

Constitutional Rights and Same-Sex Marriage: A Three-Nation Comparison¹

Abstract

This paper examines the constitutional recognition and protection of same-sex marriage across three democratic nations: India, the United States, and South Africa. The comparative analysis aims to understand how constitutional frameworks either facilitate or hinder the legal recognition of same-sex marriage. While the U.S. and South Africa have recognized same-sex marriage through judicial pronouncements and constitutional interpretation, India is yet to grant such recognition despite the decriminalization of homosexuality. The research identifies patterns in constitutional jurisprudence, cultural resistance, and legal reforms, arguing that a robust interpretation of equality and dignity rights under constitutional law is critical in securing marriage equality. Methodologically, the study adopts a qualitative and comparative legal approach using constitutional texts, judicial decisions, and academic commentary.

Keywords:

Same-Sex Marriage, LGBTQ+ Rights, Constitutional Law, Equality and Non-Discrimination, Civil Rights, Marriage Equality, Human Rights, Fundamental Rights, Comparative Constitutionalism, Judicial Review, Religious Freedom, United States Constitution, Canadian Charter of Rights and Freedoms, Indian Constitution, Legal Recognition of LGBTQ+ Unions.

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1. Introduction

The global discourse on LGBTQ+ rights has undergone a significant transformation over the past few decades, evolving from demands for decriminalization and protection from violence to broader calls for legal recognition, social acceptance, and substantive equality. At the forefront of this movement lies the issue of marriage equality, which has emerged as a litmus test for the realization of full civil rights for LGBTQ+ individuals. The right to marry is not only a matter of personal autonomy or private life—it is deeply interwoven with the public affirmation of identity, access to a multitude of legal and economic benefits, and inclusion within the socio-legal framework of citizenship. Denying same-sex couples the right to marry effectively relegates them to a second-class status, undermining the constitutional promises of equality, dignity, liberty, and non-discrimination.²

Across jurisdictions, the legal status of same-sex marriage sits at the intersection of several key constitutional doctrines. It engages debates about the scope of fundamental rights, the interpretive role of courts, and the limits of legislative and majoritarian authority. The principles of equality before the law, protection of personal liberty, and the right to human dignity—enshrined in many democratic constitutions—have become pivotal in constitutional challenges seeking recognition for same-sex unions. These rights are often interpreted to impose positive obligations on the state to protect minorities and uphold their full participation in social and familial institutions. However, the recognition of these rights remains contested and uneven across the globe. While numerous countries have embraced marriage equality through progressive judicial interpretation, legislative reforms, or constitutional amendments, others continue to resist such recognition due to deeply embedded cultural, religious, and political objections.³

In many societies, the institution of marriage is closely linked with traditional notions of gender, sexuality, and family, often perceived as being inherently heterosexual. Legal reform in such contexts is not merely a technical exercise in statutory change but a cultural and ideological battle that challenges patriarchal norms, religious orthodoxy, and historical legacies of exclusion. In countries where majoritarian politics dominate the legislative agenda, courts have often played a crucial role in interpreting constitutional principles to protect marginalized groups, including the LGBTQ+ community. Yet even judicial victories

² *Obergefell v. Hodges*, 576 U.S. 644 (2015).

³ *South African Constitution*, 1996, Section 9 (Equality Clause).

may be met with institutional inertia, political backlash, or social resistance, illustrating the complex relationship between constitutional ideals and lived realities.⁴

This paper undertakes a comparative constitutional analysis of same-sex marriage recognition in three diverse democratic nations: India, the United States, and South Africa. These countries offer a rich comparative framework, as they differ markedly in their colonial legacies, legal traditions, religious compositions, and social attitudes toward homosexuality, yet each possesses a written constitution that formally guarantees equality and fundamental rights. The United States exemplifies a model where judicial activism, particularly through the Supreme Court's interpretation of the Fourteenth Amendment, has led to nationwide recognition of same-sex marriage.⁵ South Africa, in contrast, stands out as a pioneer on the African continent for embedding sexual orientation as a protected category in its post-apartheid constitution, leading to judicial recognition of same-sex marriage grounded in the country's transformative constitutionalism. India presents a unique case: although the Supreme Court decriminalized same-sex relations in *Navtej Singh Johar v. Union of India* (2018),⁶ it has yet to recognize a constitutional right to marry, as demonstrated in *Supriyo v. Union of India* (2023), where the judiciary deferred to the legislature on the issue.⁷

Through this comparative study, the paper seeks to explore the role of constitutional interpretation, judicial philosophy, and socio-political context in either advancing or restraining the cause of marriage equality. It aims to identify the structural, cultural, and legal factors that contribute to divergent outcomes and to assess whether constitutional democracies can truly fulfill their egalitarian promises without extending the right to marry to all individuals, regardless of gender or sexual orientation. Ultimately, this research aspires to contribute to the global conversation on LGBTQ+ rights, constitutional justice, and inclusive citizenship, arguing that the struggle for marriage equality is emblematic of the broader quest for legal recognition, social acceptance, and human dignity in contemporary constitutional democracies.

