

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 5

2024

© 2024 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Same-Sex Marriages in Contemporary Society

RAYNA JOSHI¹

ABSTRACT

The right to marriage is universally recognized as a fundamental human right, symbolizing love, commitment, and the pursuit of happiness. However, for marginalized communities, particularly the LGBTQ+ population, this right remains elusive due to entrenched legal and societal barriers. Despite significant legal advancements in LGBTQ+ rights, true equality cannot be achieved until same-sex marriages are fully recognized within India's diverse religious and legal frameworks. This paper explores the religious and legal complexities surrounding same-sex marriages in India, focusing on the challenges posed by personal religious laws. It also examines the potential for the Special Marriage Act (SMA) to provide legal recognition for same-sex couples, while addressing the need for a Uniform Civil Code (UCC) to ensure broader inclusivity and accessibility.

The analysis begins by tracing the evolving jurisprudence on LGBTQ+ rights, highlighting landmark cases such as Naz Foundation v. Government of NCT of Delhi (2010), National Legal Services Authority v. Union of India (2014), and Navtej Singh Johar v. Union of India (2018), which decriminalized consensual same-sex relations. The study then delves into personal laws governing marriage across religious communities—Hindu, Muslim, and Christian—and their limitations in accommodating same-sex unions.

The research emphasizes the Special Marriage Act as a potential legal avenue for same-sex marriages, reinforced by recent judicial rulings. Finally, the paper advocates for the implementation of a UCC as a transformative step toward achieving marriage equality and safeguarding individual rights, transcending religious and cultural boundaries. This research contributes to the ongoing discourse on LGBTQ+ rights and the quest for equal marriage rights in India.

Keywords: *Same-sex marriage rights, LGBTQ+, Special Marriage Act, Uniform Civil Code (UCC).*

I. INTRODUCTION

The right to marriage is widely regarded as a fundamental human right, emblematic of love, commitment, and the pursuit of happiness. However, for marginalized communities such as the

¹ Author is a student at OP Jindal Global University, India.

LGBTQ+ (Lesbian, Gay, Bisexual, Transgender, Queer, and more) population, the institution of marriage has often seemed like an elusive dream, veiled behind a tapestry of legal and societal obstacles. While significant legal progress has undeniably been made in the realm of LGBTQ+ rights, it is crucial to acknowledge that genuine equality remains unattainable till the barriers to same-sex marriages are not dismantled. In my opinion, constraining marriage to the definition of a sanctified bond between "one man and one woman" constitutes an arbitrary and unwarranted form of gender-based discrimination, encroaching upon fundamental rights like privacy, autonomy, a life with dignity, and the freedom to express one's sexual orientation² and self-identified gender.

This research paper will delve into the potential religious challenges associated with amending personal religious laws and will then go on to propose a practical solution through the implementation of the Special Marriage Act, which can provide a legal avenue for same-sex couples seeking legal recognition. This paper delves into the intricacies surrounding the extension of same-sex marriage rights within diverse religious contexts. Moreover, the paper emphasizes the critical importance of implementing a Uniform Civil Code in India, which will prove to be a transformative measure aimed at advancing accessibility and inclusivity for every citizen throughout the nation.

Before delving into the arguments of personal laws surrounding same-sex marriages let us look at how the fundamental rights of the LGBTQ+ have made some progress over the years. In the *Naz Foundation v. Government of NCT of Delhi (2010)*³, the two-judge bench at Delhi High Court took a groundbreaking step by declaring Section 377 unconstitutional for consensual private acts, although the Supreme Court later overturned this decision. Following that, in *National Legal Service Authority v. Union of India (2014)*⁴, the Supreme Court affirmed the LGBTQ+ community's right to self-identity and gender equality by recognizing transgender people as a 'third gender'. The jurisprudential landscape further shifted with *K.S. Puttaswamy v. Union of India (2017)*⁵, where the Supreme Court established the right to privacy as fundamental, emphasizing the importance of personal choices. A crucial turning point in the legal evolution occurred with the 2018 *Navtej Singh Johar v. Union of India*⁶ case, a

² Bhogle, S. (2019) *The momentum of history realising marriage equality in India, THE MOMENTUM OF HISTORY – REALISING MARRIAGE EQUALITY IN INDIA*. Available at: <http://nujlawreview.org/wp-content/uploads/2020/02/12-3-4-Satchit-Bhogle.pdf> (Accessed: 27 October 2023).

³ Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.

⁴ National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

⁵ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

⁶ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

groundbreaking legal milestone that partially decriminalized Section 377 (Unnatural Offences)⁷ of the Indian Penal Code, 1860⁸. This case recognized the importance of privacy and affirmed that an individual's sexual orientation is an inherent aspect of their identity.

(A) Personal Laws in India

Personal laws, often referred to as religious laws, constitute a set of legal regulations that are applicable to individuals practicing various religions, encompassing faiths like Hinduism, Islam, Christianity, Parsi, and others. Throughout history, these personal laws have played a pivotal role within both the legal system and the social fabric. They predominantly encompass a wide range of principles related to various aspects of life, including marriage, divorce, maintenance, adoption, inheritance, guardianship, succession, and more. Historically issues of family law have been left to the states to regulate in accordance with their religious norms and beliefs. In India, it is important to note that there exists no single, uniform legal framework governing the institution of marriage. Instead, there is a deliberate divergence, aimed at upholding the principles of religious freedom and preserving the core practices of the diverse faiths and beliefs that collectively constitute the nation.

Now let us discuss the prevalent marriage acts in our country and whether there is any scope for same-sex marriages to fit into its discourse.

(B) Hindu laws

The Hindu Marriage Act of 1955⁹, the principal legislation governing Hindu matrimonial unions in India, does not explicitly address the issue of whether marriage is exclusively limited to heterosexual couples. While the Act does not expressly prohibit same-sex marriages, it extensively employs gender-specific terminology, predominantly using "husband" and "wife" when referring to spouses¹⁰. This linguistic preference becomes particularly significant when considering the legal rights and obligations stemming from marriage, such as those outlined in Sections 9 and 13 of the Act¹¹, which pertain to the Restoration of Conjugal Rights and Marriage Dissolution, respectively. Consequently, it is evident that while the HMA, 1955 does not explicitly ban same-sex marriages, it does not provide a legal framework or protections for such

⁷ Babar, D.K. (2019) *Homosexuality and same sex marriages - need for legislation - pen acclaims, "Homosexuality and Same Sex Marriages - Need for Legislation"*. Available at: <http://www.penacclaims.com/wp-content/uploads/2019/11/Deepali-Kadam-Babar.pdf> (Accessed: 27 October 2023).

⁸ The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.

⁹ The Hindu Marriage Act, 1955.

¹⁰ Bhogle, S. (2019) *The momentum of history realising marriage equality in India, THE MOMENTUM OF HISTORY – REALISING MARRIAGE EQUALITY IN INDIA*. Available at: <http://nujlawreview.org/wp-content/uploads/2020/02/12-3-4-Sachit-Bhogle.pdf> (Accessed: 27 October 2023).

¹¹ The Hindu Marriage Act, 1955, §§9, 13(2).

couples once they are married.

A significant legal milestone was reached through a groundbreaking decision by the Madras High Court in the case of *Arunkumar and Sreeja vs. Inspector General of Registration and Others*¹². In this landmark ruling, the court acknowledged the status of a transgender woman as a 'woman' and a 'bride' within the framework of Section 5 of the Hindu Marriage Act, 1955¹³. The Madras High Court's interpretation of 'bride' extended beyond cis-gendered females, encompassing anyone who identifies as a 'woman.' The court's deliberation in the Arunkumar case also delved into mythological narratives, emphasizing that Hinduism does not inherently oppose same-sex unions. Nevertheless, the judgment clarified that if two individuals identifying as men sought to wed, it would not align with the legal definition of 'bride' and would, therefore, fall outside the Act's provisions. It is important to note that this verdict did not modify the Act's fundamental structure, which still regards the union as one between a 'man' and a 'woman.'

The debate over same-sex marriage in India saw a significant development in the case of *Abhijit Iyer vs. Union of India and others*. Where Mr. Iyer petitioned for the recognition of same-sex marriages under the Hindu Marriage Act of 1955, arguing that the law is gender-neutral and not explicitly against such unions. He contended that denying this right violates Articles 14 and 19 of the Constitution of India. Despite the decriminalization of homosexuality¹⁴ (Navtej Singh Johar), The Central Government insisted on traditional gender-specific marriages. Essentially, the legal situation concerning same-sex marriage under India's Hindu Marriage Act of 1955 is characterized by uncertainty and a lack of clear legal guidelines. The Act neither explicitly prohibits these unions nor offers a well-defined legal structure for them.

