

MARRIAGE EQUALITY IN INDIA: CONSTITUTIONAL DIMENSIONS AND LEGAL CHALLENGES IN RECOGNISING SAME-SEX MARRIAGE

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Abstract

The LGBTQIA+ community is a diverse and inclusive group of individuals who share non-heterosexual and non-cisgender identities due to which they face distinct gender identity and sexual orientation issues. Same-sex marriages are unions between two people belonging to the same sex. Such marriages are officially illegal in India, although attempts are underway to recognise and legalise them. The country's legal system does not recognise marital equality, including the rights and advantages that come with it, such as inheritance, shared property ownership, and adoption rights. This is an important issue since it addresses LGBTQIA+ people's fundamental human rights, as well as the acceptance and protection of their partnerships. Legalising same-sex marriage would not only bring legal recognition and protection to LGBTQIA+ couples, but it would also increase societal acceptance and lessen discrimination against the community. The paper will delve into the constitutional analysis of the feasibility and limitations of legalising same-sex marriage in India.

Keywords: Same-sex, Marriage, Gender, LGBTQIA+, Constitution.

Introduction

Same-sex marriage is a contentious issue in India and around the globe. India, to a large extent, still does not completely recognise LGBTQIA+ rights, discrimination against homosexuality, or same-sex marriage. In India, religion has a significant role in society and personal rules, despite the country being secular. Marriage follows long-standing traditions and beliefs. Marriage is a significant commitment between a man and a woman. In Hindu law, marriage is considered a sacred connection. Traditional practices and traditions shape attitudes about sexuality and marriage. Heterosexuality is prevalent in Indian society, and marriage is considered a sacred bond between a man and a woman. The legal meaning of marriage in India is influenced by religious, personal, and secular regulations.

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In India, marriage is regulated by the Hindu Marriage Act, 1955, Special Marriage Act, 1954, Indian Christian Marriage Act, 1872, and the Muslim Personal Law (Shariat) Application Act, 1937.¹ None of these laws explicitly define or permit same-sex marriage. LGBTQIA+ people face social discrimination and conservative attitudes that hinder acceptance of same-sex relationships. The Special Marriage Act, 1954 makes it possible for Indian citizens or Indian nationals abroad to marry without considering their religion, caste, or creed; however, it does not legalise marriages among the same-sex people.² Therefore, although Indian marriage legislation has evolved through time, it still does not allow same-sex people to get married, which can be understandable since the Supreme Court has recently decriminalised homosexuality.³ What the LGBTQIA+ activists need to do is campaign for the passing of laws that will permit them to marry, adopt children, and inherit their partner's property from them. Nonetheless, where in 2018 the Union government decided not to comment on the constitutionality of Section 377 of the Indian Penal Code, 1860, it has made it quite clear that they will resist any call for same-sex marriages.

But this seems to be contradictory in view of the judiciary's ruling since, if we are to uphold the idea of equality with regard to the LGBTQIA+ community, then the right to marry, inherit property, and get insurance (mediclaime and life) would form a part of it. In other words, denying the LGBTQIA+ community these basic rights purely on the basis of their sexual orientation would amount to discrimination and would thus be unconstitutional (violating Articles 14 & 19).⁴

Right to Marriage: Whether Legal Right or Not?

The freedom to marry is not explicitly mentioned in the Constitution.⁵ Nevertheless, in the famous case of *Lata Singh v. State of Uttar Pradesh*,⁶ the Supreme Court has included the right to marry under Article 21 of the Indian Constitution. In this case of inter-caste marriage, the Supreme Court ruled that when the individual becomes major, then he/she is entitled to marry any individual he/she likes. The Supreme Court further ruled that

1 Hindu Marriage Act, No. 25 of 1955, India Code; Special Marriage Act, No. 43 of 1954, India Code; Indian Christian Marriage Act, No. 15 of 1872, India Code; Muslim Personal Law (Shariat) Application Act, No. 26 of 1937, India Code.

