in this regard. While the Court recognised the aspirations of queer individuals for love, dignity, and partnership, it deferred the matter of legal recognition to the legislature.[16] This judgment exposed a significant gap between formal decriminalisation and substantive equality.

## IV. The Contemporary Debate and Constitutional Morality

The evolution of same-sex marriage law must be viewed in light of the broader struggle for equality and non-discrimination. The shift from criminalisation to constitutional protection, while significant, remains incomplete without affirmative recognition of same-sex unions. The argument for marriage equality is not merely about access to an institution but about the State's obligation to treat all citizens with equal respect and legal concern. Legal scholars have argued

[12] Naz Foundation v Government of NCT of Delhi 160 DLT 277 (Del HC).
[13] Suresh Kumar Koushal v Naz Foundation (2014) 1 SCC 1.
[14] Navtej Singh Johar v Union of India (2018) 10 SCC 1.
[15] ibid [561] (Chandrachud J).
[16] Supriyo @ Supriya Chakraborty v Union of India 2023 SCC OnLine SC 1460.

that constitutional morality demands that courts interpret the Constitution not through the lens of popular morality, but through its transformative ethos of justice, liberty, and equality.[17] Denial of marriage rights, in this framework, amounts to a form of structural inequality, denying same-sex couples the rights, benefits, and social legitimacy that marriage confers.

It is crucial to understand that the demand for marriage equality is not simply about the right to participate in a social institution, but about the State's obligation to ensure equal treatment under the law. Marriage, as recognised by Indian jurisprudence, is not merely a personal affair but a legal relationship that brings with it a range of rights, entitlements, and societal legitimacy. The exclusion of same-sex couples from this institution effectively results in a denial of equal citizenship, relegating queer individuals to a second-class status.

## Judicial Approaches: From Decriminalisation to Reluctance on Affirmative Rights

The Indian judiciary's role in the recognition of LGBTQIA+ rights has undergone a remarkable transformation over the past two decades from silence and denial to cautious affirmation and, more recently, a notable judicial restraint in affirming substantive equality. This trajectory reflects both the progressive capacity of constitutional interpretation and the limitations of courts in challenging deeply embedded societal norms.

The turning point in Indian LGBTQIA+ jurisprudence was the Delhi High Court's landmark decision in Naz Foundation v Government of NCT of Delhi, which for the first time read down Section 377 of the Indian Penal Code to decriminalise consensual same-sex acts between adults. The court rooted its decision in constitutional guarantees of dignity, privacy, and equality, recognising that criminalisation fostered systemic discrimination and stigma against sexual minorities.[18] However, this progressive ruling was overturned in Suresh Kumar Koushal v Naz Foundation, wherein the Supreme Court adopted a regressive approach, describing the queer population as a "minuscule minority" and holding that the legislature, not the judiciary, should decide the fate of Section 377.[19]

[17] Danish Sheikh and Rupali Samuel, 'Beside Marriage Equality: Conversations on Supriyo' (2024) 20(1) Socio-Legal Review 134 https://repository.nls.ac.in/slr/vol20/iss1/2/ accessed 5 June 2025.
[18] Naz Foundation v Government of NCT of Delhi 2009 SCC OnLine Del 1762, (2009) 160 DLT 277.
[19] Suresh Kumar Koushal v Naz Foundation (2014) 1 SCC 1.

This reversal triggered widespread criticism for its failure to uphold constitutional morality over social morality. It was only in 2017, in the historic Justice K. S. Puttaswamy v Union of India judgment on the right to privacy, that the Court unequivocally reaffirmed that sexual orientation is an essential facet of individual identity and dignity, deserving constitutional protection.[20] This laid the doctrinal groundwork for the Supreme Court's unanimous decision in Navtej Singh Johar v Union of India, which decriminalised homosexuality by declaring Section 377 unconstitutional to the extent it penalised consensual same-sex conduct among adults.[21]

In Navtej, the Court embraced the concept of constitutional morality as a guiding principle and held that popular societal norms could not justify legal discrimination. Justice Chandrachud explicitly stated that "constitutional morality requires that this Court must act as a counter-majoritarian institution," particularly in matters affecting minority rights and personal liberty.[22] The judgment marked a significant doctrinal shift by interpreting constitutional provisions in a transformative manner, placing the individual and their dignity at the centre of constitutional discourse.

However, the optimism that followed Navtej was tempered by the Supreme Court's approach in Supriyo @ Supriya Chakraborty v Union of India. Despite acknowledging that queer persons have the right to cohabit and form intimate relationships, the Court stopped short of granting marriage equality, instead deferring the matter to the legislature.[23] The majority opinion underscored the principle of separation of powers, holding that judicial recognition of same-sex marriages would amount to judicial overreach. While this decision reaffirmed the rights to dignity and non-discrimination, it notably failed to translate those principles into affirmative legal recognition of marriage for same-sex couples.