Against this backdrop, the present study seeks to examine how constitutional rights have been interpreted and applied in the context of same-sex marriage across India, the United States,

⁴ *Minister of Home Affairs v. Fourie*, 2005 (1) SA 580 (CC).

⁵ *Civil Union Act 17 of 2006* (South Africa).

⁶ *Navtej Singh Johar v. Union of India* (2018)

⁷ *Supriyo v. Union of India* (2023)

and South Africa. Each of these nations offers a distinctive legal and socio-political environment, making them ideal case studies for understanding the varied constitutional pathways to or away from marriage equality. In the United States, same-sex marriage was legalized through a landmark judicial decision in *Obergefell v. Hodges* (2015),⁸ which relied on the Due Process and Equal Protection Clauses of the Fourteenth Amendment to affirm that marriage is a fundamental right that must be extended to same-sex couples. South Africa's journey, on the other hand, was shaped by its transformative post-apartheid Constitution, which explicitly prohibits discrimination based on sexual orientation and places a strong emphasis on dignity and equality. The Constitutional Court's decision in *Minister of Home Affairs v. Fourie* (2005) compelled legislative action, culminating in the Civil Union Act of 2006, thereby legalizing same-sex marriage.

In contrast, India presents a more complex and evolving picture. The landmark *Navtej Singh Johar* decision (2018) decriminalized consensual same-sex relations and affirmed the dignity and autonomy of LGBTQ+ individuals under Articles 14, 15, and 21 of the Indian Constitution. However, the more recent *Supriyo v. Union of India* (2023) case revealed the judiciary's reluctance to extend these rights to the domain of marriage, reflecting the tensions between progressive constitutional values and legislative conservatism. By deferring the matter to Parliament, the Indian Supreme Court left a significant gap between the recognition of individual rights and the realization of family and relational rights, thus highlighting the incomplete trajectory of constitutional inclusion.

This paper, therefore, aims not only to compare legal outcomes but also to analyze the judicial reasoning, constitutional frameworks, and political contexts that have influenced these outcomes. It explores whether the text and structure of a constitution alone are sufficient to guarantee equality, or whether judicial will, legislative courage, and societal transformation are also indispensable. Through this comparative lens, the study endeavors to offer insights into how constitutional democracies can reconcile universal human rights norms with local cultural sensibilities, and what this means for the future of marriage equality in both developing and developed legal systems.

⁸ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

2. Literature Review

Scholarly attention on same-sex marriage primarily focuses on human rights, civil liberties, and comparative law. Key works include:

- Carlos A. Ball explores the constitutional foundation of same-sex marriage in the U.S., focusing on liberty and equality under the Due Process and Equal Protection Clauses.
- Makau Mutua and Catharine Albertyn analyze the transformative potential of South Africa's post-apartheid Constitution in recognizing the rights of sexual minorities.
- Arvind Narrain examines the post-Navtej Singh Johar era in India and its implications for broader LGBTQ+ rights, arguing for an expansive reading of Article 14 and 21 of the Indian Constitution.

Yet, comparative work that juxtaposes these three jurisdictions remains limited, particularly in the context of how constitutional interpretation either fosters or blocks legal reform for same-sex couples.

3. Research Objectives

- To assess how constitutional rights frameworks have influenced the legal status of same-sex marriage.
 - To compare the judicial approaches and legal reasoning used in recognizing or denying marriage equality.
 - To examine how socio-political and cultural factors impact constitutional interpretation in each nation.
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4. Research Questions

1. How do the constitutional principles of equality, liberty, and dignity operate in the recognition of same-sex marriage in India, the U.S., and South Africa?