2 Special Marriage Act, No. 43 of 1954, §§ 4-8, India Code.

3 *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

4 INDIA CONST. arts. 14, 15, 19, 21.

5 INDIA CONST. arts. 19, 21.

6 *Lata Singh v. State of Uttar Pradesh*, (2006) 5 SCC 475.

parents can break off all relations from their children but cannot murder them. Marriage is a sacred religious tradition, but apart from that, it is a basic human right as well. This right is internationally recognised under the Human Rights Charter under the name of “right to have a family” and many other charters as well.⁷ Everyone has the right to marry whom they love, and they are legally protected if they choose to marry someone. Therefore, people belonging to the LGBTQIA+ community cannot be deprived of basic human rights just because of their sexual orientation. If two lesbians, gays, bisexuals, and transgender people want to marry, their third gender should not be a problem at all. In its judgment in *Navtej Singh Johar*,⁸ the court has protected their right to have consensual sex, and therefore, they have the same right to legalise their union through marriage as well.

After the decriminalisation of homosexuality in 2009, the court of Haryana effectively legalised the marriage of two lesbians.⁹ Nevertheless, a more important decision was rendered in 2019 as the Supreme Court struck down Section 377.¹⁰ In 2019, the Madras High Court bench, affirmed a marriage of a biological male to a trans woman under the Hindu Marriage Act of 1955 and the order was given for its registration.¹¹ The constitutional position as to the right of marriage and same-sex marriage was further considered by the Supreme Court in the case of *Supriyo @ Supriya Chakraborty v. Union of India*.¹² The Constitution Bench of the Supreme Court by a majority refused to accept any right to marry as a fundamental right within the Constitution and ruled that the Special Marriage Act, 1954 would not admit of judicial interpretation or construction for the purpose of recognising the marriage between same sex persons. However, by this decision, the Court also upheld the constitutional guarantees enjoyed by the queer individuals against discrimination, coercion, and violence and also acknowledged that they have the right to select their partners and live with them. The Court also instructed the Union Government to form a committee which would look into the rights of the queer individuals in their relationships and would consider the matter related to the access to goods and services, social welfare schemes, and other legal guarantees.

7 Universal Declaration of Human Rights art. 16(1), G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 23(2), Dec. 16, 1966, 999 U.N.T.S. 171.

8 *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

9 *Savita v. State of Haryana*, AIR 2019 P&H 1663.

10 *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

11 *Arunkumar v. Inspector General of Registration*, AIR 2019 Mad. 265.

12 *Supriyo @ Supriya Chakraborty v. Union of India*, (2023) 14 SCC 1.

Supriyo, therefore, is an important landmark in terms of constitutional law, as while safeguarding the autonomy and dignity of the LGBTQIA+ community members, it did not confer upon them the right to enter into same-sex marriages. Thus, Supreme Court itself has recorded in its majority judgment that there was no right to marriage in the constitution, that Special Marriage Act could not be read in such a way as to make same-sex marriage possible, and yet recognizing the existing rights of gender identity, sexual orientation, choice of partners and cohabitation.

The rights of LGBTQIA+ individuals are human rights as well, such as equal rights, self-expression, the right to live, and freedom from discrimination on the basis of their sexual orientation. All these rights are provided to the citizens of India under the Constitution of India and no one can strip them of these rights. That is why some laws are needed to protect these rights of the LGBTQIA+ individuals. As the homosexual couple cannot legalise their marriage, they miss many benefits and privileges that other couples receive. They are not permitted to adopt a child and also cannot enter the name of their same-sex partner on any medical emergency document. They cannot apply for spouse visa; therefore, when it comes to marriage between different countries in India, the couple is faced with much more complications than others. They face a lot of trouble in securing their future since they cannot nominate each other due to a lack of proof of their marriage.

Furthermore, they are also not allowed to make wills in the names of their partners, and if they make one, there are high chances of having it contested. Homosexual couples cannot create a joint bank account and cannot get any joint loans. It is also impossible for them to adopt a child and women cannot act as surrogates for their partners. All married people are entitled to pensions, maintenance, and succession; the only exception here are the homosexuals. The financial benefits provided through Employment Provident Fund Schemes, Workmen's Compensation Act, Migrant Labour Act, etc., can be availed only by those who are related either by blood or marriage. In addition, homosexuals that get married in other countries where homosexuality is legal will not be able to get registered in India. The marriage certificate issued to them will not be recognised; however, heterosexuals will be allowed to do so by proving that they have got married in other countries.

