



Examining the Legal Status of Same-Sex Marriages in India: Reconciling Tradition with Modernity

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ABSTRACT

In India, the legal status of same-sex marriages exists at the intersection of tradition and modernity, presenting a complex challenge for lawmakers and society alike. Despite the decriminalization of homosexuality in 2018, thanks to the landmark *Navtej Singh Johar v. Union of India* case, the legal recognition of same-sex marriages remains elusive. This is primarily due to India's adherence to traditional personal laws, which are deeply rooted in cultural and religious practices. The Special Marriage Act, which allows couples of different religions or nationalities to marry outside the realm of personal laws, is often seen as the most promising avenue for same-sex couples seeking legal recognition. However, the Act's silence on the issue of homosexuality leaves room for interpretation and debate. Similarly, the Hindu Marriage Act and the Foreign Marriage Act, which govern marriages within specific communities and for Indian nationals abroad, do not explicitly address same-sex unions, posing significant hurdles for LGBTQ+ individuals seeking legal recognition of their relationships. While there have been significant strides in LGBTQ+ rights in recent years, including increased visibility and advocacy efforts, societal attitudes towards homosexuality in India remain mixed. Traditional norms and conservative values often clash with modern principles of equality and human rights, creating tension and resistance to legal reforms. To reconcile tradition with modernity and achieve legal recognition for same-sex marriages in India, a comprehensive approach is necessary. This includes legislative reforms that explicitly recognize the rights of LGBTQ+ individuals to marry, as well as efforts to shift societal attitudes and perceptions through education and awareness campaigns. By aligning India's legal framework with international standards and embracing principles of equality and inclusivity, the country can take a significant step towards achieving social justice and equality for all its citizens, regardless of sexual orientation or gender identity.

KEYWORDS: Justice, Marriage, Same-Sex, Homosexuality, LGBTQ+.

SIGNIFICANCE OF MARITAL STATUS FOR THE THIRD GENDER

Same-sex marriage is described as “*the ceremonial union of two persons of the same sex; a marriage or marriage-like relationship between two women or two men*” and is defined as a legal union or a contract between two people.¹ Marriage is significant for their personal lives and is helpful for obtaining some essential amenities and advantages, as is its legal recognition of same-sex or LBGT unions. It has been shown that simply accepting their marriage and providing it legal status will give that community respect and dignity, resulting in their inclusion as a member of society. They will also benefit from the legal recognition of same-sex marriage in terms of other concerns such as adoption services, maintenance and allowances, property rights, and succession. In addition to the aforementioned, the marital status of an individual also affects their economic rights under the Workmen's Compensation Act, pension rights, and employee provident funds (Ravichandran, 2013).

Same-sex couples are equally entitled to the title of marriage, as Chief Justice Deborah Poritz correctly declared in *Lewis v. Harris*² when the majority questioned what is meant by the name. The minority believed that the legal system had failed to treat everyone fairly and provide them with equal protection by failing to grant advantages and rights to those who were not married. The argument that the offspring of such a couple would suffer mental harm and differ from those of the heterosexual pair was completely refuted, and it was concluded that marriage between people of the same sex was a fundamental due process right.³

IS MARRIAGE A RIGHT?

According to Art. 16 of the Universal Declaration of Human Rights affirms that everyone has a fundamental right to marriage and parenthood.⁴ In addition, the Supreme Court of India ruled in the Hadiya case that the right to marriage has been upheld alongside the right to life because it is a personal

¹ Bryan A. Garner (ed.), *Black's Law Dictionary* (2008).

² *Lewis v. Harris*, 908 A. 2d 196 (N.J. 2006).

³ Matthew T Cook and Jason E Shelly, 'Recognition of Same-Sex Marriage' (2007) 8 Geo J Gender & L 683, 695- 697.

⁴ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)), art 16.

decision on which society has no bearing.⁵ Similar conclusions are reached in the Privacy case, where it is determined that family, marriage, and sexual orientation are fundamental to an individual's dignity and are, therefore, private in nature.⁶ Given the aforementioned details, it is argued that marriage is a private matter and that the state should act to support the people and create a framework for its legalization rather than acting in a religious manner and forbidding anyone from getting married.

