COURTS, CONSTITUTIONS, AND GENDER EQUALITY: A STUDY OF LGBTQ+ RIGHTS IN INDIA AND CANADA

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ABSTRACT

Gender equality, understood as encompassing equality across sexual orientation and gender identity, is a crucial component of constitutional democracy and substantive human rights protection. This paper undertakes a comparative doctrinal analysis of LGBTQ+ rights in India and Canada to examine how constitutional interpretation, judicial engagement, and legislative responses shape the realization of equality, dignity, and personal liberty for sexual and gender minorities. By situating the LGBTQ+ rights within the broader framework of gender justice, the study highlights how constitutional systems respond to historically marginalised identities.

Canada represents a rights-affirming constitutional model grounded in the Canadian Charter of Rights and Freedoms. Through purposive judicial interpretation, sexual orientation and later gender identity have been recognized as protected grounds under the equality law, leading to comprehensive legislative codification. Same sex marriage has been recognised in the country since 2005; recent data indicates that 70% of LGBTQ+ Canadians have faith in legal protection against discrimination. India, by contrast, illustrates a model of transformative constitutionalism driven primarily by judicial intervention. Landmark judgments such as *Nalsa v UOI* constitutionalised the rights to dignity, privacy, and equality for LGBTQ+ persons. The restrictive framework for Transgender Persons (Protection of Rights) Act 2019 reveals a gap between constitutional ideals and legislative implementation.

The paper argues that achieving substantive gender equality requires moving judicial recognition towards legislative consolidation and effective enforcement. It recommends comprehensive anti-discrimination legislation and alignment of statutory frameworks with constitutional principles in India, while urging Canada to strengthen monitoring and implementation mechanisms to address persistent social inequities.

1. INTRODUCTION

Legal recognition and the protective measures of LGBTQ+ is a key indicator of the health of a constitutional democracy. They challenge the state's commitment to the rights of minorities against the frequently overpowering agencies of majoritarian morality and majoritarian political populism. This paper challenges the impact of the constitutional structures of India and Canada on legislative and judicial authorities to broaden or narrow the rights of sexual and gendered minorities. The topicality of this analogy is increased by the fact that both jurisdictions interpret their constitutions using a transformative approach. Transformative constitutionalism has historically been used by the Supreme Court of India to address colonial wrongs, most prominently in decriminalizing homosexuality. The courts of Canada, however, have adopted a dialogic model, whereby the judicial rulings are responded by legislative action, which in principle, increases rights. Nevertheless, events between 2023 and 2025 indicate a switching of roles or, at least, a significant complication of these stories. A sort of stalemate in the legislation has arisen in India, where the judiciary has been hesitant to act in response to a Parliament that has been slow to act on queer marriages. In Canada, on the other hand, a legislative override has become a reality, with provinces actively undermining the judiciary to reverse rights.

This paper presents a detailed comparative constitutional analysis of the constitutional processes related to LGBTQ+ rights in the Commonwealth democracies of India and Canada. Regarding this, both jurisdictions are based on a common-law tradition and a constitutional obligation to democratic institutions, which, as of 2024 and 2025, have exhibited significantly different patterns of development.

In India, there is a stage of judicial saturation in the discussion on marriage equality, as seen in the Supreme Court's refusal to recognize ad hoc marriages between same-sex couples, as in the case of Supriyo v. Union of India[1], and the later rejection of review petitions in 2025. However, traditional feminist frameworks governing family law increasingly conflict with newer constitutional activism asserting the horizontal application of fundamental rights against private discrimination, as evidenced by the October 2025 Supreme Court judgment in Jane Kaushik v. Union of India, which recognized that private employers cannot discriminate based

[1] *Supriyo @ Supriya Chakraborty v. Union of India*, 2023 SCC OnLine SC 1348

on gender identity[2]. On the other hand, Canada, a long-standing lighthouse of LGBTQ+ rights, is now mired in a constitutional crisis with the dialogue between courts and legislatures disintegrating. The provincial governments taking the pre-emptive step of invoking the notwithstanding clause, Section 33, in order to overrule the rights of transgender youth is a huge step backwards in Charter jurisprudence. [3]

There were expectations of extensive developments in the rights of the LGBTQ+ community. However, the reality has been quite different. The legal victory did not mean the removal of the deep-rooted social prejudices against the community. The community has to continue their fight for basic rights like marriage, adoption, surrogacy, and, foremost, anti-discrimination laws. This paper attempts to examine the current legal scenario, critically analyse the steps taken by the legislature to address the rights of the LGBTQ+ community, and suggest reforms to actively address the issues.

