

Marriage Equality in India: Between Constitutional Morality and Social Prejudice

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Abstract: Marriage has never been just a ritual. It is like a recognition, protection, and dignity for the couples. But, In India, "same sex couples" remain outside of this circle of legal recognition. They may share love, build families, and live openly, but the law still calls them strangers. This exclusion is not just silence. It is active discrimination in motion. This paper traces the long arc of history, from ancient acceptance of gender diversity and same-sex desire, to colonial criminalisation under Section 377, to the gradual constitutional victories of privacy, dignity, and equality. It examines how marriage laws in India, (Hindu, Muslim, Christian), continue to frame unions in strictly gendered terms, leaving no room for same-sex couples. Judicial precedents, from *Naz* to *Navtej* and most recently *Supriyo*, reveal both progress and hesitation. They affirm constitutional morality but fall short when it comes to giving full recognition. The thing is equality cannot be partial. Civil unions may serve as a temporary measure, but only marriage can solve this longstanding issue. The Constitution speaks of liberty and dignity for all. This paper argues that India must move beyond outdated statutes, amend its laws, and bring them in line with constitutional promise. Delay deepens injustice. Recognition is overdue. Justice cannot wait.

Introduction - Marriage is a bond between two people, a social contract. It is also a civil recognition. It carries rights of inheritance, adoption and property. It carries dignity for couples. In India, marriage has long been associated with the tradition, caste, and gender roles. It has been about family duty as much as personal choice. The law has copied this narrow view. It assumes marriage is between a man and a woman and anything else is invisible. But the Constitution does not accept this invisibility. It speaks of equality and dignity. It talks about liberty and choice. Articles 14, 15, and 21 are not just empty words. They apply to all people, not only those who fit social expectations.

Same-sex couples today stand outside the circle of recognition. They may live together and they may love openly and may build a family. But without marriage, the law does not protect them. They remain excluded from rights that others take for granted. This exclusion is not neutral. It is active discrimination. The fight for recognition is not about breaking tradition. It is about making law consistent with the Constitution. Courts have said again and again: constitutional morality is higher than social morality. Law cannot bow to prejudice. Law must protect rights of everyone equally.

This paper looks at the path to marriage equality. It traces the history, the statutes, the judicial precedent, and the suggestions made by the courts themselves. It shows why recognition is not just desirable. It is required.

History and Background : India has a very long history. It is rich in culture, philosophy, and layered societies. Yet the record of sexuality in the earliest period is thin. From Harappa and Mohenjo-Daro, the evidence is unclear. What people desired and how they lived their intimate lives remains open to guesswork. But with the rise of the Vedic age, texts and traditions began to mention same-sex desire and what later came to be called the "third gender."

The idea of *trityaprakriti*, the third nature, has always been part of Hindu philosophy. It refers to people who do not fit the male-female binary system. They may live outside fixed roles of gender and sexuality. This concept was not seen as something alien. It was recorded as part of life. As in many deities and stories reflect the same. The story of Aravan is one of the most famous. "Before Aravan's sacrifice in the *Mahabharata*, Krishna takes the form of Mohini, a woman, and marries him. This tale is not merely a myth but is actively lived today through the Kuvagam festival in Tamil Nadu, where the *Hijra* or *Aravani* community identifies with the Mohini's widowhood, celebrating a legacy of divine transformation and relationships that exist beyond the binary. The tale shows gender fluidity, divine transformation, and recognition of relationships beyond the binary system"¹. Another example comes from the *Kamasutra*. This ancient text was written by Vatsyayana and is not just about heterosexual love. "It speaks in detail about same-sex relationships"². It recognises that desire exists in varied

forms. It describes practices, roles, and social spaces of those who did not conform to the binary. The text does not criminalise them. It records them as part of society³.

Art also reflects this acceptance. "The Khajuraho temples, built in the 10th to 12th centuries, contain sculptures of sexual expression in many forms"⁴. They show intimacy between men and between women and also between groups. They show fluidity, not rigidity. The message is clear: desire was diverse, and it was represented in sacred spaces without shame.