PERSONAL LAWS – MARITAL RIGHT AND STATUS

- **Hindu Personal Law**

The definition of marriage is absent from the Hindu Marriage Act of 1955. The fact that marriage is only between a man and a woman was not specified in the aforementioned act. In contrast, it identifies them as two Hindus. Additionally, same-sex marriage is not officially forbidden by the legislation.⁷ However, the use of terminologies like 'Bride' and 'Bridegroom' in sec. 7 made the act's language heteronormative.⁸ Due to the act's inherent flexibility, simply changing the vocabulary will be sufficient to eliminate its heteronormativity and permit homosexual couples to get married in accordance with the Hindu marriage act's rules.

- **Christian Personal Law**

Nowhere in the Indian Christian Marriage Act of 1872 was it stated that gays could not get married. Marriage was not defined in this act, similar to the Hindu marriage act. However, it never used the names 'Bridesmaid' or 'Bridesgroom' making it open to the inclusion of gays within its ambit. It was defined as a marriage between two people by the solemnization of the union and its legitimacy under Sec. 4 and 25.⁹ Christian personal law was thus liberal and accommodating enough to recognize same-sex unions.

But the issue with this act was that the Indian divorce legislation¹⁰ has a heteronormative tone, and since Christian marriages are dissolved in accordance with the requirements of that act, it is necessary to interpret the divorce action in a way that includes gays.

- **Muslim Personal Law**

In Islam and Christianity, the idea of homosexuality is regarded as being forbidden.¹¹ However, homosexuality is now allowed in western countries like the United States, most of which are Christian.¹² Some assert that homosexuality is expressly forbidden in the Quran, despite the fact that the Quran's guidelines for marriage are heteronormative. Others claim that there is only a non-inclusion and not an unequivocal restriction.¹³ Additionally, Muslim personal law utilizes the phrases 'husband' and 'Muslim woman' when referring to divorce, indicating that there is the least room for same-sex unions.¹⁴ In order to include Islamic couples of the same sex, the state must either create a new law specifically addressing same-sex marriage or amend the special marriage statute.

- **Special Marriage Act**

Since husband and wife are frequently addressed in the Special Marriage Statute, despite the lack of an express provision for same-sex marriage, the act is not gender-neutral in and of itself. Applying this statute while a couple is married may result in issues. For instance, sec. 27 of the act states in explanation (1A) that a wife may also file for divorce in district court on the grounds that her husband has committed rape, sodomy, or bestiality since the marriage was solemnized.¹⁵ However, if the petitioner is a man, the question of whether a man can obtain a divorce on these grounds will come up because it is specifically stated that a 'wife' (i.e. a female) can pursue a divorce on these grounds will emerge.

There is another instance to understand the legislators giving the female spouse the right under sec. 36 - "*Where in any proceeding under Chapter V or Chapter VI it appears to the district court that the wife has no independent income sufficient for her support and the necessary expenses of the proceeding, it may, on the application of the wife, order the husband to pay to her the expenses of the proceeding, and weekly or monthly during the proceeding such sum as having regard to the husband's income, it may seem to the court to be reasonable.*"¹⁶ Application of this sec. will be challenging in this situation as well if the couple just has one member with a steady salary who is a homosexual male. We cannot simply apply this clause in this case and state that

⁵ *Shafin Jahan v. Asokan K M*, 2018 SCC Online SC 343 (SC).

⁶ *K S Puttaswamy v. Union of India*, (2017) 10 SCC 1 (SC).

⁷ R Venkadesh Kumar & Arulkannappan, 'A Study on the Legal Recognition of Same Sex Marriage' (2018) 120(5) IJPAMS 2945, 2948.

⁸ The Hindu Marriage Act 1955, s 7.

⁹ The Indian Christian Marriage Act 1872, s 4 and 25.

¹⁰ The Divorce Act 1869.