There are instances where the Right to Marriage is also a Fundamental Right and also comes under the Human Rights, and each person is eligible for it, without considering his/her social orientation. However, the question arises if the rulings are extensive to include same-sex marriages. The other

important point that needs to be kept in mind is that while the world is becoming bigger in terms of boundaries, India still remains traditional and does not like its people marrying out of caste. Even today people die for inter-caste marriage, and hence the idea of same-sex marriage becomes even harder to accept.

It is not a valid point to say that it is not possible for the LGBTQIA+ community to get married on the grounds that their sexual orientation is different from the rest. This issue poses yet another extremely pertinent question: Is it so important for the majority to be correct that they have the right to take away someone's right to live their life?

Issues & Challenges faced by LGBTQIA+ due to lack of legal recognition of the Right to Marriage

India, with a history and tradition of rich legacy, has been facing the issue of LGBTQIA+ rights in terms of the country's legal structure. The LGBTQIA+ community, based on laws created in the era of the colonial period and societal norms, has faced many problems with the laws regarding the legal rights, including cases of prosecution for same-sex relations, struggle for gay marriage, and other matrimonial rights. While Section 377 IPC was finally struck down, the legal regulation of gay marriages still constitutes a major issue. The Indian marriage laws, greatly influenced by religious traditions and conventions, do not regulate marriage of persons of the same sex, meaning that gays do not have the possibility to use some of the advantages of the married couples, such as property ownership, inheritance, and adopting children. Adoption and parenting rights also remain one of the major concerns for the LGBTQIA+ community. Due to the absence of laws regulating their rights in this field, LGBTQIA+ citizens wanting to adopt a child face another challenge.

The lack of entitlement to marriage rights poses several challenges for the LGBTQIA+ community.

(i) Legal Protections against Discrimination

- LGBTQIA+ individuals often face prejudice due to the lack of legal recognition for same-sex marriage.
- Employment discrimination: LGBTQIA+ employees may experience unfair treatment, harassment, or termination due to their sexual orientation or gender identity.¹³

13 Human Rights Campaign Foundation, *Equality Rising: LGBTQ+ Workers and the Road Ahead* (2021).

- **Housing discrimination:** Same-sex couples may have difficulty renting or purchasing property due to discriminatory practices.
- **Healthcare disparities:** Without marital rights, LGBTQIA+ partners may lack access to spousal health benefits or decision-making authority in medical situations.

(ii) **Marriage Equality** - The lack of marriage equality denies same-sex couples fundamental rights and privileges:

- **Property rights:** Married couples can jointly own property, while LGBTQIA+ couples may struggle with property inheritance and ownership.
- **Legal recognition:** Marriage provides legal status and protections, such as spousal insurance coverage, inheritance rights, and tax benefits.
- **Social acceptance:** Marriage validates relationships and fosters social acceptance, which is crucial for mental and emotional well-being.

Without marriage rights, LGBTQIA+ couples face challenges in building stable, legally recognised families.

(iii) **Adoption Rights and Parenting** - Adoption regulations frequently favour heterosexual married couples, making it challenging for same-sex couples to adopt.

For LGBTQIA+ parents, the lack of marriage rights has an impact on their parenting rights, including custody disputes and decision-making.

(iv) **Marginalization and Social exclusion** - Marginalization and social exclusion prohibit them from getting basic services and contribute to their isolation from their own families. Lack of support and marginalization have driven some people to engage in criminal behaviour, and they are also more vulnerable to health conditions such as HIV/AIDS. These challenges stem from cultural opinions towards their sexual orientation.

(v) **Socio-Economic issues** - Homosexuals earn less than heterosexuals and face more workplace discrimination. This frequently results in job loss and subsequent difficulties with poverty.