This judicial restraint reveals a reluctance to push the boundaries of constitutional interpretation when it comes to institutional reforms that challenge entrenched social norms. Scholars have observed that by declining to enforce marriage equality, the Court effectively upheld a status quo that perpetuates legal invisibility and structural exclusion of queer

[20] Justice K S Puttaswamy v Union of India (2017) 10 SCC 1.
[21] Navtej Singh Johar v Union of India (2018) 10 SCC 1.
[22] Navtej Singh Johar (n 4) [560] (Chandrachud J).
[23] Supriyo @ Supriya Chakraborty v Union of India 2023 SCC OnLine SC 1460.

relationships.[24] The dissenting opinion by Chief Justice D.Y. Chandrachud, however, reflected a more robust understanding of constitutional guarantees. He argued that the right to marry cannot be denied on the basis of sexual orientation and that the State has a positive obligation to provide legal frameworks that accommodate diverse familial forms.[25]

The Indian judiciary's oscillation between progressive affirmation and cautious deference underscores the challenges of realising constitutional promises through adjudication alone. While Navtej and Puttaswamy stand as beacons of transformative constitutionalism, the decision in Supriyo reveals the limits of judicial will in confronting heteronormativity embedded within personal laws and statutory regimes. True equality, as envisioned by the Constitution, will require not only courageous judicial interpretation but also legislative and societal commitment to embracing inclusivity in all its forms.

## Comparative Constitutionalism and Global Jurisprudence

The question of same-sex marriage has gained momentum not only in India but also across the globe, where constitutional courts have increasingly become vehicles for expanding the scope of marriage rights. Comparative jurisprudence offers valuable insight into how constitutional democracies have interpreted equality, dignity, and liberty in the context of marriage rights for same-sex couples. These international developments provide both persuasive precedent and normative grounding for Indian courts and legislators.

In the United States, the watershed moment came in Obergefell v Hodges, where the Supreme Court held that the denial of marriage licenses to same-sex couples violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[26] The Court observed that marriage is a fundamental right inherent to the liberty of the person and that same-sex couples, like their heterosexual counterparts, are entitled to the constellation of benefits that the legal institution of marriage provides.[27] South Africa, with one of the most progressive constitutions in the world, recognised same-sex marriage in Minister of Home Affairs v Fourie. The Constitutional Court held that denying marriage to same-sex couples amounted to unfair discrimination under Section 9 of the Constitution and failed to uphold the values of dignity,

[24] Danish Sheikh and Rupali Samuel, 'Beside Marriage Equality: Conversations on Supriyo' (2024) 20(1) Socio-Legal Review 134.
[25] Supriyo (n 6) (Chandrachud CJI, dissenting opinion).
[26] Obergefell v Hodges 576 US 644 (2015).
[27] ibid [14].

equality, and freedom.[28] Importantly, the Court issued a suspended declaration of invalidity, giving Parliament one year to enact a statute accommodating same-sex unions, which led to the Civil Union Act of 2006.

In Europe, the European Court of Human Rights (ECtHR) has gradually evolved its stance. While it stopped short of mandating same-sex marriage in Schalk and Kopf v Austria, it recognised that stable same-sex relationships fall within the scope of "family life" under Article 8 of the European Convention on Human Rights.[29] Later, in Oliari v Italy, the ECtHR found that Italy's failure to provide any legal recognition to same-sex couples was a violation of their right to private and family life.[30] Other jurisdictions have embraced marriage equality through constitutional interpretation or legislative reform. Canada legalised same-sex marriage through a combination of provincial court rulings and federal legislation, culminating in the Civil Marriage Act, 2005. Taiwan became the first Asian nation to legalise same-sex marriage following a constitutional court ruling in 2017, which gave Parliament a deadline to enact a law in consonance with constitutional protections.[31]

These comparative experiences underscore a common jurisprudential trajectory: the recognition that excluding same-sex couples from marriage is incompatible with constitutional values of equality, dignity, and autonomy. The courts in these jurisdictions did not merely act as adjudicators but embraced their role as guardians of constitutional morality similar to the ethos adopted in Navtej Singh Johar but not followed through in Supriyo. While every jurisdiction must interpret its constitution within its own cultural and legal context, the global convergence around same-sex marriage demonstrates that constitutional principles are not culture-bound they are grounded in universal notions of human dignity and justice. For India, these examples present a roadmap for future engagement with the issue, offering both legal reasoning and moral direction.