¹¹ Huda, 'What Does Islam Say About Homosexuality' (*Learn Religious*, 20 Jan 2019) <<https://www.learnreligions.com/homosexuality-in-islam-2004396>> accessed 27 November 2022.

¹² *Baker v. State*, 744 A. 2d 864 (Vt. 1999).

¹³ Muhsin Hendricks, 'Islamic Texts: A Source for Acceptance of Queer Individuals into Mainstream Muslim Society' (2010) 5 *The Equal Rights Review* 31, 37.

¹⁴ The Dissolution of Muslim Marriage Act 1939.

¹⁵ The Special Marriage Act 1954, s 27.

¹⁶ The Special Marriage Act 1954, s 36.

a homosexual male who has no other source of income will be allowed to make a financial claim against the other partner. This is so because the legislation wrote these laws specifically to help women and with the advancement of women in the Indian community in mind. So, it would be against the legislative intent to apply this clause to homosexual men.

However, it may be reliably inferred that a marriage under the act will be allowed given the lack of any stated prohibition banning homosexual marriage and the recent Supreme Court judgment legalizing homosexuality. Only in situations where a right or obligation has been expressly granted to a male or female will complications occur.

THE LGBTQ+ COMMUNITY IN INDIA

Ironically, homosexuality was not considered a social taboo in the ancient world and was seen as a normal sexual inclination. The manuscripts and other Hindu writings provide evidence for this. Rigveda According to one of the main sources of Hindu law, 'Vikriti Evam Prakriti' things that appear to be abnormal are actually natural.¹⁷ According to many academics, this has to do with the acceptance of homosexuality as a rather normal phenomenon. Even the ancient Hindu scripture Kamasutra, which was composed by Vatsyayana between 400 BCE and 300 CE and is about eroticism, sexuality, and emotional fulfillment in life, makes mention of homosexuality by devoting its ninth chapter to homosexual activity in humans.¹⁸ In comparison to numerous forms of heterosexuality, homosexuality is portrayed in other ancient writings such as Arthashastra as a minor infraction with the lowest grade of fine.

Homosexuality is portrayed as a natural phenomenon in many historical monuments across the nation, including the Konark Sun Temple in Odisha and the Khajuraho temples in the caves of Ajanta and Ellora, where there are images of women and men engaging in sexual activity with members of their own gender. While same-sex marriage is forbidden in Islam for Muslims, it became very popular among the Delhi Sultanate's sultans, who frequently engaged in extramarital affairs. Among the Mughals, Babur in Baburnama writes in his autobiography of his crush on a young man. Homosexuality, which was regarded as 'true love' was practiced even by Mughals of the novel class and was widespread in central Asia.¹⁹

LEGAL OBLIGATION – INCLUSION OF SAME-SEX MARRIAGE

Many applications for the legalization of same-sex marriage have been filed in India. The supreme court of India has dismissed a review petition submitted to debate the civil rights of homosexuals, including marriage, succession, maintenance, etc., and to review the decision in *Navtej Singh Johar v. Union of India*²⁰. The act that was passed in 2019 to protect the rights of transgender people seems to make it obvious, even though the verdict about the civil rights of gays appears to be lacking or unclear. According to Chapter 2 of the Transgender Act of 2019 established a few grounds on which it strongly forbids any form of discrimination against transgender people and their rights.²¹ The act appears to have included the civil rights of the transgender community within its purview, leading to the ambiguous implication that all of the aforementioned personal laws must be amended in accordance. It is also suggested that a uniform civil code be established in order to legalize same-sex marriage by enlarging the definition of marriage in India as well as in other foreign countries.

RECENT TRENDS

Only three years have passed since Sec. 377, which outlawed homosexuality, was declared unconstitutional in the landmark *Navtej Singh Johar* decision.²² That ruling alone could have been enough to grant the LGBTQ+ group legal equality in social rights, including the freedom to marry. The decision of Arun Kumar (2019)²³ was a start, although it was limited to transgender people (who identify as women) or incorrectly referred to as "*the third gender*". Thus, a number of petitions²⁴ have been submitted in a sincere effort to bring about legislative reform, questioning the exclusion of marriage rights for LGBTQ+ couples from various statutes, including the Hindu Marriage Act of 1955 and the Foreign Marriage Act of 1969.