(C) Muslim and Christian Personal laws

Regarding same-sex marriage under the Indian Muslim Personal Law¹⁵, it's essential to note that Islamic law, primarily guided by the Shariat, historically does not recognize marriage equality. Demonstrating the legitimacy of same-sex unions within the framework of Islamic law poses a distinct and intricate challenge, as underscored by the arguments put forth by the *All-India Muslim Personal Law Board (AIMPLB)* during the Section 377 dispute. Notably, the AIMPLB articulated their positions with regard to same-sex unions, with their secretary, Zafaryab Jilani, asserting that homosexuality is 'injurious to one's health'. Despite their firm stance on the issue, the AIMPLB opted not to engage in any legal proceedings related to Section

¹² *Arunkumar and Sreeja v. Inspector General of Registration and Others*, W.P.(MD) No.4125 of 2019.

¹³ The Hindu Marriage Act, 1955, §5.

¹⁴ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

¹⁵ The Muslim Personal Law (Shariat) Application Act, 1937, No. 26, Acts of Parliament, 1937.

377, thus firmly solidifying their position on the matter. The Jamiat Ulama-I-Hind submitted an affidavit to the highest court, characterizing same-sex marriages as a threat to the integrity of family structures and as a violation of established personal laws in the nation¹⁶.

Within the purview of the Indian Christian Marriage Act of 1872¹⁷, the solemnization of marriages is traditionally solemnized by religious priests, and they too contend that same-sex marriages are at odds with religious scriptures, societal norms, and the traditional structure of families. Notably, this Act also does not contain any explicit provisions for the recognition of any form of marriage apart from heterosexual unions.

(D) The Special Marriage Act

Let us examine the viability of the Special Marriage Act 1954¹⁸ as a pragmatic solution for accommodating same-sex marriages.

The Special Marriage Act (SMA) was instituted to streamline marriages between individuals of differing religious backgrounds, offering an alternative to traditional religious ceremonies. While the SMA's intention was to promote inclusivity, it remains notably silent on the matter of same-sex marriages, using language such as "male-female" and "bride-bridegroom." This linguistic nuance has raised concerns regarding its applicability to LGBTQ+ couples. Recent legislative developments have reflected a growing acceptance of same-sex relationships in India, marked by the recognition of same-sex live-in partnerships.

The *Uttarakhand High Court* issued a landmark decision in June 2020, declaring that same-sex live-in partnerships are not illegal. This important decision confirmed that such partnerships are protected under Article 21 of the Indian Constitution, which gives the fundamental right to self-determination and the ability to choose one's sexual partner. Echoing this sentiment, the Punjab and Haryana High Court, in July 2020, upheld the rights of same-sex couples to engage in live-in relationships and receive protection under Article 21, further advancing the legal recognition¹⁹ of LGBTQ+ relationships in India.

In the Delhi High Court on October 5, 2020, *Kavita Arora and Ankita Khanna* filed a joint petition asserting that their fundamental rights under Articles 14, 15, 19, and 21 of the

¹⁶ Same-sex marriage: Minority religious organisations have been opposed, as 'unnatural', 'against personal laws' (2023) *The Indian Express*. Available at: <https://indianexpress.com/article/political-pulse/same-sex-marriage-minority-religious-organisations-opposed-unnatural-personal-laws-8986802/> (Accessed: 27 October 2023).

¹⁷ The Indian Christian Marriage Act, 1872.

¹⁸ The Special Marriage Act, 1954, § 2(1)(c).

¹⁹ Agarwal, A. (2022c) *Marriage equality in India: Thinking beyond judicial challenges to secular marriage law*, SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4249070 (Accessed: 29 October 2023).

constitution had been infringed²⁰. They sought equal benefits for same-sex married couples, highlighting the challenges they faced due to the absence of legal provisions recognizing same-sex marriages. Their primary request was to register their marriage under the Special Marriage Act of 1954. However, the Government opposed their petition, contending that same-sex marriages conflicted with societal values and the traditional concept of the Indian family unit. They argued that altering current marriage laws could disrupt the existing legal framework, emphasizing the absence of any uncodified or codified recognition of same-sex marriage in personal or statutory law.