Other Sanskrit texts and commentaries also mention same-sex intimacy and third-gender roles. The *Puranas* and later commentaries record rituals, blessings, and even duties of such persons⁵. While not always equal in status, their existence was never erased. They had a place in the cultural imagination.

Moving to the medieval era, the Delhi Sultanate period also contains records of same-sex desire. Memoirs and chronicles reveal rulers and nobles who openly expressed affection for men⁶. This was not hidden, though sometimes framed in the language of poetry or devotion. The Persian tradition of celebrating beauty and love between men found echoes in India as well.

Under the Mughals, the same pattern continued. Babur, the first Mughal emperor, wrote in his memoirs of his deep attachment to a young man⁷. His words are personal and open. They show that desire was not always concealed, even at the highest levels of rule. Later rulers also tolerated or even celebrated such expressions within court culture. Although, through these centuries, Indian society may not have always given full equality, but same-sex love and gender diversity were still part of the fabric. They were seen in temples, in texts, in courts, in poetry. They were not erased by native traditions.

The real break came with colonial law. British rule imposed a rigid, Victorian standard of morality. In 1860, "Section 377 of the Indian Penal Code was enacted"⁸. It criminalised "carnal intercourse against the order of nature." This phrase was deliberately vague but carried the weight of moral judgment. It treated same-sex intimacy as unnatural, sinful, and criminal.

For the first time, what had been visible in art, religion, and culture was pushed into silence by a statute. People who had been part of society for centuries were branded criminals. The law gave stigma the force of punishment. Fear replaced recognition. What had once been diverse was now declared deviant.

Section 377 has shaped Indian society for more than 150 years. It did not just punish the acts. It made identity itself unlawful. It silenced expression. It created generations of shame and invisibility. This colonial law stood at the centre of queer history in India until it was finally struck down in 2018⁹.

The arc of history is clear. Ancient India recorded diversity. Medieval India reflected it in art and poetry.

Colonial India criminalised it. Post-independence India inherited this criminalisation and took decades to challenge it. The fight for marriage equality today is the next step in correcting this long injustice.

Legislative Framework: Indian marriage law is built on statutes. Each statute defines who can marry, how, and what rights they can have. Every one of these statutes assumes heterosexual marriage. This assumption is the root of exclusion¹⁰.

"The **Hindu Marriage Act, 1955** is the first example. It talks about a "bride" and a "bridegroom." It lists down conditions for marriage with these terms"¹¹. The Act assumes one man and one woman. Same-sex couples are erased at the level of definition only.

The **Special Marriage Act, 1954** was meant to be a secular alternative. It covers interfaith couples. It avoids religious rites. But it repeats the same binary language. It still says "husband" and "wife." It still imagines only a man and a woman. The Act is neutral in religion but not in gender¹².

Personal laws under other faiths follow the same pattern. The **Christian Marriage Act, 1872** and the **Parsi Marriage and Divorce Act, 1936** both assume opposite-sex marriage. Muslim law recognises marriage as a contract, but again between man and woman only. None of these codes provide space for same-sex unions¹³.

The result is very simple. Same-sex couples cannot register their marriage under any existing law. They cannot claim the bundle of rights attached with marriage. They cannot access inheritance under succession laws. They cannot adopt jointly. They cannot claim spousal benefits in employment. They cannot decide medical treatment for each other in emergencies. The law keeps them as legal strangers, even if they share a life together¹⁴.

This exclusion is not a small gap. It is a violation of constitutional guarantees. Article 14 promises equality before law. Article 15 prohibits discrimination, including on the basis of sex. Courts have read sexual orientation into this protection. Article 19 secures freedom of expression and association. Choosing a partner is part of this. Article 21 guarantees life and personal liberty. The Supreme Court has said life under Article 21 means dignity, not mere survival¹⁵.

Yet the statutes remain unchanged. They reflect social morality rather than constitutional morality. They protect tradition, not rights. By defining marriage in gendered terms, they block an entire class of citizens from recognition¹⁶. Repeal of Section 377 ended criminal stigma. But marriage law still denies civil recognition. The Constitution is forward, the statutes are backward. This gap creates daily injustice¹⁷. The non-criminalisation is not enough, especially in a country like India. Where the mindset of the population is still very backward. Only proper legal protection and recognition can solve this issue.

