



## Discriminated homosexuality in India: the overriding effect of social morality over constitutional morality

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**Abstract:** A Supreme Court's decision has denied the right to same-sex marriage in India, raising questions about constitutional equality versus societal norms. The lack of legal recognition for LGBTQIA+ unions highlights urgent needs for rights, reform, and anti-discrimination policies.

In the [judgement](#) of *Supriyo alias Supriyo Chakraborty and another vs. Union of India*, on October 17, 2023, the five judges of the Supreme Court of India passed a decision which by 3:2 majority [stated](#) that no person has a fundamental right to marry the person of the same gender.

Relevant to this context is a more [recent issue](#) that has garnered media and judicial interest in 2024, namely a scandal involving an alleged gender change surgery undertaken at the instigation of a partner who later rescinded a promise of marriage. Persuaded by their partner to undergo the surgery, the victim was subjected to betrayal when the accused refused to honour the commitment. This incident has foregrounded the dire need for gender-neutral laws regarding the complexities of consent, identity, and personal autonomy in modern India.

This wider social discourse has made me introspect about my own biases and limitations. A few months ago, while I was in Delhi, something happened that made me

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reflect deeply. I was travelling on the metro, sitting next to a young couple. On the surface, it seemed like any ordinary moment. But there was something unique about them; they were part of the rainbow community. At that moment, I found myself struggling to fully accept their relationship, not because of any homophobia or animosity, but due to the limitations of my upbringing. I had always been taught that only two identities existed in the world, and such belief left me unprepared to understand anything beyond that.

This experience stirred a curiosity within me, especially after the Supreme Court's decision in *Supriyo vs. Union of India*. This ruling [means](#) that in the country [LGBTQIA+ couples](#) do not have the right to marry, also denying them the rights related to successions, or the right to adopt a child. Significantly, for those in this community, it feels as though you have been completely stripped of legal recognition.

Notably, a dissenting judgment by the Hon'ble Justice emphasised that courts should be guided by constitutional morality, not by societal customs. These relationships are based on love and partnership, yet without legal recognition, they are treated as mere cohabitation. Many queer couples continue to hope for rights and protections, but the ruling leaves them in a state of uncertainty, denied even the most basic legal recognition.

### **Concept of constitutional morality vs social morality**

The societal and constitutional aspects of the legality of the marriage of heterosexual couples are at odds. Indian society often perceives same-sex marriage as morally wrong and contrary to the rule of nature. While the Indian Constitution is rooted in the principle of equality. Part III of the Indian Constitution guarantees fundamental rights, including [Article 14](#) (equality before the law or the equal protection of the laws), [Article 15](#) (prohibition of discrimination on the ground of religion, race, caste, sex, or place of birth), and [Article 21](#) (right to life). These constitutional provisions stand in stark contrast to societal attitudes, highlighting the need for legal reform.

Moreover, undermining the recognition of same-sex marriage does not comply with international human rights standards. Article 16 of the Universal Declaration of Human Rights ([UDHR](#)) and Article 23(2) of the International Covenant on Civil and Political Rights ([ICCPR](#)) enshrine the right to marry a person of one's choice as an inalienable right. However, the Supreme Court's verdict that the right to marry is not a fundamental right as well as its refusal to grant marriage rights to same-sex couples are inconsistent with these norms and with earlier progressive stance.

Since India's independence, only two genders were officially recognised until [2014](#), when transgender activists filed a suit with the Supreme Court for the recognition of the third gender as the official gender alongside with male and female genders. Further progress was made in [2018](#), when the Supreme Court stated that criminalising consensual sexual acts between two adults of the same sex is unconstitutional, granting the LGBTQIA+ community the liberty to live with their partner.

Despite these steps, in *Supriyo vs. Union of India* the court [acknowledged](#) queer couples' rights to form emotional, mental, or sexual relationships, drawing from the rights to privacy, choice, and autonomy, but no right to marry for same-sex couples was recognised. In this regard, the [Special Marriage Act of 1954](#), which was intended to provide a civil form of marriage for those unable or unwilling to marry under personal law, has been interpreted by the Supreme Court in a way that denies LGBTQIA+ couples their marriage-related rights. However, such an interpretation leads to violate Article 14 of the Indian Constitution by denying them equality before the law.

### **Way forward**

After extensive debate, the Indian judiciary has left the recognition of same-sex marriage to the Parliament. While the judiciary has emphasised the need for [rights](#) such as succession, maintenance, and financial benefits under the [Income Tax Act 1961](#), rights flowing from employment, such as insurance, joint bank accounts, pensions, and gratuities, it remains unclear whether the legislative or executive branches will address these issues.

How to tackle this situation in the gloomy and narrow present of the rainbow community and lead them to a colourful and rightful future where they can live together, adopt, demand maintenance, and have rights and favourable laws that deal with uniformity and consistency?

- Introducing comprehensive anti-discrimination laws that protect LGBTQIA+ individuals in employment, education, healthcare, and housing is crucial.
- Advocating for marriage equality to allow LGBTQIA+ individuals to marry and have their relationships legally recognised.
- Encouraging the implementation of inclusive policies in workplaces and educational institutions to create a safe and accepting environment for LGBTQIA+ individuals.
- Promoting awareness and sensitization programmes to educate the public about LGBTQIA+ issues and foster acceptance and understanding.
- Ensuring that transgender people's gender identity is recognised legally, including their right to self-identification free from discrimination.
- Ensuring access to LGBTQIA+-friendly healthcare services and addressing the specific healthcare needs of the LGBTQIA+ community.
- Encouraging greater political representation of LGBTQIA+ individuals to ensure their voices are heard in policymaking.

At its core, this movement is about upholding fundamental principles of life that everyone is entitled to. Being homosexual should not deprive anyone of the basic legal entitlements and societal benefits that are available to others. Certainly, the absence of such laws must be urgently addressed, as equal rights are not just a matter of legal frameworks but also a matter of human dignity. People should think about it. Ultimately, we are all equally human.