

LEGAL LOCK JOURNAL
2583-0384

VOLUME 3 || ISSUE 4

2024

This Article is brought to you for “free” and “open access” by the Legal Lock Journal. It has been accepted for inclusion in the Journal after due review.

To submit your Manuscript for Publication at Legal Lock Journal, kindly email your Manuscript at legallockjournal@gmail.com.

**THE EVOLVING FRAMEWORK FOR SAME-SEX MARRIAGE IN INDIA -
AN EXAMINATION OF THE IPC AND BNS**

Rakesh IR¹ & Jayaram R²

ABSTRACT

Same-sex marriage is the marriage of two people of the same legal sex. It can also refer to marriage between partners of the same gender identity. Marriage of Same-Sex couples is not recognized in India but Same-Sex relationships were decriminalized by the Supreme Court in navtej johar case which left questions open for their marriage. The legal structure in India did not contribute to facilitating this community. Recognizing same-sex marriage as a fundamental human right is imperative to eliminate discrimination, ensuring equal access to marriage for all individuals and providing justice to the LGBTQIA+ community. This paper examines the evolution of legal and social frameworks pertaining to marriage, with a particular focus on the rights and recognition of same-sex couples. It explores the legal landscape, societal attitudes, and potential implications of recognizing same-sex unions within the existing legal framework, bringing light on the intersection of individual rights and emphasizes the significance of recognizing and resolving the LGBTQIA+ community's inherent discrimination within existing legal institutions. By examining landmark cases and legal precedents, this paper serves as a comprehensive examination of the evolving framework for same-sex marriage in India, drawing on the nuances within the IPC and BNS.

As the legal landscape evolves, the paper advocates for a holistic approach that combines legal reforms with social awareness and acceptance also various recommendations are provided for legislative amendments and policy changes to foster an environment where same-sex couples can enjoy equal rights and protection under the law.

KEYWORDS: LGBTQIA+, Same-sex, IPC, BNS,

¹The author is a student at Tamilnadu dr. Ambedkar law school (School of Excellence in law).

²The co author is a student at Tamilnadu dr. Ambedkar law school (School of Excellence in law).

INTRODUCTION:

Marriage, whether sacramental or contractual, has always been regarded holy. It is a natural connection between two 'Individuals'. In most advanced nations, marriage as a union between a man and a woman is progressively being superseded by a union between two people or individuals of either gender. The legal status of same-sex marriage in India remains ambiguous as is the impact on marital rights and consequences.

India attempts to recognize and legitimize same-sex marriage. Legalizing same-sex marriage would not only bring legal recognition and protection to same sex couples, but it would also increase societal acceptance and eliminate discrimination against the group. It is a critical problem for LGBTQIA+ rights activists and advocates all over the world, and its impact extends beyond the legal realm to larger social and cultural attitude towards the LGBTQIA+ community. The right to life and personal liberty guaranteed by Article 21³ of the Indian Constitution includes an individual's right to choose any sexual partner they desire, and such denial of their right is an infringement of individual's human rights. The Supreme Court in the case of *Navtej Singh Johar v. Union of India*⁴ ruled unanimously that section 377 of IPC⁵ is unconstitutional, in so far as it criminalizes consensual sexual conduct between adults of same-sex.

In India, the lack of legal recognition for same-sex marriage not only denies homosexual partners the basic rights enjoyed by heterosexual couples, but also exposes them to consequences such as discrimination, limited social recognition and acceptance within their family, and even heightened the risk of honour killings.

WHETHER RIGHT TO MARRIAGE IS A FUNDAMENTAL RIGHT?

“Marriage is a legally and socially sanctioned union, usually between a man and a woman, which is regulated by laws, rules, customs, beliefs, and attitudes that prescribe the rights and duties of the partners”⁶. Marriage is not an inherent, unqualified right, but rather one subject to statutes and customs.

³ INDIA CONST. art. 2

⁴ Navtej Singh Johar v. Union of India, (2017) 9 SCC 1

⁵ Indian Penal Code, 1860, § 377, No. 45, Act of Parliament, 1860 (India).