The framework is clear: Parliament must amend statutes.

Language must shift from “husband and wife” to “spouses.” Marriage law must move from gendered to gender-neutral. Until then, courts can guide interpretation, but lasting change requires legislative reform.

Judicial Precedent: The constitutional journey of LGBTQ+ rights in India has unfolded largely through the courts, with each judgment contributing a distinct layer of reasoning on dignity, privacy, equality, and autonomy. Although the Supreme Court has not yet recognised a right to same-sex marriage, the jurisprudence it has developed over the past two decades provides a strong doctrinal foundation for such recognition. The following cases illustrate how constitutional principles have evolved in response to the lived realities of queer persons.

1. *Naz Foundation v. NCT of Delhi (2009)*: In *Naz Foundation v. NCT of Delhi (2009)*, the Delhi High Court was asked to examine whether Section 377 of the Indian Penal Code should continue to criminalise consensual same-sex intimacy between adults or not. The petitioner, Naz Foundation, argued that the law not only violated fundamental rights but also made HIV/AIDS outreach difficult, as queer individuals were pushed into secrecy and fear. The Court noted that although Section 377 appeared neutral, in practice it overwhelmingly affected gay and bisexual men and reinforced deep social stigma.

Drawing on international principles, medical consensus, and constitutional values, the Court observed that LGBTQ persons had long suffered discrimination, invisibility, and harassment. It emphasized that dignity, privacy, and equality cannot be denied simply because a group is unpopular or misunderstood. The judges highlighted that criminalisation intruded into personal autonomy and violated Articles 14, 15, and 21, as it treated individuals as lesser because of their identity and denied them equal protection and respect.

Ultimately, the Court held that LGBTQ persons could not be burdened with a law that denied them full participation in society or forced them to live in silence. Section 377 was therefore read down to exclude consensual adult relationships, marking a crucial step toward constitutional recognition and inclusion¹⁸.

2. *Suresh Kumar Koushal v. Naz Foundation (2013)*: In *Suresh Kumar Koushal v. Naz Foundation (2013)*, the Supreme Court was asked to review the Delhi High Court's 2009 decision that had read down Section 377 IPC to decriminalise consensual same-sex relations between adults. The petitioners argued that the High Court had exceeded its authority, claiming that Section 377 applied to acts rather than identities and that only Parliament could remove or amend the provision. Unlike the High Court, the Supreme Court emphasized that very few cases had actually been prosecuted under Section 377 and therefore concluded that LGBTQ persons did not form a sufficiently identifiable or significantly affected “class” to warrant constitutional protection.

The Court held that it was not its role to reinterpret the law on the basis of changing societal values, stating that such reforms must come through legislative action. It rejected the argument that Section 377 violated Articles 14, 15, and 21, and reinstated the provision in full, permitting the criminalisation of consensual same-sex intimacy. The judgment effectively reversed the progress made in *Naz Foundation*, creating a legal contradiction: while constitutional rights require protection regardless of majority opinion, the Court treated LGBTQ rights as dependent on legislative will¹⁹.

3. *National Legal Services Authority (NALSA) v. Union of India (2014)*: In *NALSA v. Union of India (2014)*, the petitioners, including the National Legal Services Authority, sought formal recognition and protection of the rights of transgender persons, who had historically been pushed to the margins of society. They argued that the lack of legal recognition denied them access to education, employment, healthcare, and basic dignity. The Court acknowledged that transgender individuals, despite being part of Indian society for centuries, had suffered serious social, economic, and cultural exclusion simply because their gender identity did not align with traditional binary roles.

The Court observed that self-identification of gender is an essential part of personal autonomy and that forcing individuals into fixed categories of “male” or “female” violates constitutional guarantees. It held that the transgender community constituted a socially and educationally backward class, and therefore deserved protective measures under Article 15(4) and Article 16(4). The judgment recognised the right to identify as male, female, or as a third gender, affirming that such identity must be respected by the State.