## Marriage Equality and Legislative Reform: The Road Ahead

The decision in Supriyo v Union of India, by declining to extend marriage rights to same-sex couples and deferring the matter to the legislature, has underscored the critical need for

[28] Minister of Home Affairs v Fourie [2005] ZACC 19, 2006 (1) SA 524 (CC).
[29] Schalk and Kopf v Austria App no 30141/04 (ECtHR, 24 June 2010).
[30] Oliari and Others v Italy App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015).
[31] Interpretation No 748, Constitutional Court of Taiwan, 24 May 2017.

legislative reform in India. While the judiciary has played a pivotal role in recognising fundamental rights of LGBTQIA+ individuals such as the right to dignity, privacy, and decriminalisation of consensual same-sex conduct affirmative recognition of marriage equality now rests primarily with Parliament. India's existing marriage laws, including the Hindu Marriage Act 1955, the Special Marriage Act 1954, and the Indian Christian Marriage Act 1872, are all drafted in heteronormative terms. These statutes use gendered language such as "husband and wife" or "bride and bridegroom" which precludes same-sex couples from marrying under the current legal framework. The Special Marriage Act, which was intended as a secular and egalitarian statute, ironically becomes an exclusionary instrument due to its gendered formulations.[32]

To bring about substantive marriage equality, legislative intervention must do more than amend gender-specific terms. It must affirmatively recognise diverse forms of relationships and family structures, including queer unions. A gender-neutral and sexuality-inclusive law would not only uphold the constitutional values of dignity, autonomy, and equality, but also bring Indian family law in line with global human rights standards. Such reform should include equal access to adoption, inheritance, spousal benefits, and tax rights, ensuring that same-sex couples enjoy parity in both legal and social terms. In light of the Supriyo verdict, civil society and advocacy groups have a renewed role in pushing for legislative change. Public discourse, legal education, and community mobilisation can act as catalysts for reform by influencing political will. At the same time, progressive state governments may consider enacting state-level legislation or policies to afford limited recognition or civil union frameworks, as interim measures pending national action.

Crucially, marriage equality must be approached not merely as a symbolic gesture but as an essential component of substantive citizenship. Denying same-sex couples the legal institution of marriage continues to perpetuate a second-class status, reinforcing social stigma and legal invisibility. Legislative silence or delay on this issue only compounds historical discrimination. As legal scholar Gautam Bhatia observes, "A democracy that takes rights seriously cannot treat queer relationships as less deserving of institutional recognition."[33] The path to marriage

[32] See Gautam Bhatia, The Transformative Constitution: A Radical Biography in Nine Acts (HarperCollins 2019) 243–248.
[33] Gautam Bhatia, 'Marriage Equality in India: The Supreme Court's Missed Opportunity' (2023) Economic and Political Weekly https://www.epw.in/journal/2023/35/commentary/marriage-equality-india.html accessed 5 June 2025.

equality in India is undeniably complex, shaped by competing narratives of tradition, religion, and morality. Yet the transformative spirit of the Constitution—so often invoked by the Supreme Court demands that the law evolve to reflect the lived realities and equal dignity of all its citizens. The future of marriage equality lies not only in the hands of legislators but also in the conscience of a society that must decide whether it will extend full and equal membership to all forms of love.

## Conclusion

The debate on marriage equality in India sits at the intersection of law, morality, and evolving social consciousness. From the criminalisation of same-sex conduct under Section 377 to its decriminalisation in *Navtej Singh Johar*, the Indian legal system has taken decisive steps towards recognising the dignity and rights of queer individuals. However, the denial of marriage rights in *Supriyo v Union of India* reveals the unfinished nature of this constitutional journey. At its core, marriage equality is not merely a question of legal semantics or social preference. It is a matter of constitutional justice. The refusal to recognise same-sex marriages sustains structural discrimination and denies individuals the full spectrum of citizenship and personhood. While the Supreme Court has championed constitutional morality in its rhetoric, it has not always followed through in its remedies.

Comparative constitutional experiences show that the legal recognition of same-sex marriage is both possible and transformative. They demonstrate that a robust commitment to equality and dignity can transcend cultural and religious opposition. India's own constitutional ethos anchored in justice, liberty, equality, and fraternity demands a similar trajectory. As the locus of action now shifts to the legislature, the call for marriage equality must be framed not as a demand for special rights, but as a claim to equal rights under the Constitution. The time has come to reimagine family law in a way that is inclusive, pluralistic, and affirming of diverse identities. In doing so, the Indian State can finally move from tolerance to acceptance, and from recognition to full equality for all its citizens irrespective of whom they love.