(vi) **Unheard Rural voices** - Urban LGBTQIA+ individuals' voices are heard on a variety of online and offline platforms. Rural LGBTQIA+ people, on the other hand, usually suppress their emotions due to a lack of exposure, comfort, and internet connectivity in their community, and their refusal to marry leads to more physical abuse.

Despite the many difficulties, there remains hope for change. Looking ahead, it is expected that India will enact more LGBTQIA+-related laws and regulations. Marriage laws will be amended to accommodate same-sex unions, adoption by LGBTQIA+ couples will be explicitly recognised, and comprehensive anti-discrimination legislation will be enacted to protect LGBTQIA+ people from discrimination in a variety of settings.

Feasibility of Legalisation of Marriage of LGBTQIA+ in India

Talking about the feasibility of legalisation of marriage of LGBTQIA+ in India, it becomes difficult to decide that how much it would be practical for the society as simply implementing anything will not be sufficient, societal recognition is also required for the same and on the other hand it is also essential to mention that how much it would be discriminatory for LGBTQIA+, if they will not be granted the right to marriage. There are certain concerns which are required to be taken into consideration for understanding the practicality of legalisation of same-sex marriage.

• Marriage as a Social institution and not a “Private issue”

Marriage is not just about privacy of two people belonging to the same sex but it is a social institution and a public concept entailing different rights, responsibilities, and legal consequences ranging from divorce, alimony, and adoption. While Article 245 of the Indian Constitution grants the Parliament of India the exclusive power to make laws relating to all or any part of the territory of India, these laws are supposed to be consistent with the requirements of the Constitution.¹⁴ Therefore, if the decision of the Supreme Court of India is that the refusal to allow same-sex marriages goes against the Constitution, then it is the task of the legislature to make amendments in the existing marriage laws in order to compensate for the injustice committed. It is wrong to call for a society-wide discussion on the issue when firstly, a discussion on this has already taken place in the court, and secondly, the statistics clearly show that the acceptance of homosexuality (not same-sex marriages) remains low even in the wake of the landmark *Navtej Singh Johar*¹⁵ verdict owing to prejudice and bias, not the fault of the LGBTQIA+ community.

14 INDIA CONST. arts. 245-246, sched. 7, list III, entry 5.

15 *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

Secondly, it is wrong to believe that any alteration made in the law pertaining to same-sex marriage must come only through the legislature. This is a positivist view of law and runs contrary to the tradition of law-making in India. In the context of the Indian legal system, which is an extension of the common law system, it is the task of the judges, in addition to the legislature, to bring about the modernization of the law in light of the present-day situation in society. It is the Indian Constitution, which is a transformative document,¹⁶ that entrusts this responsibility of interpretation and updating of law to the judges so that it meets the socio-economic realities and expectations of the country, especially those of its vulnerable sections of the population. Even though it is the task of Parliament to make laws concerning marriage, people can take help of the Constitution for remedying their grievances and approach the Supreme Court under Article 32 of the Constitution if their basic rights are violated. Therefore, it is wrong to assert that the judiciary has no jurisdiction over the problems of marriage, including same-sex marriage.

• On the Legislative Intent of India's Existing Marriage Laws

While the personal laws of India were being made, Section 377 of the Indian Penal Code prohibited same-sex relations that are consensual and private between individuals as “against the order of nature”, but the Indian Psychiatric Association was yet to decide on whether homosexuality was a mental disorder. Nevertheless, after taking into account cases such as *National Legal Services Authority v. Union of India*¹⁷ and *Navtej Singh Johar v. Union of India*,¹⁸ the judiciary and civil society have recently realised that there was a mistake historically made: queerness is natural and normal and is a part of one's nature. This has led to the Madras High Court to amend the definition of “bride” under Section 5 of the Hindu Marriage Act to include transgender women in *Arun Kumar v. Inspector General of Registration*¹⁹

Keeping in mind the above developments, it is essential to go back to what the Court observed in *Navtej Singh Johar* case with regard to accepting the erroneously established position in *Suresh Kumar Koushal v. Naz Foundation*,²⁰ which would “amount to a retrograde step in the direction of progressive interpretation of the Constitution and denial of progressive

16 *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

17 *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

18 *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

19 *Arunkumar v. Inspector General of Registration*, AIR 2019 Mad. 265.