This reasoning directly challenged older judicial assumptions that tied identity strictly to biological characteristics. *NALSA* established that dignity, equality, and freedom require acknowledging gender as experienced by the individual, not imposed by society, making it a foundational decision in India's gender-rights jurisprudence.²⁰

4. *Justice K.S. Puttaswamy v. Union of India (2017)*: In *Justice K.S. Puttaswamy v. Union of India (2017)*, a nine-judge bench of the Supreme Court was asked to determine whether the Indian Constitution recognises the right to privacy as a fundamental right. The case arose in the context of challenges to the Aadhaar scheme, but its implications extended far beyond identity databases. The Court examined earlier decisions that had denied the existence of a constitutional right to privacy and found that those rulings no longer reflected contemporary understandings of dignity, autonomy, or personal liberty.

The judges observed that privacy is intrinsic to the freedoms protected by Articles 14, 19, and 21 and that without safeguarding the private sphere and choices of one's body, identity, relationships, and personal information

and other rights becomes hollow. They expressly recognised that privacy protects intimate zones of human life, including sexual orientation and gender identity, noting that discrimination rooted in these aspects violates dignity. By affirming privacy as a fundamental right, the Court directly undermined the reasoning in *Suresh Kumar Koushal*, which had minimised the rights of LGBTQ persons. The judgment held that constitutional guarantees evolve with societal values and cannot be denied simply because a group is small or unpopular²¹.

5. *Navtej Singh Johar v. Union of India (2018)*: In *Navtej Singh Johar v. Union of India* (2018), a group of petitioners challenged the constitutional validity of Section 377 IPC after the Supreme Court's earlier decision in *Suresh Kumar Koushal* had reinstated the criminalisation of same-sex intimacy. The petitioners argued that Section 377 continued to stigmatise LGBTQ individuals, deny them dignity, and expose them to discrimination and harassment. The Court examined the lived experiences of queer persons and acknowledged that the law had historically reduced them to fear, invisibility, and social exclusion.

Drawing on *Puttaswamy*'s recognition of privacy as a fundamental right, the judges held that consensual intimacy between adults lies at the core of personal autonomy and cannot be restricted by outdated moral views. They emphasised that constitutional morality and not majoritarian morality must guide the interpretation of rights. The Court found that Section 377 violated **Article 14** by creating an arbitrary and unreasonable classification, **Article 15** by discriminating on the basis of sexual orientation, and **Article 21** by undermining dignity, privacy, and the freedom to love. The judgment unanimously read down Section 377 to exclude consensual same-sex relations, affirming that LGBTQ persons are entitled to equality, respect, and full citizenship. It explicitly overruled *Koushal*, restoring the constitutional promise of inclusion and dignity²².

6. *Supriyo v. Union of India (2023)*: In *Supriyo v. Union of India* (2023), several same-sex couples approached the Supreme Court seeking legal recognition of their relationships and the right to marry under existing marriage laws. They argued that denying them marriage violated dignity, equality, autonomy, and the protections affirmed in *Navtej Johar* and *Puttaswamy*. The Court acknowledged that LGBTQ persons continue to face social exclusion, discrimination, and barriers to forming families, but ultimately held that the Constitution does not mandate the State to create or expand a marriage framework.

The judges agreed that queer relationships deserve respect and protection, but the majority concluded that changing the legal definition of marriage is a task for the legislature, not the judiciary. They held that statutory schemes like the Special Marriage Act were drafted for heterosexual couples and could not simply be reinterpreted to include same-sex unions without rewriting the law entirely. While emphasising that LGBTQ persons have the right to

love, cohabit, and form relationships, the Court declined to recognise a fundamental right to marry.

However, the judgment highlighted the State's obligation to protect queer individuals from abuse and discrimination and called for policy changes to address real harms. The result is a decision that affirms dignity in principle but stops short of granting full legal equality in practice, exposing continuing gaps between constitutional ideals and lived realities for LGBTQ persons.²³

Collective Impact on Marriage Equality: Read together, these judgments mark a steady constitutional evolution from criminalisation to recognition of personhood, privacy, autonomy, and intimate choice. The courts have repeatedly affirmed that:

1. identity is inherent to all human beings
2. privacy protects all intimate relationships
3. autonomy includes choosing one's partner as well
4. dignity cannot be denied on the basis of sexual orientation
5. constitutional morality must guide lawmaking.