2. COMPARATIVE STUDY

2.1 India:

Indian LGBTQ+ rights have historically taken a rather non-linear course. Although the decriminalization of homosexuality in Navtej Singh Johar [4]was celebrated as an act of emancipation; however, the years that followed the ruling revealed the shortcomings of a rights discourse that is highly dependent on judicial utterances with no legislative support. The decade between 2023 and 2025 can be marked by a tension between not treating the Supreme Court as a super-legislature on the issue of marriage and its active promotion of anti-discrimination standards in the workplace and in general.

2.1.1 The Supriyo Impasse-

In *Supriyo @ Supriya Chakraborty v Union of India*,[5] decided by a Five-Judge Constitutional Bench gave a unanimous verdict that there is no constitutional right to marry under the Indian Constitution. The Court, by a majority of 3:2, refused again to interpret the Special Marriage Act, 1954, by construing it as it represented the non-heterosexual couples, grounding its

[2] *Jane Kaushik v. Union of India*, 2025 INSC 1248
[3] Canadian Charter of Rights and Freedoms, s 33
[4] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.
[5] *Supriyo @ Supriya Chakraborty (*n 1)

judgment on the fact that this would amount to judicial lawmaking.

The rationale behind this was the doctrine of separation of powers. The majority view written by Justice S. Ravindra Bhat held that marriage is a polycentric institution, a complex network of statutory rights, which includes inheritance, succession, and adoption. This deference to the doctrine means that any judicial seeking to reform the meaning of marriage would be a cascading force to these complementary laws, which was the sole purpose of the Court in doing so. In Supriyo, the Court held that the fact that marriage was considered a union between a natural man and a natural woman was due to an intelligible differentia that the union intends to create, namely procreation and social stability, and therefore did not violate Article 14[6]. In a more important way, the Court opposed the right to select partner, which is the result of the right to privacy and autonomy in Article 21[7], and the right to marry, which is the statutory status granted by the state. The Court voted in favor of the former and against the state having a positive obligation towards recognizing the latter. This placed LGBTQ+ couples in a legal limbo: they are not barred from living together and demonstrating their love, but they are strangers to the family legislation. This stand was solidified in January 2025, when a new bench of the Supreme Court rejected the petitions of review filed over the Supriyo ruling. [8] The Court ruled that there was no error directly visible on the record, and hence the door to wedlock equality was now closed, at least in the foreseeable future.

2.1.2 The Administrative Response:

The acknowledgment of the suffering caused by a lack of legal status necessitated the Supriyo judgment to direct the Union Government to establish a High-Level Committee that would address the human issues of queer couples. Conducted under the chairmanship of the Cabinet Secretary, the committee issued several administrative advisories in 2024 and 2025, thereby making an effort to bridge the gap between non-recognition and functional necessity.[9]

In the food security sphere, the Department of Food and Public Distribution issued an advisory

[6] The Constitution of India 1950, art 14
[7] The Constitution of India 1950, art 21
[8] *Same-Sex Marriage, Supreme court Dismisses petititons to review its decision refusing to recognise queer marriages* (LiveLaw, 8 January 2025)< https://www.livelaw.in/top-stories/supreme-court-dismisses-review-petitions-against-its-decision-refusing-to-recognize-queer-marriages-280498 >accessed 19 December 2025
[9] Press Information Bureau, 'Host of measures taken by Government of India for the welfare of queer community' (Press Release, 16 October 2023) <https://pib.gov.in/PressReleseDetailm.aspx?PRID=2050655>accessed 19 December 2025

instructing the state governments to treat partners of a queer relationship as members of the same household with regard to the right to receive a ration card.[10] This advisory was an important admission of mutual economic entity that queer couples formed and allowed them to receive subsidies as a family unit instead of individuals that were not related. Similarly, the Department of Financial Services issued a clarification to the banking sector, stating categorically that there is no legal barrier to prevent the queer community from opening joint bank accounts with their partners. [11]The demystification also clarified that the name under nominees can be specified as the queer partners to receive the account balance in the event of the holder's death.[12]