Recognizing the unions of LGBTQ+ couples extend beyond individual rights to include inheritance, gifts, joint adoption, and other legal benefits. Currently, LGBTQ+ couples in India can only grant property rights to their partners through a will, which is often restricted by personal laws to a specific portion of their property. They are also barred from taking out joint loans or buying insurance for their spouses. Despite the Supreme Court's ruling in

¹⁷ Stephen Hunt, *The Ashgate Research Companion to Contemporary Religion and Sexuality* (Ashgate 2012) 368.

¹⁸ Sengupta, *Refractions of Desire, Feminist Perspectives in the Novels of Toni Morrison, Michèle Roberts, and Anita Desai* (Atlantic 2006) 21.

¹⁹ Sherry Joseph, 'Gay and Lesbian movement in India' (1996) 31 Economic and Political Weekly 2228 <<https://www.jstor.org/stable/4404520>> assessed 22 March 2024.

²⁰ Shailender, 'SC Junks Plea on Civil Rights for LGBTQ' (*The Tribune*, 13 Aug 2019) <<https://www.tribuneindia.com/news/archiv.e/sc-junks-plea-on-civil-rights-for-lgbtq-817174>> assessed 22 March 2024.

²¹ The Transgender Persons (Protection of Rights) Act 2019, s 3.

²² *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321.

²³ *Arun Kumar v. Inspector General of Registration and Ors.*, WP No 4125 of 2019 and 3220 of 2019.

²⁴ *Abhijit Iyer Mitra & Ors. v. Union of India* W.P.(C) 6371/2020; *Dr Kavita Arora & Anr v. Union of India* WP. (Civil) No.2842/2022; *Vaibhav. Jain & Anr v. Union of India* W.P. (C) 7657/2020; *Udit Sood and Ors. v. Union of India and Anr. W.P.(C) 2574/2021*; *Joydeep Sengupta v. Union of India & Ors. W.P. (C) 2574/2021*.

Shakti Vahini (2018) affirming the fundamental right of adults to marry the person of their choice, these rights remain inaccessible to LGBTQ+ couples. Since Justice K.S. Puttaswamy's (2017) ruling affirming the right to privacy, several laws have supported this principle. The Yogyakarta Principles (2006) assert that all individuals are born free and equal in dignity and rights, and are entitled to fully exercise their human rights regardless of sexual orientation or gender identity.

However, the rights of the LGBTQ+ community remain largely unrecognized, violating the principles of equality and individual freedom enshrined in Art. 14, 15, 19, and 21 of the Constitution. This is in stark contrast to international statutes like the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights, which prohibit discrimination based on various statuses, explicitly including sexual orientation and gender identity. It is imperative that rights evolve in line with contemporary morality rather than outdated beliefs. To achieve Bentham's "greatest happiness of the greatest number" principle, a holistic approach to the utilitarian principle is necessary. The union of same-sex couples does not harm society; rather, it affirms their equality and their rights to privacy and personal liberty.

The scope of the current petitions extends to the Foreign Marriage Act of 1969, the Hindu Marriage Act of 1955, and the Special Marriage Act of 1954, aiming to scrutinize and advance these laws towards inclusivity. In Navtej Singh Johar, Justice Malhotra aptly noted that history owes an apology to the LGBTQ+ community and their families. The Netherlands was the first country to recognize same-sex marriage in 2001, with Costa Rica being the most recent in 2020. The upcoming discussion on these petitions on February 3 of the following year holds the promise of significant progress towards equal rights, marking a continued effort to honor that apology and advance social justice for the LGBTQ+ community.²⁵

DISPUTE BETWEEN DELHI HIGH COURT AND CENTRAL GOVERNMENT

Abhijit Iyer Mitra submitted a petition to get marriages between LGBTQIA couples registered under the Hindu Marriage Act. The Hindu Marriage Act is said to contain language that is gender-neutral and does not specifically forbid same-sex marriages. In a different petition, Dr. Kavita Arora requests that the South-East Delhi Marriage Officer issue a directive ordering her to get married to her partner in accordance with the Special Marriage Act. She argues that same-sex couples also have the fundamental right to select their own spouse under Article 21 of the Constitution.