A recent development has emerged concerning the inclusion of same-sex marriages under the purview of the Special Marriage Act. In the recent Supreme Court ruling on October 17th 2023, a landmark case involving *Supriya Chakraborty & Abhay Dang v. Union of India*²¹ witnessed a significant shift towards ending discrimination against same-sex couples. Although the five-judge bench did not reach a unanimous decision on granting legal recognition to queer couples in the form of a "civil union," it was a pivotal moment in acknowledging the need for change. The petitioners sought to reinterpret the Special Marriage Act of 1954, urging that it be made gender-neutral, thus permitting same-sex couples to marry under its provisions. They argued that the SMA violated various constitutional articles by restricting marriage between same-sex and gender nonconforming individuals, and they proposed replacing gender-specific terms like "husband" and "wife" with "party" or "spouse." Chief Justice of India D.Y. Chandrachud and Justice Sanjay Kishan Kaul maintained that while queer couples have the right to seek recognition, any legal status for such unions must come from parliamentary legislation. This ruling marks a significant step towards equal rights for the LGBTQIA+ community in India.

The Special Marriage Act was introduced to allow people of different religions to marry and register their marriage. The SMA, in this sense, provides recognition to marriages that are categorized as socially unacceptable by certain religious members of society. Therefore, adding another provision and allowing same sex marriages to fall within its ambit seems like the only probable legal aid as of now²².

II. NEED FOR A UCC

In the context of India's existing legal landscape, a pivotal question emerges: Can the long-

²⁰ *Same-sex marriage: Meet dr Kavita Arora and Ankita Khanna, petitioners fighting a battle for Justice* (2023) *India.Com*. Available at: <https://www.india.com/women/same-sex-marriage-meet-dr-kavita-arora-and-ankita-khanna-petitioners-fighting-a-battle-for-justice-6420271/> (Accessed: 27 October 2023).

²¹ *Supriya Chakraborty & Abhay Dang v. Union of India*, W.P.(C) No. 1011/2022 Diary No. 36593/2022.

²² Priyanshi Bhardwaj, *The Scope of Recognition of Same-Sex Marriage in India*, 4 INDIAN J.L. & LEGAL Rsch. 1 (2022).

debated Uniform Civil Code (UCC) serve as the catalyst for granting homosexual unions the societal recognition they deserve? This question has lingered for an extended period due to India's diverse cultural and religious tapestry, where the implementation of a uniform or common legal framework applicable to all citizens would inevitably raise profound religious and social concerns.

The fundamental premise of a UCC is to establish a unified set of laws governing personal matters, including marriage, divorce, inheritance, and adoption, across the board, irrespective of an individual's religious beliefs²³. Essential to this concept is the imperative drive toward gender inclusivity and the safeguarding of individual rights. Within the traditional societal framework, the notion of family has conventionally adhered to a heteronormative model, but for the UCC to be effective, it must begin by broadening the definition of "family." Granting legal recognition to homosexual couples under the UCC not only extends them their rightful status but also ensures access to essential legal provisions, including the right to register marriages, access to divorce proceedings, restitution of conjugal rights, and matrimonial relief, among others²⁴. This inclusive approach fosters a healthier and safer environment for homosexual couples to coexist within their own country, affording them the respect and protection they rightly deserve.

In conclusion, the struggle for same-sex marriage rights in India embodies a profound quest for justice, equality, and the recognition of fundamental human rights. While India has witnessed significant legal milestones in the path towards LGBTQ+ inclusivity, genuine equality remains an aspiration. This research has illuminated the intricacies of personal laws, rooted in religious contexts, which have historically governed diverse aspects of life, including marriage. The Special Marriage Act and the recent Supreme Court rulings offer promising avenues for change, yet parliamentary legislation remains crucial. Furthermore, the implementation of a UCC, a unifying legal framework, stands as a transformative solution that can extend inclusivity and accessibility for every citizen.

As India navigates its rich tapestry of cultures and religions, the call for same-sex marriage rights represents a step towards progress, fostering a society where love knows no boundaries, and the institution of marriage becomes a universal right.

²³ *What's uniform civil code (UCC): What does constitution say & why it's such a controversial topic in India?* (2023) *The Economic Times*. Available at: <https://economictimes.indiatimes.com/news/how-to/what-is-uniform-civil-code-what-does-constitution-say-about-it-why-its-such-a-controversial-topics-in-india/articleshow/101348565.cms> (Accessed: 27 October 2023).

²⁴ Gupta, B. (2022) *The case for same-sex marriages in India*, SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4209007 (Accessed: 27 October 2023).