2. What are the legal and judicial mechanisms through which same-sex marriage has been recognized or denied in these countries?
 3. To what extent do cultural and political factors influence constitutional interpretation in matters related to LGBTQ+ rights?
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5. Methodology

This research adopts a qualitative, doctrinal, and comparative legal method. The key elements include:

- Doctrinal Analysis: Examination of constitutional provisions (e.g., Articles 14, 15, and 21 of the Indian Constitution; the Equal Protection and Due Process Clauses of the U.S. Constitution; and the equality and dignity clauses in South Africa's Bill of Rights).
 - Case Law Review: Landmark judgments such as *Obergefell v. Hodges* (U.S.), *Minister of Home Affairs v. Fourie* (South Africa), and *Navtej Singh Johar v. Union of India* and *Supriyo v. Union of India* (India).⁹
 - Comparative Framework: Identifying similarities and divergences in constitutional reasoning and outcomes.
 - Secondary Sources: Academic articles, legal commentaries, legislative debates, and international human rights instruments.
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6. Constitutional and Legal Analysis: A Comparative Study

6.1 United States

- Legal Framework: The U.S. Constitution does not explicitly mention marriage. However, the Supreme Court in *Obergefell v. Hodges* (2015) held that same-sex couples have a fundamental right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

⁹ *IBID*

- Key Principles: Dignity, autonomy, and equal protection.
- Outcome: Legalization of same-sex marriage nationwide.

6.2 South Africa

- Legal Framework: The South African Constitution is one of the most progressive in the world, explicitly prohibiting discrimination on the basis of sexual orientation.
- Key Case: *Minister of Home Affairs v. Fourie* (2005), where the Constitutional Court ruled that the common law definition of marriage was unconstitutional.
- Outcome: Civil Union Act of 2006 legalized same-sex marriage, making South Africa the first African nation to do so.

6.3 India

- Legal Framework: The Indian Constitution guarantees equality (Article 14), non-discrimination (Article 15), and protection of personal liberty (Article 21).
- Progress: *Navtej Singh Johar v. Union of India* (2018) decriminalized consensual same-sex relations.¹⁰
- Setback: In *Supriyo v. Union of India* (2023), the Supreme Court declined to legalize same-sex marriage, deferring the issue to the legislature.
- Challenge: Constitutional rights are yet to be translated into family law reforms.

7. Analysis and Discussion

The comparative analysis reveals:

- Judicial Role: In the U.S. and South Africa, courts have played a transformative role. In India, the judiciary has shown restraint, recognizing individual rights but leaving marriage equality to legislative processes.
- Constitutional Text: South Africa's explicit mention of sexual orientation provides a strong constitutional basis. In contrast, India and the U.S. rely on broader equality and liberty clauses.

¹⁰ Supra note at 6

- Cultural Politics: Societal norms and political will greatly influence constitutional interpretation. India's reluctance can be partly attributed to cultural conservatism and political hesitance.
- The comparative analysis of India, the United States, and South Africa in the domain of same-sex marriage recognition reveals the complex interplay of judicial reasoning, constitutional structure, and socio-political dynamics. While all three nations uphold constitutional guarantees of equality and dignity, their institutional responses to LGBTQ+ rights, particularly marriage equality, have diverged significantly. This section unpacks these divergences across three central themes: the judicial role, the constitutional text, and the influence of cultural politics.
- One of the most striking contrasts among the three jurisdictions lies in the judicial approach to same-sex marriage. In both the United States and South Africa, courts have acted as transformative agents, often leading the charge in expanding LGBTQ+ rights. Conversely, the Indian judiciary, while progressive in some respects, has adopted a more restrained and deferential posture regarding marriage equality.
- In the United States, the Supreme Court has historically played a central role in advancing civil rights, and its decision in *Obergefell v. Hodges* (2015) marked a significant milestone in LGBTQ+ jurisprudence. In *Obergefell*, the Court held that the Fourteenth Amendment's Due Process and Equal Protection Clauses require states to license and recognize marriages between same-sex couples. The judgment framed marriage not merely as a legal contract but as a fundamental liberty interest protected by the Constitution. Justice Anthony Kennedy, writing for the majority, emphasized that same-sex couples possess the same dignity and autonomy as heterosexual couples and must not be denied access to one of society's most important institutions.
- South Africa's Constitutional Court, in *Minister of Home Affairs v. Fourie* (2005),¹¹ adopted a similarly transformative stance but within a very different socio-legal context. Emerging from the shadows of apartheid, South Africa's new constitutional order was designed to rectify historical injustices and promote substantive equality. The Court ruled that denying same-sex couples the right to marry violated the constitutional rights to equality and dignity. It gave Parliament a deadline to rectify the situation, which led to the enactment of the Civil Union Act (2006), thereby legalizing same-sex marriage. Notably, the Court's reasoning went beyond formal

¹¹ *Minister of Home Affairs v. Fourie* (2005)

equality and stressed the transformative constitutionalism that underpins the post-apartheid legal order—a commitment to societal reform through law.