The Ministry of Health and Family Welfare in the health sector came up with detailed guidelines that outlawed "conversion therapy," which was deemed as professional misconduct.[13] In addition, the ministry also gave guidelines to hospital administrations authorizing partners, who could then sign medical authorization forms, and also take the body of a deceased partner on their behalf, in the absence of biological kin. Although this is crucial relief, legal scholars describe it as a kind of administrative citizenship. They are executive orders, which are not as permanent and statutory as a marriage, and can be cancelled or ignored by junior bureaucrats. As a result, it prevents them from granting the "bouquet of rights" that comes with formal marriage, including automatic inheritance or tax benefits.[14]

2.1.3 Jane Kaushik v. Union of India (2025)[15]:

Assuming that the Supriyo judgment represents judicial restraint, then the ruling in Jane Kaushik v. Union of India, decided on October 17, 2025, is an epitome of judicial activism revival, especially in the areas of transgender rights and employment discrimination. The case involved the dismissal of a transgender woman on the basis of her gender alone in two private

[10] Centre forms 6-member panel to look into issues faced by queer community' *India Today* (New Delhi, 15 April 2024) <https://www.indiatoday.in/india/story/government-forms-committee-to-look-into-issues-faced-by-queer-community-rights-2528060-2024-04-15> accessed 19 December 2025.
[11] Department of Financial Services, 'Advisory regarding opening joint bank account and nomination thereof by persons of Queer Community' (28 August 2024) https://financialservices.gov.in/beta/en/circulars/advisory-regarding-opening-joint-bank-account-and-nomination-thereof-persons-queer accessed on 18 December 2025
[12] Department of Food and Public Distribution, 'Advisory on recognition of queer partners as members of the same household for ration card purposes' (Ministry of Consumer Affairs, Food & Public Distribution, Government of India, 2024)
[13] National Medical Commission declares conversion therapy as professional misconduct, *Medical Dialogues* (5 September 2022) https://medicaldialogues.in/health-news/nmc/nmc-declares-conversion-therapy-as-professional-misconduct-under-imc-regulations-98599 accessed 18 December 2025
[14] A Nigam, 'Prohibition of and Rehabilitation from Violence', *Queering the Law* (2025)
[15] *Jane Kaushik (*n 2)

schools. This case has been used by the Supreme Court to express the doctrine of omissive discrimination. The Court believed that the State's inability to adopt the Transgender Persons (Protection of Rights) Act, 2019, including its inability to appoint and establish complaint officers and form welfare boards, constituted a violation of fundamental rights. The decision held that the state government's failure to act under a statutory obligation to safeguard a vulnerable group of people constituted a judicially reviewable constitutional tort.

More drastically, the Court imposed a ban on discrimination by non-governmental establishments. Conventionally, the fundamental rights in India are used vertically, and are enforceable against the State exclusively. Nevertheless, by treating Article 3 of the Transgender Act[16], which prohibits discriminatory employment, as a horizontal application of constitutional values, the Court, in effect, applied Article 15[17] and Article 21[18] horizontally to the private employers.

The Court also operationalized these directives by issuing a so-called continuing mandamus, a committee under the leadership of Justice Asha Menon tasked with developing a binding policy on equal opportunities (the EOP) to be applied to all establishments, and thus ensconced the principle of self-identification in the NALSA judgment[19] into the Transgender Act, despite its bureaucratic implications being a reality with the 2019 Act.

2.1.4 Legal Vacuum of the Bharatiya Nyaya Sanhita

The newly passed Criminal Law, the Bharatiya Nyaya Sanhita (BNS) 2023 has an objective to promote gender neutrality and enhance protections for women and children. While this is a progressive step taken by the government in broadening the laws and expanding their scope towards greater inclusivity, it still fails to achieve the same objective as mentioned. Section 2(10)[20] states that the pronoun "he" is to be used inclusively, covering men, women, and transgender individuals. However, a closer examination reveals contradictions when comparing its language to the old Indian Penal Code (IPC).