⁶ INDIAN LAW JOURNAL , Marriage, Britannica, at <https://www.britannica.com/topic/marriage>, last seen on 15/07/2021.

i. UDHR AND RIGHT TO MARRY:

Article 16 of the Uniform Declaration of Human Rights deals with Right To Marry⁷-(1) Men and Women of full age, without any limitation due to race, nationality of region, have the right to marry and to found a family. They are entitled to Equal rights as to marriage, during marriage and at its dissolution.(2) Marriage shall be entered into only with the free and full consent of the intending spouses.(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the state. So, Right to marry as a human right is guaranteed under Universal Declaration of Human Rights.

ii. FUNDAMENTAL RIGHT AND RIGHT TO MARRY:

The right to marry a partner of one's choice is not specifically stated in Indian Constitution. However, the Indian judiciary has repeatedly held that the freedom to marry and choose a partner are part of the right to life and personal liberty guaranteed by Article 21 of the Constitution⁸. The most prominent such example is the case of *Lata Singh v. State of U.P.*⁹, in which the Supreme Court held that a person who is not a minor has the freedom to marry whoever they want. Later, in *Shakti Vahini v. Union of India*¹⁰, it was established that two adults who consensually choose each other as their life partner are exercising their freedom of choice and expression under Articles 21 and 19¹¹ of the Constitution. As a result, an individual's personal liberty includes the freedom of choice to pursue happiness. Honourable Supreme Court again looked into another case for reference. It was the case of *Arumugam Servai v. the State of Tamil Nadu*¹², In this case, the court held that “The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is an erosion of choice. If the right to express one’s own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness”. The recent landmark Judgment of *Supriya Chakraborty & Anr.*

⁷ UDHR Art. 16

⁸ INDIA CONST. Art. 21

⁹ Lata Singh v. State of U. P., AIR 2006 SC 2522

¹⁰ Shakti Vahini v. Union of India.(2018) 7 SCC 192

¹¹ INDIA CONST. Art. 19

¹² Arumugam Servai v State of Tamil Nadu, (2011) 6 SCC 405

*v. Union of India*¹³, where Justice Bhat leading the majority opinion held that all persons have the right to relationship and choice of partner, cohabit and live together, as an integral part of choice. This is already recognised under Article 21 of Indian Constitution. Justice Narasimha added that marriage is a fundamental freedom, not a right.

To entirely eliminate discrimination against LGBTQIA+ couples, same-sex partnerships must be legalised, with the first step being the legal acknowledgment of homosexual marriages. Despite the fact that the right to a partner of choice have been declared part of Article 21 of the Constitution in numerous cases, same-sex marriages are still not recognized in India, violating the fundamental rights guaranteed to all citizens, regardless of religion, race, caste, sex, place of birth, sexual orientation, or gender identity which is violation of Article 15 of Indian Constitution.

PERSONAL LAWS AND INCLUSION OF SAME-SEX MARRIAGE:

In India, marriage is governed by personal laws based on religion. The Hindu Marriage Act of 1955 governs Hindus, Sikhs, Jains and Buddhists. The Indian Christian Marriage Act of 1872 governs Christians, and the Parsi Marriage and Divorce Act of 1936 governs Parsis. The Unwritten Muslim personal laws apply to Muslims. Marriage is a fundamental aspect of religion and is governed by its own laws. But none of the personal laws expressly accepted the same-sex marriage.

A thorough examination of the Hindu Marriage Act, 1955 reveals that there is no clear-cut provision requiring a marriage to be performed between a man and a woman. The regulations governing marital rights under the Indian Christian Act of 1872 are identical to those in the Hindu Marriage Act of 1955. This Act is from the British era, and there is no doubt that marriage can only take place between a husband (man) and a wife. Marriage is seen in Islam as a contract, or Mithaqun Ghalithun (a binding agreement). Marriage's aim is to fulfill a man's and a woman's essential their desire for one other, as well as to realize their procreative roles. Marriage is a contract between a man and a woman, with the male providing financial support and the woman receiving exclusive sexual access (by vaginal intercourse). Homosexuals cannot legally marry or recognize their relationship since they are unable to fulfill the marriage commitment. The Quran does not make homosexual actions punishable

¹³ Supriya Chakraborty & Anr. v. Union of India, Writ Petition (Civil) No. 1011 of 2022

by death, and Prophet Muhammad expressed contempt for gay relationships while not outright prohibiting them.

Criminal laws related to Homosexual:

The developments within Indian law, particularly regarding the decriminalization of same-sex relations and the proposed Bharatiya Nyaya Sanhita (BNS), reflect a progressive shift towards protecting the rights and dignity of the LGBTQIA+ community. The landmark cases of *Navtej Singh Johar v. Union of India*¹⁴ and *Naz Foundation v. Govt. of NCT of Delhi*¹⁵ have paved the way for greater inclusivity and recognition of the rights of individuals regardless of sexual orientation. By striking down Section 377 of the Indian Penal Code, the Supreme Court and the Delhi High Court have affirmed the constitutional principles of equality, freedom, and justice, recognizing that discrimination based on sexual orientation is unconstitutional.