A spouse of a foreign-born Indian citizen or OCI cardholder is entitled to apply for registration as an OCI under the Citizenship Act regardless of the applicant spouse's gender, sex, or sexual orientation, according to the argument made by OCI cardholder Joydeep Sengupta and his partner Russell Blaine Stephens. Because according to sec. 7A(1)(d) of the Citizenship Act of 1955 does not distinguish between heterosexual, same-sex, or queer spouses, the argument goes, a person who is married to an Overseas Citizen of India and whose union has been legally recognized for two years should be declared eligible to apply as a spouse for an OCI card.

Two related petitions, one requesting recognition of a transgender person's marriage and the other requesting recognition of a lesbian couple's marriage, have also received notices from the High Court. For the Central Government, Solicitor General Tushar Mehta argued that 'spouse' refers to a husband and wife and that 'marriage' is a term used to refer to heterosexual couples, hence there is no need to file a separate reply with regard to the Citizenship Act. He said according to the law as it exists, a biological man and a biological woman may marry.²⁶

The Solicitor General further asserted that petitioners have a misunderstanding of the *Navtej Singh Johar v. Union of India* decision, which decriminalized homosexual conduct between adults when they occur in private. He spoke that "*the question at hand is whether or not homosexual couples can get married. Your Lordships must make a choice in that. Some people have the wrong idea about the Navtej Singh Johar case. It only eliminates the crime... It makes no mention of marriage.*" Senior Attorney Saurabh Kirpal argued against this, saying that, *while same-sex marriages are not expressly permitted in this instance, the inescapable inference favours recognizing them. Constitutional issues are understood in this way*".²⁷

The Centre had already opposed the requests in an affidavit. It stated that there is a 'legitimate governmental interest' in restricting marriage recognition to people of the opposite sex alone and that the institution of marriage is more than just a concept confined to an individual's privacy. The affidavit said that neither uncodified personal laws nor codified statutory laws recognize or acknowledge the institution of marriage between two people of the same gender. The statement "*You don't need marriage certificates for hospitals, nobody is dying because they don't have marriage certificates*" was made in opposition to the urgent listing of the requests.²⁸

SEEKING TO SUPREME COURT

A division bench led by Chief Justice of India DY Chandrachud mandated that notices be sent to the Attorney General of India and the Central government, requiring responses within four weeks. Senior attorney Mukul Rohatgi, representing the petitioners, emphasized that this issue follows the landmark Navtej Singh Johar and Puttaswamy verdicts, stating, "*This is about living, not material possessions. It affects succession and health. We are specifically*

²⁵ Arnesia Young, 'Netherlands Celebrates 20 Years Since Being First Country to Legalize Same-Sex Marriage' (*My Modern Met*, April 2, 2021) <<https://mymodernmet.com/netherlands-legalize-same-sex-marriage-20-years/>> assessed 22 March 2024.

²⁶ Shivam Garg, 'Legal Recognition of Same-Sex Marriage Rights in India' (2020) 9 CNLU LJ 158.

²⁷ Prabhat Singh Rana, 'Marriage: A Privilege' (*Live Law*, 3 Jan 2022) <<https://www.liv.elaw.in/columns/hindu-marriage-act-special-marriage-act-lgbtq-community-188637>> assessed 22 March 2024.

²⁸ *Ibid*, *Abhijit Iyer Mitra & Ors. v. Union of India*, WP (C) No. 6371/2020 & CM Appl. No. 22554/2020.

addressing the Special Marriage Act here.” Notably, nine cases seeking recognition of same-sex marriage under the Special Marriage Act, Foreign Marriage Act, and Hindu Marriage Act are currently pending before the Delhi High Court and Kerala High Court.