[16] Transgender Persons (Protection of Rights) Act 2019, s 3
[17] Constitution of India 1950, art 15
[18] Constitution of India 1950, art 21
[19] *National Legal Services Authority v Union of India* (2014) 5 SCC 438
[20] Bharatiya Nyaya Sanhita 2023, s 2(10)

Section 76[21] and 77 [22], which replaces Sections 354B and 354C of the IPC which states about usage of criminal force to woman with an intention to disrobe her and voyeurism, removes gender specificity from the perpetrator, allowing for gender-neutral offenders. But still the victim's gender remains strictly confined to a woman indicating a partial and incomplete shift toward gender neutrality. These inconsistencies within the new laws raise questions about the coherence of its approach to gender neutrality.

Moreover, Chapter 5 of the BNS, which addresses crimes against women and children, continues to have a full gendered language. Section 63 and 64[23], dealing with rape and its punishment, uses pronoun as "he" and "man" for the offender, and states the victim as a woman. Under the Section 63, the definition of the rape could have been broadened by including victims of any gender under the term "woman" thus leading to protect the transgender individuals from being victims of such offences. This leads to the exclusion of transgender individuals. BNS is a missed opportunity to align with the principles laid out in the landmark 'NALSA' and 'Navtej Singh Johar' judgments, which affirmed rights for transgenders and LGBTQ+ individuals.

Alternatively, the post Section 377[24] The ruling, which was narrowed down to address the non-consensual sex between men, bestiality, and unnatural sex with children, could have been retained with modifications ensuring safeguards for LGBTQ+ individuals and other vulnerable groups, thereby making the BNS a more inclusive gender-neutral legislation. The law requires a more comprehensive review to ensure that all individuals, regardless of their gender or sexual orientation, are treated equally. The BNS remains inconsistent with its broader objectives of equality and inclusivity.

2.1.5 The Deed of Family Association

With no Supreme Court directive on the matter of marriage, several Indian High Courts have been creative in protecting queer couples. One such example has been the Madras High Court which has been at the vanguard of this judicial inventiveness. The Court in the case of M.A. v. Superintendent of Police[25] stated that marriage is not the only way to create a family, and that same sex relationships and the complete absence of marriage should still receive the same

[21] Bharatiya Nyaya Sanhita 2023, s 76
[22] Bharatiya Nyaya Sanhita 2023, s 77
[23] Bharatiya Nyaya Sanhita 2023, s 63 & 64.
[24] Indian Penal Code 1872, s 377.
[25] *M.A. v Superintendent of Police* (2025) SCC OnLine Mad 2542

protections afforded by Article 21. As a way of operationalising this recognition, the Court encouraged the state government to formalise the Deed of Familial Association (DFA), a contractual tool that allows two persons to outline the nature of their relationship, provide mutual care and protection for each other against harassment by their biological families. A registered DFA would gain an evidentiary reminiscence in matters of domestic violence, medical crises and police protection, which would create a lightweight version of marriage through the contraction law, although a DFA is not a marriage; thus, police protection of interfaith and cohabiting couples by the Allahabad High Court in 2025 would reverse aggressive anti-conversion narratives.[26]

2.2 Canada:

Since time immemorial, Canada has been regarded as a post-national model of liberal constitutionalism, in which the Charter of Rights and Freedoms facilitate a constructive dialogue between the judicial system and the legislature. However, 2024 and 2025 are indicators of a systematic crisis of this model. The growing utilitarianism with respect to Section 33, which is the Notwithstanding Clause, by provincial governments to override the rights of gender-diverse youth, suggests that we are no longer dealing with dialogue but a form of fiat legislation.

2.2.1 Section 33 and Its Pre-Emptive Deployment

Section 33[27] allows Parliament or provincial legislatures to proclaim that a law will have the effect of notwithstanding fundamental freedoms or legal and equality rights. It was originally intended to act as a release valve, which would be used mainly after a judicial intervention; it is currently being used pre-emptively as a means to protect legislation against judicial scrutiny.