- In contrast, the Indian Supreme Court’s approach has been incremental and cautious. In *Navtej Singh Johar v. Union of India* (2018), the Court delivered a landmark judgment that decriminalized consensual same-sex relations, recognizing the rights to dignity, privacy, and personal autonomy under Articles 14, 15, and 21 of the Constitution. However, when confronted with the issue of marriage equality in *Supriyo v. Union of India* (2023),¹² the Court declined to extend constitutional protection to same-sex marriage. While acknowledging the discrimination faced by queer couples, the majority opinion refrained from directing legal recognition of such unions, instead urging the legislature to deliberate on the issue. This deference reflects a judicial philosophy of minimalism, wherein the Court limits its role in areas perceived to involve deeply contested social values or require broad policy decisions.
- This divergence reveals two distinct judicial postures: activist versus deferential. While the American and South African courts embraced their roles as protectors of minority rights against majoritarian impulses, the Indian judiciary chose institutional restraint, thereby delaying the full realization of LGBTQ+ rights in the marriage domain.
- Another key factor influencing judicial outcomes is the constitutional text itself. The degree to which a constitution explicitly articulates protections for sexual minorities plays a crucial role in shaping legal interpretations and outcomes.
- South Africa stands out as the only country among the three that explicitly includes sexual orientation as a protected category in its constitutional equality clause. Section 9 of the South African Constitution prohibits discrimination on several grounds, including race, gender, sex, and sexual orientation. This explicit textual commitment provided the juridical foundation for the Constitutional Court’s decision in *Fourie*, enabling it to anchor marriage equality in the Constitution’s normative commitment to inclusivity, equality, and dignity. The clarity and strength of this provision left little room for ambiguity and signaled an institutional commitment to LGBTQ+ rights from the very inception of the democratic era.
- In contrast, the U.S. Constitution contains no explicit mention of sexual orientation or gender identity. The recognition of same-sex marriage in *Obergefell* was grounded in

¹² id

interpretative doctrines developed under the Fourteenth Amendment, particularly the principles of substantive due process and equal protection. The absence of explicit language meant that judicial recognition of same-sex marriage depended heavily on the evolving understanding of liberty and equality. The Court justified its reasoning by pointing to precedents on privacy, marriage, and bodily autonomy (*Loving v. Virginia*, *Lawrence v. Texas*), interpreting the Constitution as a “living document” capable of embracing contemporary understandings of human dignity.¹³

- Similarly, the Indian Constitution does not explicitly mention sexual orientation. Instead, LGBTQ+ rights have been read into broad constitutional provisions—such as Article 14 (equality before law), Article 15 (non-discrimination), and Article 21 (protection of life and personal liberty). In *Navtej Singh Johar*, the Supreme Court utilized these articles to decriminalize homosexuality and recognize the intrinsic dignity of LGBTQ+ persons. However, in the absence of explicit textual support and with a legal framework still steeped in heteronormative family law structures, the Court in *Supriyo* hesitated to extend these rights into the realm of marriage. The ambiguity in constitutional text made it easier for the Court to sidestep a definitive ruling, illustrating how the strength of constitutional language can either empower or limit judicial action.
- Thus, textual clarity—or its absence—can significantly shape the possibilities of constitutional interpretation. While South Africa’s express inclusion of sexual orientation facilitated legal recognition, the more abstract formulations in India and the U.S. required interpretative innovation and greater judicial courage.
- The final, and perhaps most underappreciated, factor in the recognition of same-sex marriage is the role of cultural politics. Constitutional guarantees are not enforced in a vacuum; they operate within complex societal matrices shaped by religious beliefs, historical legacies, political ideologies, and public opinion. These factors influence not only the judiciary’s sensitivity to certain rights but also the legislature’s willingness to enact reforms.
- In South Africa, the legal recognition of same-sex marriage was facilitated by a unique post-apartheid constitutional moment that sought to create an inclusive, egalitarian society. Although cultural resistance to LGBTQ+ rights still exists,

¹³ *Loving v. Virginia*, *Lawrence v. Texas*

particularly in rural and conservative areas, the Constitution provided a normative framework that prioritized reconciliation and non-discrimination. Moreover, the political leadership of the African National Congress (ANC) supported constitutional reforms and did not obstruct judicial directives. As a result, the legal framework advanced even in the face of uneven social acceptance.