20 *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.

realization of rights”. The legislative intent must be understood in the context of the progress made in science, psychiatry, and social knowledge regarding the concepts of family and sexuality.

To suggest that the legislative intent of the prevailing marriage laws of India, especially the Special Marriage Act, 1954, is heteronormative and, therefore, needs to be preserved, is to disregard the social context which has come into being after 1954. “The fundamental rights enshrined in our Constitution are dynamic and timeless,” according to the Navtej Singh Johar case, and any “static interpretation” of the rights to “liberty” and “equality” would be unconstitutional in spirit because they are “transformative”.²¹

• Procreation and Consummation as essential to a valid marriage

According to Section 12 of the Hindu Marriage Act 1955,²² the marriage shall be considered voidable if there is an absence of consummation of the marriage due to the impotence of one of the partners. But, in this case, same-sex couples can also consummate. To say that “consummation” only means penile vaginal sex, is actually a factually incorrect notion. The criterion for consummation and procreation of the offspring in marriage is archaic and discriminative. Such criteria cannot be equated with different marriages in equal measure. Moreover, due to the advancements in medical sciences, same-sex couples can conceive and have children through artificial means such as surrogacy, IVF, etc.

Moreover, one has to understand that marriage does not consist of just sex and reproduction. Marriage is an alliance of love, respect, and commitment. Everyone, regardless of his/her sexual preference, must be allowed the freedom of choosing his/her mate and getting legally married to him/her irrespective of whether he/she wants to have a baby or not. Therefore, discriminating against same-sex couples in terms of marriage because procreation is one of the primary purposes of marriage is also an insensitive attitude towards those heterosexual couples who either suffer from infertility or sexual dysfunction or don’t want to reproduce for whatever reason.

Marriage of LGBTQIA+: Special Marriage Act and Uniform Civil Code

The Special Marriage Act (SMA) was enacted in 1954 to provide two persons with a marriage that is outside the realm of religion. Two people of the same religion or of different religions can get married and registered under this Act and are free from their personal laws. Marriages under this Act do not

21 *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

22 Hindu Marriage Act, No. 25 of 1955, § 12(1)(a), India Code.

need any kind of religious rituals or practices in order to be considered legally recognised, unlike marriages under the Hindu Marriage Act of 1955. However, there is a provision within this Act that states that the two individuals have to be of opposite sexes (as it accepts male and female), hence the homosexual community cannot benefit from this Act.

For this purpose, amendment of Section 4(c) of the Act²³ should be demanded, which says that the minimum age for men is 21 years and for women is 18 years. It will not have any effects on any religious laws, and therefore, there is less possibility of a popular uprising against it. Amendment of the Special Marriage Act by judicial means is possible due to the fact that it can be declared as unconstitutional. In cases of *Goodridge v. Dept. of Public Health*²⁴ and *Varnum v. Brien*,²⁵ the Supreme Court of the United States of America held that “Marriage laws that do not permit same-sex marriages are unconstitutional as marriage is an individual right and he cannot be deprived of it until and unless there is some strong reason, and being of same sex is not one of those reasons.”

Also in Canada, the court has given a ruling in *Halpern v. AG of Canada*²⁶ where it is stated that “the current definition of marriage is violative of the rights of same-sex couples and thus the definition was changed to voluntary union of two persons.” In the case of *Minister of Home Affairs v. Fourie*²⁷ of South Africa, the court ruled that “the marriage laws which do not allow for same-sex marriage are discriminatory on the basis of sex.”

Alongside the Special Marriage Act, there is the Uniform Civil Code (UCC), but only the state of Uttarakhand has come to be the first state to implement this common law applicable to families. Each and every individual marries under the provisions of the existing law regardless of his or her religion. Article 44 of the Indian Constitution²⁸ gives provisions for UCC, but there is an ongoing debate on whether it should be implemented throughout the whole country. Nonetheless, UCC does not allow same-sex marriage at all.