2.2.2 The Saskatchewan Pronoun Policy

Late in 2023, Saskatchewan passed Bill 137, which requires parental consent when students under 16 years of age wish to change their name or pronouns in school. An objection was raised when one of the lower courts passed an injunction on the policy due to probable irredeemable harm to the transgender youth. As a result, the provincial government held an emergency

[26] Jwalika Balaji and Mandar Prakhar, 'Rewriting *Supriyo*: Unpacking India's Marriage Equality Judgment' (2025) 7(1) *Amicus Curiae* 288, 305.
[27] Canadian Charter of Rights and Freedoms, s 33

meeting to invoke Section 33 and prevail over the injunction, thereby overruling the students' rights to equality and to personal security. Throughout 2025, there were legal preparations. In August 2025, the Saskatchewan Court of Appeal made a landmark ruling on the coverage of the notwithstanding clause.[28] The Court noted that even though Section 33 of the Constitution safeguards the law against a strike, it does not bar the ability of the courts to review the legislation and render a declaration identifying it as compliant or otherwise with the Charter, despite, in any case, limiting judicial options to strike against a law. In November 2025, the Supreme Court of Canada accepted appeals on this issue, establishing a basis to have a conclusive decision on the boundaries of legislative immunity.

2.2.3 Legislating Morality

In late 2024, Alberta[29] followed suit, introducing a body of laws (Bills 26[30], 27,[31] and 29[32]) arguably the most hostile anti-LGBTQ+ rights attack ever enacted in Canadian history. These bills outlaw gender affirming surgery on minors, puberty blockers and hormone therapy under 16 years old, and mandate parental consent to any sexual orientation education. Similar to Saskatchewan, Alberta used Section 33 to shield these laws against Charter attacks. Bill 29, the Fairness and Safety in Sport Act, contains a prohibition against transgender women and girls competing in the female sporting categories. Through the pre-emptive use of the notwithstanding clause, Alberta left the judiciary without any chance to examine the evidence, or absence of it, concerning the alleged harm of gender-affirming care or trans inclusion in sport, thus, legal scholars believe that this approach is an indicator of failing the dialogue model. Instead of defending rights restrictions under Section 1 the reasonable limits clause, governments are circumventing the proportionality analysis altogether.

2.2.4 The Federalism Defense

Since Section 33 renders Charter arguments ineffective, opponents of the legislation have grown to employ structural federalism arguments. The opponents argue that Bill 26 (the healthcare ban) in Alberta infringes on the prerogative of the federal government in the

[28] *Saskatchewan (Minister of Education) v UR Pride Centre for Sexuality and Gender Diversity* (CA decision 11 August 2025)
[29] Alberta Bill 26 (Health Statutes Amendment Act, 2024
[30] Bill 26 (Health Care & Gender Affirming Care) *Health Statutes Amendment Act, 2024 (No 2)*, SA 2024, c 16
[31] Bill 27 (Education & Parental Consent) *Education Amendment Act, 2024*, SA 2024, c 14
[32] Bill 29 (Sports) *Fairness and Safety in Sport Act*, SA 2024, c F-1.5

exclusive jurisdiction of criminal law, a domain in which the regulation of health among the populace is implemented. This means that if the courts were to find that the pith and substance of the provincial law is to impose morality as opposed to healthcare, the law can be struck down as ultra vires, i.e., beyond the constitutional authority of the province. Since Section 33 is only applicable to the Charter rights, it cannot protect the laws that are against the separation of powers. This is a structural argument that has come up as the last legal fortification of transgender rights in Canada.

2.2.5 Electoral Accountability as a Democratic Corrective (New Brunswick)

In an interesting opposite trend, politicking mobilization was effective in New Brunswick. The changes to Policy 713 were repealed in January 2025, after the defeat of the Progressive Conservative administration, by the successive Liberal administration[33]. This episode demonstrates that, despite the apparent stalemate between the courts and the legislature in terms of the dialogue, the democratic electoral process is a feasible corrective mechanism, but the process is slower and less predictable.