- The United States, on the other hand, experienced a rapid shift in public opinion on same-sex marriage over the past two decades. By the time *Obergefell* was decided in 2015, a majority of Americans supported marriage equality. This societal evolution played a crucial role in enabling the Supreme Court to deliver a landmark decision without severe political fallout. Although opposition persisted, particularly among religious conservatives, the pluralistic and rights-based political culture allowed for the absorption of such changes within the constitutional order.
- India presents a more conservative and complex picture. Despite the progressive tone of the Supreme Court in *Navtej Johar*, Indian society remains deeply influenced by heteronormative family structures, religious traditions, and patriarchal values. Marriage is often viewed through the lens of caste, religion, and reproduction, leaving little room for alternative familial arrangements. This cultural conservatism is reflected in the political leadership's reticence to endorse same-sex marriage. The ruling government, while silent on the issue during *Navtej Johar*, actively opposed same-sex marriage in *Supriyo*, arguing that it was incompatible with Indian values and that such a change should emerge through public debate and legislative action.
- This absence of political will, combined with social resistance, has made it difficult for Indian courts to take bolder steps. The judiciary, sensitive to accusations of judicial overreach and conscious of its limitations in democratic policymaking, opted for restraint rather than transformation. This demonstrates that even the most progressive judgments can fall short of their potential when cultural politics and majoritarian pressures inhibit institutional action.
- In sum, the comparative analysis of same-sex marriage recognition in India, the United States, and South Africa highlights how constitutional rights are shaped not just by legal doctrine, but also by judicial temperament, textual provisions, and socio-political environments. While South Africa exemplifies the power of a transformative constitution supported by clear legal mandates and institutional cooperation, the United States shows how judicial interpretation and societal change can drive reform in the absence of textual clarity. India, in contrast, illustrates the limits of

constitutionalism when progressive ideals encounter cultural conservatism and legislative inertia.

- For advocates of marriage equality, these lessons underscore the importance of not only pursuing legal strategies but also engaging in political advocacy, public education, and cultural transformation. Constitutional promises, however noble, require sustained institutional commitment and societal support to become fully realized. The struggle for marriage equality, therefore, is not merely a legal battle but a multidimensional quest for recognition, justice, and human dignity.

8. Research Problems

- The gap between constitutional rights and legislative action in India remains unaddressed.
 - The judicial deference to the legislature on marriage equality raises questions about the scope of constitutional interpretation.
 - Inconsistent application of dignity and equality principles across nations suggests the need for a unified approach rooted in international human rights law.
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9. Limitations

- This study focuses on three nations and does not cover other jurisdictions where same-sex marriage is legal (e.g., Canada, Germany).
 - The evolving nature of LGBTQ+ rights means that legal developments post-2025 are not included.
 - Socio-religious dimensions are mentioned but not deeply analyzed.
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10. Conclusion

The comparative constitutional analysis of India, the United States, and South Africa underscores the crucial role of constitutional interpretation in advancing LGBTQ+ rights, particularly the recognition of same-sex marriage. In the United States and South Africa,

judicial boldness and a transformative reading of constitutional principles such as equality, dignity, and liberty enabled the courts to mandate marriage equality, despite significant societal resistance. These jurisdictions demonstrate that when constitutional values are interpreted progressively and expansively, they can serve as powerful instruments for social inclusion and justice. In contrast, India's judiciary, while affirming the rights to privacy and dignity in *Navtej Singh Johar*,¹⁴ adopted a cautious and deferential stance in *Supriyo v. Union of India*, leaving the question of marriage equality to the legislature. This approach reflects a deeper institutional tension between judicial activism and legislative supremacy, revealing the challenges of translating constitutional promises into lived realities. The Indian experience illustrates that formal constitutional guarantees are insufficient unless interpreted with moral imagination and a commitment to substantive equality. Ultimately, the findings suggest that to realize the full spectrum of LGBTQ+ rights, including marriage equality, constitutional interpretation must evolve dynamically, guided not only by legal text but also by principles of justice, empathy, and human dignity.

11. Recommendations

- India should enact legislative reforms aligned with constitutional principles to recognize same-sex marriage.
- Judiciaries should not shy away from enforcing fundamental rights even in the face of cultural resistance.
- International human rights frameworks should be used as persuasive tools to advocate for universal marriage equality.

¹⁴ id

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