The proposed BNS, with its absence of provisions criminalizing LGBTQIA+ individuals, further reinforces this commitment to safeguarding the rights of the community. Instead of perpetuating discrimination and stigma, the BNS seeks to protect and uphold the dignity of all individuals, irrespective of their sexual orientation or gender identity. By reframing the legal framework the BNS represents a positive step towards ensuring equality before the law for all citizens.

In essence, these legal developments underscore a broader societal shift towards acceptance, tolerance, and respect for LGBTQIA+ rights in India. Moving forward, it is imperative to continue advocating for comprehensive legal protections and social acceptance to create a more inclusive and equitable society for all.

In *Abhijit Iyer v. Union of India and Others*¹⁶, Mr. Abhijit Iyer petitioned for the registration of same-sex marriage under the HMA, 1955. He argued that the statute is gender-neutral and does not explicitly prohibit same-sex marriage. Non-recognition of the right to marry a person of choice violates fundamental rights stated in Articles 14 and 19 of the Indian

¹⁴ Navtej Singh Johar v. Union of India, AIR 2018 SUPREME COURT 4321

¹⁵ Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277

¹⁶ Abhijit Iyer v. Union of India and Others W.P.(C) 6371/2020

Constitution. Homosexual relationships have been socially stigmatized due to an inequality in marital privileges between them and heterosexuals. Despite the decriminalization of homosexuality, the Central Government informed the Delhi High Court that marriages are only permitted between biological man and woman, i.e., heterosexuals.

LEGALISATION OF SAME-SEX MARRIAGE:

Marriage provides social, economic, and moral benefits to both parties. Homosexual couples face social stigma because there are no same-sex marriage laws in place. This raises the stigma associated with homosexuality and may promote homophobia. Homosexual couples cannot receive the same advantages as heterosexual couples in a live-in relationship, including protection from domestic violence and maintenance/alimony. To ensure fundamental rights are protected, the couple must have access to all of the aforementioned rights. The prohibition of same-sex unions can lead to serious mental illness and long-term societal chaos; a nation like India, the non-legalization of same-sex unions may have adverse effects. India is a flexible country, but whether it can amend the laws governing to same-sex marriage that needs to be addressed. Fundamental rights like the right to life (Article 21), the right to equality (Article 14), the right to freedom of speech and expression (Article 19(1)(a)), the right to live with dignity (Article 21), the right to choose a partner (Article 21), and the right to privacy (Article 21) would be violated if same-sex marriage is not made legal. Article 15 of the Indian Constitution mandates the State to prevent from discriminating solely on the basis of religion, race, caste, sex, place of birth, or any combination of these factors.

Marriage is seen as a very significant social and legal institution in a country like India. In our society, marriage is linked to both legal privileges and social responsibilities. The "Right to choose one's life partner to marry," which is guaranteed by Article 21 of the "Right to Life," is so fundamental to a person's existence that our constitution gives everyone complete discretion over who they choose to marry. Despite being acknowledged as such, the fundamental right to marry the person of one's choosing does not extend to same-sex unions. This demonstrates how LGBTQIA+ people's basic rights are in vulnerability. The lack of legislative action leaves them vulnerable to losing their constitutional right to marry.

Homosexual spouses are unable to take advantage of perks like as maintenance and succession that heterosexual partners enjoy. Article 15 of our constitution says that the state shall not discriminate on any grounds of religion, race, caste, sex, or place of birth against any citizen. The restriction on same-sex marriage violates fundamental rights of individuals.

This important judgment of *Navtej Johar Case*¹⁷ provided the LGBTQIA+ community with long-awaited recognition and equality. Although most viewed it as a huge win, but same-sex marriage is still prohibited. LGBTQ couples are still denied legal and societal recognition as heterogeneous spouses. Despite the constitution and personal laws granting everyone the right to marry regardless of gender, same-sex marriages in India remain illegal. Legalizing same-sex marriages alone is insufficient in countries like India, where marriages are validated by both legal and societal recognition. Our society and legislation will eventually approve same-sex marriages, yet it may take a few years to do so.

CONSEQUENCES IF INDIA LEGALISED THE SAME-SEX MARRIAGE:

Legalizing same-sex marriage in India would undoubtedly reshape the institution of marriage, potentially yielding both positive and negative consequences within contemporary society. However, the legal system is constantly evolving, and there have been continuous debates, court cases, and initiatives in support of marriage equality and LGBTQIA+ rights in India. Various constructive actions have been implemented, such as the Supreme Court of India's 2018 decriminalization of homosexuality. The legalization of same-sex marriage in India will depend on a number of factors, including the general public's attitude, political will, court rulings, and the country's changing cultural environment. