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# Unveiling India's Path to Same-Sex Marriage: Legal Challenges and Solutions

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## ABSTRACT

*Same-sex marriage has been fast becoming an issue of recognition and legalisation worldwide, with varying degrees of acceptance or resistance witnessed. Our primary contention centers on the fundamental principle that denying same-sex rights constitutes a violation of individual constitutional rights. We also acknowledge the potential challenges associated with amending personal religious laws, which may carry religious repercussions. However, we propose a viable solution in the form of the Special Marriage Act, which can serve as a refuge for same-sex couples seeking legal recognition. Throughout our argument, we will demonstrate the complexities involved in granting same-sex marriage rights within various religious contexts as well as under the various Fundamental Rights and subsequently, we will elucidate how these rights can be effectively secured through the utilization of the Special Marriage Act.*

**Keywords:** Same -sex, Fundamental Right, Special Marriage Act , LGBTQ+, Homosexuality.

## I. INTRODUCTION

India, a nation steeped in tradition and diversity, stands at a crucial crossroads in its history, grappling with a fundamental issue of equality and personal freedom. The sacred institution of marriage, a necessity of societal acceptance, remains exclusive for a substantial portion of the population—the LGBTQ+ community. While significant legal milestones have been achieved in the recognition of LGBTQ+ rights, the quest for true equality demands that the barriers preventing same-sex marriage be dismantled. We recommend that limiting the definition of marriage to a union between "one man and one woman" represents arbitrary and unjustified sex discrimination, infringing upon fundamental rights such as privacy, autonomy, life with dignity, and freedom of expression – including the expression of sexual orientation and self-identified gender.

This essay aims to showcase India's legal landscape, highlighting the societal challenges preventing progress. It suggests the unequivocal recognition of same-sex marriage, aligning it

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with traditional opposite-sex marriage asserting that our existing constitutional framework is sufficient to enforce this right. It further posits that the Special Marriage Act of 1954, by offering a path towards marriage equality, can serve as a harmonious bridge between the demand for inclusivity and the preservation of religious freedoms, thus encapsulating India's aspiration for a more inclusive, diverse, and equitable society.

## II. HISTORICAL STIGMA AND ITS LEGAL BACKGROUND

Throughout Indian history, homosexuality was stigmatized and criminalized under Section 377 of the Indian Penal Code during British colonial rule.<sup>3</sup> This law subjected LGBTQ+ individuals to societal discrimination and legal persecution. However, evolving medical research shed light on homosexuality as a natural aspect of human diversity, challenging the perception of it as sinful or criminal.<sup>4</sup> The Indian Judiciary has played a crucial role in advancing LGBTQ+ rights:

1. Naz Foundation v. Government of NCT of Delhi (2010):<sup>5</sup> The Delhi High Court declared Section 377 unconstitutional for consensual private acts, although the Supreme Court later overturned this decision.
2. National Legal Service Authority v. Union of India (2014):<sup>6</sup> The Supreme Court recognized transgender individuals as a 'third gender,' affirming their right to self-identify and promoting gender equality.
3. K.S. Puttaswamy v. Union of India (2017):<sup>7</sup> The Supreme Court established the right to privacy as fundamental, emphasizing personal choices.
4. Navtej Singh Johar v. Union of India (2018):<sup>8</sup> This landmark case partially decriminalized Section 377, acknowledging privacy and affirming sexual orientation as an intrinsic part of an individual's identity.

These legal milestones reflect India's evolving attitude towards LGBTQ+ rights and personal autonomy, challenging historical discrimination and criminalization.

The legal framework surrounding marriage is largely based on traditional ideas rooted in a heteronormative understanding. Developments in achieving inclusivity and a more equal legal landscape for marriage have no doubt, advanced us towards a more progressive society, however, we still find ourselves drawing from our fundamentally conservative ideology. As

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<sup>3</sup> Deepali.M. babar, Homosexuality and same sex marriages - need for legislation - pen acclaims 2019.

<sup>4</sup> *ibid*

<sup>5</sup> Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.

<sup>6</sup> National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

<sup>7</sup> K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

<sup>8</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶616 (per Chandrachud, J.).

recent as 2023 in *Supriyo v Union of India*, the Supreme Court held that transgender persons can now legally get married under existing personal laws. Chief Justice D. Y. Chandrachud remarked how marriage is based on sexuality, not on gender, and how the two concepts are not one and the same. As per this landmark judgment, a transgender man can get married to a woman or even a transgender woman, and vice versa. The base requirement is that there is an existing heterosexual relationship.<sup>9</sup> While this is a step towards marriage equality, it is founded in the traditional understanding that marriage is between a man and a woman alone. To truly achieve marriage equality in its fullest sense, we need to stop and wonder whether a liberal approach such as elucidated in *Supriyo* is really enough, or seems to be an error in the very definition of marriage? We require to take a look at the very grassroots level and rectify this in order to propagate legislative reform in this arena.

### **III. NEED FOR SAME-SEX MARRIAGE**

The right to marry is essential in society, especially in Indian society. Marriage as a union of two people and their families is the most socially accepted form of intimacy. Proponents of religion and custom have advocated that marriage is a sacred institution deeply rooted in our society. Young men and women are largely encouraged to get married by their families and sustain that relationship owing to the sanctity of marriage. But this kind of encouragement only finds its way into heterosexual relationships and unions.

Apart from the fact that marriage takes away from a life of solitude and is considered a “union of soul and body,” marriage opens up a network of new rights that are now available to the married couple, such as inheritance rights, protection from domestic violence, adoption rights, etc.<sup>10</sup>

Without the right to marry, same-sex unions shall never be wholly accepted in society. Recognizing the union of a same-sex couple under statutory law allows them to claim their relationship in totality. Restrictions on the extent of a relationship are grossly violative of an individual’s right to life and liberty. Thus, same-sex marriage is a necessity in our society to uplift the position of these sections of people as well as let them treat their personal choices and relationships with the same respect as we treat heteronormative relationships.

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<sup>9</sup> *Supriyo v Union of India*, 2023 INSC 920

<sup>10</sup> Gupta, *The case for same-sex marriages in India*, 2022.

#### IV. CONSTITUTIONAL FRAMEWORKS: PAVING THE WAY FOR SAME-SEX MARRIAGE IN INDIA

##### (A) Article 14

Article 14<sup>11</sup> of the Indian Constitution guarantees equal treatment before the law. Denying same-sex couples the right to marry constitutes discrimination based on sexual orientation.<sup>12</sup> The argument that marriage should only be between 'one man and one woman' for procreation is outdated and irrational. This discrimination cannot be justified on moral or traditional grounds, as constitutional morality and individual rights, including privacy and autonomy, take precedence.<sup>13</sup> The National Legal Services Authority v Union of India judgment recognizes 'sex' to include gender identity and sexual orientation, further emphasizing the discrimination against LGBTQ+ individuals in marriage laws. Restricting marriage based on procreation alone is untenable, as it doesn't void marriages involving impotent, infertile, elderly, or medically challenged individuals. Discrimination isn't founded on morality or protecting traditional notions of marriage, as constitutional morality and positive rights, including privacy and free expression, override such arguments. It's time to rectify this injustice and grant equal marriage rights to all citizens, regardless of their sexual orientation.<sup>14</sup>

##### (B) Article 21

Further, Article 21<sup>15</sup> guarantees that no person shall be deprived of their personal life and liberty. Misra, C.J. held in Navtej Johar<sup>16</sup>, "An individual in the exercise of his choice may feel that he/she should be left alone but no one, and we mean, no one, should impose solitude on him/her." A law that forbids marriage to a partner of one's choosing requires a person to choose between living in secret, constantly afraid of being discovered, or living alone in India, where marriage is frequently the only close relationship that is socially acceptable. That life is constrained. It is not a dignified life. Therefore, marriage as defined as 'one man, one woman' must be construed as violating the right to life with dignity under Article 21<sup>17</sup>. Justice Nariman,

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<sup>11</sup> INDIA CONST. art. 14

<sup>12</sup> Satchit Bhogle, *The Momentum of History – Realising Marriage Equality in India – NUJS Law Review*, Nujslawreview.org (2019), <https://nujslawreview.org/2020/02/22/the-momentum-of-history-realising-marriage-equality-in-india/>.

<sup>13</sup> National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

<sup>14</sup> Satchit Bhogle, *The Momentum of History – Realising Marriage Equality in India – NUJS Law Review*, Nujslawreview.org (2019), <https://nujslawreview.org/2020/02/22/the-momentum-of-history-realising-marriage-equality-in-india/>.

<sup>15</sup> INDIA CONST. art. 21.

<sup>16</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶616 (per Chandrachud, J.).

<sup>17</sup> Satchit Bhogle, *The Momentum of History – Realising Marriage Equality in India – NUJS Law Review*, Nujslawreview.org (2019), <https://nujslawreview.org/2020/02/22/the-momentum-of-history-realising-marriage-equality-in-india/> (last visited Dec 4, 2024).

in the Puttaswamy case, supported the dissenting opinion of Justice Subba Rao in the Kharak Singh<sup>18</sup> case to a position of significance among the three great dissents concerning Article 21. Justice Subba Rao, in the context of constant police surveillance of an individual with a history of criminal activities, questioned, "How could a person's movements, constantly monitored by the watchful eyes of the police, be considered as genuinely free? It's as if the entire nation is transformed into a prison... The pervasive surveillance inevitably imposes inhibitions on the individual, preventing them from acting freely". Drawing an analogy from this, not allowing same-sex marriage is almost like subjecting LGBTQ+ people to this very type of scrutiny and surveillance making them incapable of acting freely.

### **(C) Article 19**

In the landmark judgement of *K.S. Puttaswamy v. Union of India*<sup>19</sup>, the Supreme Court unanimously affirmed the fundamental right to privacy under Article 19<sup>20</sup>, which included the freedom to make private and intimate decisions. Personal autonomy encompasses the positive freedom of individuals to make life decisions, express themselves, and pick what activities to engage in, as well as the negative right of not being influenced by others. Marriage needs to be within the bounds of personal freedom. Moreover, in the case of *Shakti Vahini v. Union of India*<sup>21</sup>, it was held that an individual's right to choose a partner is a constituent of their dignity and is protected under both Articles 19 and 21 of the Constitution. Thus, denying same-sex marriage is violative of Article 21 as well. Therefore, individuals ought to be permitted to marry others of the same sex as an expression of their sexual orientation, including, in the case of heterosexual transgenders, an expression of their self-identified gender.<sup>22</sup> The Supreme Court has acknowledged the right to self-expression, the right to choose one's partner and make one's own sexual decisions based on the fact that the denial of such rights violates Articles 14, 15, 19, and 21 of the Constitution. By the same rationale, denying the right to marry has the very same effect and is a gross injustice to those who don't fit into the heteronormative framework. The current provisions only make it seem as if same-sex partners are treated as second-class citizens.

## **V. MARRIAGE UNDER PERSONAL LAWS**

Keeping aside religious beliefs and purely religious rites, the practice of religion includes acts

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<sup>18</sup> *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295.

<sup>19</sup> *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

<sup>20</sup> INDIA CONST. art. 9

<sup>21</sup> *Shakti Vahini v. Union of India*, (2018) 7 SCC 192; *Shafin Jahan v. Asokan K.M.*, AIR 2018 SC 1933.

<sup>22</sup> Satchit Bhogle, *The Momentum of History – Realising Marriage Equality in India – NUJS Law Review*, Nujslawreview.org (2019), <https://nujslawreview.org/2020/02/22/the-momentum-of-history-realising-marriage-equality-in-india/> (last visited Dec 4, 2024).

that are incidental to religion. The personal laws are rooted in religion and are an integral part of the religion as a whole. India has separate 'personal laws' applicable to Hindus (along with Jains, Buddhists, and Sikhs), Muslims, Christians, and Parsis. These broadly cover marriage and divorce, adoption, and succession to property (and at one time, controversially, maintenance).

### **(A) Hindu Personal Law**

The Hindu Marriage Act of 1955<sup>23</sup>, the primary legislation governing Hindu marriages in the country, is notably silent on the specific question of whether marriage is exclusively reserved for opposite-sex couples. While the Act does not explicitly prohibit same-sex unions, it unmistakably employs gender-specific language throughout its provisions, referring to spouses as "husband" or "wife." This linguistic limitation becomes particularly significant when addressing the various legal rights and obligations that emanate from a marriage, such as those delineated in Sections 9 and 13 of the Act.<sup>24</sup>As a result, even if one were to argue that the HMA, 1955 does not expressly forbid same-sex marriages, it is equally clear that it fails to offer any legal framework or protections for such couples once married.

A notable legal development occurred in the Madras High Court's ruling in the case of Arunkumar and Sreeja vs. Inspector General of Registration and Others.<sup>25</sup> In this case, the court recognized a trans woman as a 'woman' and a 'bride' under Section 5 of the HMA, 1955. However, it is essential to understand that this judgment did not alter the fundamental structure of the Act, as the union was still perceived as between a 'man' and a 'woman.'

The debate on same-sex marriage in India took a significant step forward in the case of Abhijit Iyer vs. Union of India<sup>26</sup> and others. Mr. Abhijit Iyer filed a petition seeking the registration of same-sex marriage under the HMA, 1955. He argued that the statute's language is gender-neutral and devoid of explicit prohibitions against same-sex unions. According to Mr. Iyer, denying the right to marry a person of one's choice constitutes a violation of fundamental rights under Articles 14 and 19 of the Constitution of India. He contended that the distinction between homosexuals and heterosexuals regarding marital rights has led to the social exclusion of homosexual unions. Despite the decriminalization of homosexuality, the Central Government maintained that marriages in India must adhere to the traditional understanding, meaning they

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<sup>23</sup> The Hindu Marriage Act, 1955, §§7(2), 9, 13(2), 24.

<sup>24</sup> Satchit Bhogle, *The Momentum of History – Realising Marriage Equality in India – NUJS Law Review*, Nujslawreview.org (2019), <https://nujslawreview.org/2020/02/22/the-momentum-of-history-realising-marriage-equality-in-india/> (last visited Dec 4, 2024).

<sup>25</sup> XXXXXXXXXXXX v. Director of Health Services, 2023 SCC OnLine Ker 6244.

<sup>26</sup> Abhijit Iyer Mitra v. Union of India (2022) Writ Petition (Civil) No. 6371/2020.

can only occur between men and women, i.e., heterosexual unions.

In essence, the legal landscape in India regarding same-sex marriage under the Hindu Marriage Act, of 1955, is marked by ambiguity and inconclusiveness. While the Act does not explicitly bar such unions, it also fails to provide a clear legal framework for them. As society continues to evolve, so too will the legal interpretations and implications of this complex issue.

### **(B) Muslim and Christian Personal Law**

Indian Muslim personal law is predominantly guided by the Shariat, with the Muslim Personal Law (Shariat) Application Act, 1937<sup>27</sup> ("Shariat Act") outlining various subjects governed by the Shariat. While certain interpretations have been codified, marriage equality is not historically recognized in Islamic law. Convincing a judge that same-sex unions are legal under Islamic law is challenging, especially considering arguments presented by the All-India Muslim Personal Law Board ('AIMPLB') during the Section 377 dispute.

Regarding the Indian Christian Marriage Act<sup>28</sup>, it allows for solemnization based on the "rules, rites, ceremonies, and customs" of particular churches, which may not necessarily support same-sex marriage. There is no specific requirement for obtaining a license under the Act except that the person be a Christian. However, the term 'solemnization' generally implies the ceremonies and procedures necessary for a valid marriage. Under Christian law, this could involve a proclamation of marriage by a priest, but these procedures are subject to the provisions of the Indian Christian Marriage Act. To achieve marriage equality under Muslim and Christian law, resorting to constitutional arguments to challenge the legal prohibition may be necessary. This could involve interpreting Hindu and Christian matrimonial freedoms in a manner that recognizes gay marriages and removes prejudice based on sexual identity, either through judicial interpretation or legislative change.<sup>29</sup> However, we believe implementing such changes may face significant challenges due to societal resistance to LGBTQ culture, concerns about interference with religious practices and customs, and the need for contentious regulatory changes. The government may not prioritize such changes even if it supports the idea, making it a complex and challenging endeavor.

Therefore, we suggest that the best solution to this is to have same-sex marriages legalized under the Special Marriage Act.

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<sup>27</sup> Dissolution of Muslim Marriages Act, 1939, §4.

<sup>28</sup> The Indian Christian Marriage Act, 1872, §4.

<sup>29</sup> Satchit Bhogle, *The Momentum of History – Realising Marriage Equality in India – NUJS Law Review*, Nujslawreview.org (2019), <https://nujslawreview.org/2020/02/22/the-momentum-of-history-realising-marriage-equality-in-india/> (last visited Dec 4, 2024).



### **(C) Refuge under the Special Marriage Act:**

The Special Marriage Act of 1954 (SMA)<sup>30</sup> was introduced to facilitate marriages between individuals of different religions, allowing them to marry without adhering to traditional religious ceremonies. While the SMA was designed to promote inclusivity, it doesn't explicitly address same-sex marriages, using terms like "male-female" and "bride-bridegroom." This has prompted questions about its applicability to LGBTQ+ couples. Recent legal developments have shown a growing recognition of same-sex relationships in India, including the acknowledgment of same-sex live-in relationships.

The Uttarakhand High Court, in June 2020, ruled that same-sex live-in relationships are not unlawful, asserting that they are protected under Article 21 of the Constitution of India, which guarantees the fundamental right to self-determination and freedom of choice in sexual partners. Similarly, the Punjab and Haryana High Court, in July 2020, affirmed the entitlement of same-sex couples to live-in relationships and protection under Article 21.<sup>31</sup>

However, same-sex couples in India still lack the legal right to marry, keeping them on an unequal footing with heterosexual couples.

## **VI. REINTERPRETING THE SPECIAL MARRIAGE ACT: A HOPE FOR SAME-SEX COUPLES**

India is deeply rooted in religious values and ideals, so incorporating a matter such as same-sex marriage under our laws might attract a great deal of hostility from groups who stand behind the banner of custom, culture, and religion. Amending the personal law to incorporate same-sex marriage will require the acceptance of the same within the religious belief.

Kavita Arora and Ankita Khanna filed a combined case in the Delhi High Court on October 5, 2020, alleging that their constitutional rights under Articles 14, 15, 19, and 21 had been infringed. They maintained that married couples had significant advantages. The couple has encountered numerous problems since they lack the necessary paperwork that married couples have because there is no law that acknowledges same-sex marriage. They argued for their marriage to be registered under the 1954 Special Marriage Act. The Government, however, argued in court that marriage between two individuals of the same sex violates "societal morals" and the idea of the "Indian Family Unit." They believed that any changes to all of the current marriage regulations would have a disastrous effect on them. They maintained that same-sex

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<sup>30</sup> The Special Marriage Act, 1954, § 2(1)(c).

<sup>31</sup> Saloni Aggrawal, *Same Sex Live-In Relationship*, Legalserviceindia.com (2020), [https://www.legalserviceindia.com/legal/article-6583-same-sex-live-in-relationship.html#google\\_vignette](https://www.legalserviceindia.com/legal/article-6583-same-sex-live-in-relationship.html#google_vignette) (last visited Dec 4, 2024).

marriage is not recognized by either codified statute law or uncodified personal law.

In order to facilitate marriage and marriage registration for individuals of various religious backgrounds, the Special Marriage Act was introduced. It enables the couple to abandon customs that are part of their faith. In this way, the SMA recognizes marriages that some religious members of society would typically consider socially inappropriate.

In early 2023 the Supreme Court of India decided on this said case. The judgment of the five-judge constitutional bench, including Chief Justice D Y Chandrachud and Justices Sanjay Kishan Kaul, S. Ravindra Bhat, Hima Kohli, and P S Narasimha, said, "Such a significant social change should be legislated upon by the Parliament." It has also been maintained that because same-sex marriage concerns are complex and stem from sociocultural norms, elected officials who account to the public must decide how to handle them. Chief Justice D Y Chandrachud would have praised same-sex marriage as an extension of LGBTQIA+ rights in his ruling, even though he refrained from legalizing it outright. He urged for a more inclusive interpretation of the current legislation in order to properly defend the equality and dignity of the affected group. "The discrimination meted out in the arena of health, employment, and residence must be effaced," he said.

The Special Marriage Act regulates marriage between "any two people", but the spirit of the Act does not include same-sex marriages given the use of words like "male-female", "bride-bridegroom", etc., as has been argued by the state in the petitions submitted by Kavita Arora and Ankita Khanna along with other same-sex couples looking to marry under the SMA. But, if these provisions were to be read down and interpreted as "two males" or "two females", then that would create scope for same-sex marriages to be solemnized under this Act. The *Arunkumar v. The Inspector General of Registration*<sup>32</sup> judgment where the High Court of Madras interpreted the term 'bride' under the relevant provision of the Hindu Marriage Act, 1955 to include a transgender woman could be relied upon for such a judicial reading down. Under the current statutory framework, the Special Marriage Act can act as the only refuge for same-sex couples.<sup>33</sup>

## VII. CONCLUSION

In conclusion, this research suggests the imperative need for recognizing same-sex marriage in India. Historical context reveals the past stigmatization and criminalization of homosexuality,

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<sup>32</sup> WP(MD) No. 4125 of 2019.

<sup>33</sup> Priyanshi Bhardwaj, *The Scope of Recognition of Same-Sex Marriage in India*, 4 INDIAN J.L. & LEGAL Rsch. 1 (2022).

but India has evolved, achieving significant legal milestones. The central hypothesis, endorsing same-sex marriage on par with heterosexual marriage, gains robust support.

Marriage is a fundamental right deeply entrenched in Indian society, granting couples legal protections. Denying this right to same-sex couples perpetuates discrimination and violates fundamental constitutional principles, including equality, privacy, autonomy, and dignity.

Despite complexities within personal laws, the Special Marriage Act, of 1954, emerges as a potential solution, allowing individuals from diverse religious backgrounds to marry without traditional rituals. It provides a legal framework for same-sex couples to secure recognition.

In essence, India stands at a pivotal moment, aligning with global trends toward marriage equality. Dismantling barriers to same-sex marriage upholds principles of freedom and dignity, reflecting an inclusive, diverse, and equitable society. Recognizing same-sex marriage transcends mere acceptance; it's a fundamental human rights imperative.

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