3. Comparative Synthesis:

a) Judicial Roles

The Supreme Court in India has taken up a restrained activism position. It refused to interfere as a legislative force in the establishment of marriage equality (Supriyo), but it was aggressive in the internal sphere to impose employment rights (Jane Kaushik). This trend indicates a judiciary, which is suspicious of social institution redefinition but ardent in protecting individual dignity and material access. On the other hand, the Canadian judiciary is being sidelined on a systematic basis. The purpose of using Section 33 is to completely hush the courts and make the safeguarding of the rights of the minorities to become a purely numerical game in the legislature.

b) Legislative Roles

The parliamentary silence towards the LGBTQ+ rights in India has forced the executive arm (through the committee of the Cabinet Secretary) to fill the gap with administrative advisories,

[33] Revisions to Policy 713 effective Jan. 1 (*Government of New Brunswick*, 19 December 2024) https://www2.gnb.ca/content/gnb/en/news/news_release.2024.12.0517.html accessed 19 December 2025

producing a flimsy patchwork of rights at the whims of the executive. The provincial legislatures in Canada are very prolific, but their course is focused on restricting and not expanding. Instead of seizing opportunities to create legislative gaps, these groups proactively roll back rights that exist in the constitution by authorizing constitutional overrides.

c) The Nature of Rights

In India, the predominant conflict is about horizontal rights, which is the right not to be discriminated on by the private landlords, schools and employers. The Jane Kaushik decision is a world precedent of applying constitutional non-discrimination standards into the private arena. The battle in Canada has returned to vertical rights the right of the individual over the encroachment of the state. The ban on health care and self-identification at school is a direct state intrusion into the sphere of bodily autonomy, the war that people thought was won several decades ago.

4. Conclusion

The decriminalization of Section 377 [34] was a giant leap forward for India's legal and social landscape, providing a bedrock for furthering LGBTQ+ rights. However, this was merely the beginning of the long journey ahead toward the full attainment of comprehensive equality and protection for the LGBTQ+ community. The subsequent legislation, like the Transgender Persons (Protection of Rights) Act 2019 and Bhartiya Nyaya Sanhita 2023, reflect grave incompetence and contradictions within the legal framework. These laws have been criticized for not addressing the needs and rights of the LGBTQ+ community effectively. While the Transgender Persons Act 2019 is a step towards acknowledging the rights of transgender people, it is endowed with ambiguous definitions, intrusive procedures, and inadequate provisions to address the welfare and anti-discrimination for transgender people. Similarly, the Bhartiya Nyaya Sanhita 2019 has continued with the flaw that the previous criminal law had.

These issues highlight the need for a more informed approach. There is an urgent need for the LGBTQ+ community to be involved in creating legislation. Apart from the community, recommendations of experts and scholars must be included and actively addressed during the formation of legislation. Furthermore, there is a need for anti-discriminatory laws to foster an

[34] *Navtej Singh Johar v Union of India* (2018) 10 SCC 1

environment of tolerance and respect. Public awareness and sensitisation are other tools to encourage tolerance and respect. The development in the LGBTQ+ community rights post Section 377 has been landmark but incomplete. It reminds one that they will always need rigorous legal reform and social change, committed to human rights, for complete freedom, equality, and dignity.

A comparative study of India and Canada has clarified that the arc of the moral universe is not necessarily bent toward the pursuit of justice; it must be constantly supported by legal institutions. India is an example of a stalled transformation, where the judiciary has stretched its interpretative boldness in marriage, while still being creative in areas such as dignity and employment. The way India should proceed is through the Deed of Familial Association and the strictest application of the Equal Opportunity Policy, in order to establish a civil rights system based on. Canada, on the other hand, is an example of retrogressive constitutionalism. The politicization of the notwithstanding clause will only serve to render the Charter of Rights and Freedoms an instrument of permission, rather than a tool for upholding rights. The constitutive failure of constitutional discourse suggests that the protection of minority rights in liberal democracies is more vulnerable than previously thought. In the case of Canada, the short-term outcome will depend on the Supreme Court's imposition of procedural guardrails on Section 33 of the Canadian Charter and whether the concept of federalism can be used as a shield in areas where the Charter has been diluted.

Ultimately, the two jurisdictions demonstrate that legal recognition is not a fixed entity, but a dynamic landscape of ongoing negotiation. It is in both cases, the administrative state in India or the structural constitution in Canada, that the fight for LGBTQ + rights has not centred on the call to liberation, but on the defence of foundational citizenship.