23 Special Marriage Act, No. 43 of 1954, § 4(c), India Code.

24 *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

25 *Varnum v. Brien*, 763 N.W.2d 862, 906-07 (Iowa 2009).

26 *Halpern v. Canada (Att'y Gen.)*, 65 O.R. (3d) 161, 172-73 (C.A. 2003).

27 *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC) at 556-57 (S. Afr.).

28 INDIA CONST. art. 44.

As such, there cannot be any single reason as to why same-sex marriage should be banned besides the ignorance and prejudiced attitude towards the needs of same-sex couples. There is a gross injustice done by the legislative body since it fails to make changes to the existing laws or create new ones to resolve these problems.

Impact of legalisation of marriage of LGBTQIA+ in India:

(i) Social impact

- **Increased Social Acceptance:** Legalising same-sex marriage leads to a higher acceptance of LGBTQIA+ people. It normalizes same-sex partnerships and promotes equality, hence lowering stigma and discrimination.
- **Family Stability:** Same-sex marriage gives legal and societal recognition for same-sex couples, which can help to maintain family stability. This includes legal privileges like inheritance rights and medical decision-making, which help to reinforce family units.
- **Youth Support:** It provides good role models for LGBTQIA+ youth, demonstrating that they can aspire to the same committed, recognised relationships as their straight peers.

(ii) Cultural Impact

- **Societal change:** Legalising same-sex marriage can spark a broader societal change towards acceptance and inclusion. It questions traditional ideas about marriage and family, encouraging a more diversified interpretation of these institutions.
- **Role models:** Prominent same-sex couples can act as role models, influencing public opinion and inspiring future generations to embrace diversity.

Conclusion

India has been known for its rich culture, traditions, and societal values. Social and cultural systems of India are deeply rooted in the traditional system of family setup, where marriage of a man and woman is ideal in terms of family formation. Family is considered as the basic unit of the society, which provides emotional and financial security to the members of the family. However, in recent times, there has been increasing demand for same-sex marriages. While some people see it as a positive move for equality, others believe that it would ruin the Indian social and cultural setup.

Legalisation of Marriage of LGBTQIA+ will have positive impact on society as we know laws are vital in shaping public attitudes. Changing laws can reduce prejudice and discrimination while promoting equality and acceptance for marginalized groups. Legalising same-sex marriage in the US has led to increased acceptance and decreased prejudice towards LGBTQIA+ individuals. Passing laws can demonstrate society's support for marginalized people.

As a result, laws can contribute to the development of an inclusive and accepting culture. Laws protecting the rights of those with disabilities can promote inclusion and minimize stigma and prejudice.

The legalisation of marriage for the persons of the same-sex will have significant and intricate influence on the LGBTQIA+ community. Here are a few key points where this impact is likely to be noticeable:

- **Legal Protections and Rights:** Allowing same-sex marriage gives LGBTQIA+ couples the same legal rights and protections as heterosexual couples. This encompasses issues including inheritance, tax breaks, healthcare decision-making, and parental rights. It eliminates the legal uncertainty and vulnerability that many same-sex couples had previously experienced.
- **Health & Well-being:** Numerous studies have found that legalising same-sex marriage improves the mental and physical health of LGBTQIA+ people. It alleviates the stress and stigma associated with discrimination and fosters a sense of social acceptability. This can result in fewer cases of mental health concerns including sadness and anxiety, as well as an overall better sense of wellbeing.
- **Social Acceptance and Visibility:** Legalising same-sex marriage can increase public acceptance of LGBTQIA+ people. It challenges stereotypes and encourages the normalization of various family patterns. Increased exposure of LGBTQIA+ couples in society can promote inclusivity and encourage more people to come out.
- **Cultural and Educational Shifts:** Legalising same-sex marriage has the potential to change cultural norms and educational material. It advocates for the inclusion of LGBTQIA+ perspectives in curricula and public discourse, resulting in a more accurate and diversified understanding of human relationships and sexuality.

In essence, legalising same-sex marriage benefits the LGBTQIA+ population by improving legal rights, social acceptability, mental health, and economic prospects, as well as contributing to broader societal transformation.