Although the judiciary has not yet declared a right to same-sex marriage, the reasoning in these cases makes continued exclusion constitutionally unsustainable. Marriage equality emerges not as a new claim, but as a natural extension of the rights the Court has already recognised.

Conclusion : Marriage has never been just a ritual or a ceremony. It is how the law chooses to recognise relationships. It is how the State decides whose love counts and whose does not. In India, denying marriage to same-sex couples does not merely withhold a social label; it withdraws legal protection, security, and dignity. It tells an entire group of citizens that their relationships are acceptable only in private, but unworthy of public recognition.

The Constitution does not allow this denial from protection. Article 14 promises equality before law. Article 15 forbids all kinds of discrimination. Article 19 protects freedom of expression and choice. Article 21 protects life, dignity, and privacy. The Supreme Court has affirmed each of these rights in case after case. From *Naz* to *Navtej*, from *NALSA* to *Puttaswamy*²⁴, the message is clear: identity, privacy, autonomy, and dignity belong to every citizen.

Yet statutes remain locked in old language. "Husband and wife." "Bride and bridegroom." These words exclude by design. They protect tradition, not rights. They reflect social morality, not constitutional morality. The gap between constitutional promise and statutory practice is glaring.

The 2023 marriage equality judgment revealed this gap sharply. The majority said only Parliament can change marriage law²⁵. The dissent said courts also have a role. They argued that civil unions should be recognised now, and statutes should be read in gender-neutral terms until Parliament acts. They reminded us that constitutional morality does not wait for society to be ready.

The path forward is not unclear. Statutes should be

amended. Marriage law should be gender-neutral. Same-sex couples must be able to register their unions and claim the full bundle of rights inheritance, adoption, succession. Civil unions may serve as an interim step, but marriage equality must be the goal. Anything less is unequal. Anything less is unconstitutional.

This is not about special rights. It is about equal rights. It is not about tradition versus modernity. It is about law versus discrimination. It is about whether the Constitution applies to all, or only to some.

The courts have laid the foundation. The Constitution has set the standard. It is now for Parliament to act. Delay deepens injustice. Recognition is overdue. Justice cannot wait. Marriage equality is not charity. It is a right. And it is time.

Recommendations :

1. Enact a New “Gender-Neutral Marriage Act”: India should introduce a dedicated statute, open to all adults regardless of sex, gender identity, or sexual orientation.

This new Act should:

- a. define marriage in gender-neutral terms (“two person” or “two spouses”),
- b. allow voluntary registration of marriages without reference to religion or gender,
- c. lay out clear procedures for solemnisation, registration, maintenance, divorce, and succession,
- d. provide equal access to adoption, guardianship, inheritance
- e. override conflicting provisions in older personal laws to ensure uniform protection.

Creating a fresh statute avoids the complications of rewriting multiple religious codes and ensures uniformity similar to the Special Marriage Act, but without its gendered limitations.

2. Judicial Recognition Until the New Act Is Passed:

While legislation is the ideal route, courts can still protect couples in the interim. Courts may:

- a. issue guidelines ensuring that same-sex couples are not denied police protection or the right to cohabit,
- b. interpret existing legal provisions (like guardianship or medical agency) in gender-neutral ways,
- c. recognise civil unions temporarily until Parliament enacts the new law.

This ensures fundamental rights are not put on hold.

3. Social Sensitisation and Institutional Support: A new Act must be accompanied by awareness efforts:

- a. training for registration officials, police, and welfare authorities,
- b. public education to counter misinformation,
- c. inclusion of gender and sexuality diversity in educational curriculam.

Legal reform without social understanding risks friction and misuse.

4. Rejecting Patchwork Reforms: Simply tweaking existing Acts leads to confusion and uneven protection

across religions. A stand alone statute can avoid these problems and can ensure that all couples regardless of gender or faith are treated equally under one comprehensive legal framework. A separate legislation will solve the issues without leaving any loophole. India now needs a decisive step, a modern, inclusive, gender-neutral marriage code. It would bring clarity, dignity, and equality to millions of them. Every day without recognition leaves same-sex couples legally vulnerable. The creation of a new Act is not just policy reform; it is constitutional duty.

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