In the Kerala High Court, senior attorney Neeraj Kishan Kaul informed the panel that the Centre was moving to transfer all related cases to the Supreme Court, highlighting the impact on fundamental rights such as gratuity, adoption, and same-sex surrogacy, as well as practical matters like the creation of joint accounts.

Senior counsel Menaka Guruswamy and Saurabh Kripal also represented the petitioners. The first Public Interest Litigation (PIL) was filed by Supriyo Chakraborty and Abhay Dang, who have been together for about ten years and held a commitment ceremony in December 2021 with the blessings of their parents, relatives, and friends. They seek recognition of their marriage under the Special Marriage Act. The second PIL was filed by Parth Phiroze Mehrotra and Uday Raj Anand, who have been in a relationship for 17 years and are raising two children together. They argue that the current restrictions in Sec. 4(c) of the Special Marriage Act, which limit marriage to only males and females, prevent them from having a legal parent-child relationship with their children. They assert that Sec. 4 allows any two people to conduct a marriage ceremony, and seek the Act’s amendment to include same-sex couples.

They, therefore, ask that any gender- or sexuality-based restrictions be removed from the law to make it gender-neutral. In *NALSA v. Union of India*²⁹, the Supreme Court unequivocally said that non-binary people are protected by our Constitution and that the safeguards envisioned in Art. 14, 15, 16, 19, and 21 cannot be limited to people who identify as ‘male’ or ‘female’ biologically.³⁰

CONCLUSION

Many members of the lesbian, gay, bisexual, transgender, queer, intersex, and asexual (LGBTQIA+) communities are often forced into unhappy or violent marriages without their consent, unable to reveal their true selves to even their closest friends or family. Others spend years seeking a partner or striving for governmental recognition of their relationships. Despite the decriminalization of homosexuality, the Indian community struggles to accept same-sex couples and same-sex marriages. Homosexuality, though legal, remains largely unaccepted in India. While the younger generation shows greater tolerance and acceptance of the LGBTQIA+ community, societal taboos persist and must be eradicated to normalize homosexuality fully.

It is imperative for the legislature to address this issue by enacting laws that recognize same-sex marriages, provide for same-sex divorce, and uphold other civil rights for the LGBTQIA+ community. Anti-discrimination legislation is essential to allow LGBTQIA+ individuals to establish happy relationships and successful lives, shifting the burden of change onto the state and society rather than the individual.

Ensuring that LGBTQIA+ individuals receive the full spectrum of constitutional rights, including the fundamental right to marry the person of their choice, is crucial. Over a dozen countries have legalized same-sex relationships, and changing sentiments among India’s urban middle class reflect a growing acceptance. Prominent homosexual celebrities have openly discussed their orientation, and Bollywood films with LGBTQ themes have gained popularity. Although the Supreme Court’s decision to consider petitions for legalizing homosexual marriages marks significant progress, it is only the first step in a lengthy journey.

With the Supreme Court’s recent involvement, it is plausible that India may soon join nations that have legalized same-sex unions. However, this is not a straightforward process. Even if the Special Marriage Act allows for it, the government must amend the definition of 4(C) of the Act. The central government’s previous statements offer little reason for optimism. Nevertheless, the US Senate’s decision to pass a bill safeguarding same-sex marriage could serve as an inspiration for other democracies to support diverse beliefs and ideas.

²⁹ *NALSA v. Union of India*, (2014) 5 SCC 438.

³⁰ ‘Supreme Court Issues Notice to Centre, Attorney General on Pleas to Recognise Same-Sex Marriage Under Special Marriage Act’ (*Live Law*, 25 Nov. 2022) <<https://www.liv.elaw.in/top-stories/breaking-supreme-court-issues-notice-to-centre-attorney-general-on-pleas-to-recognise-same-sex-marriage-under-special-marriage-act-215021>> assessed 22 March 2024.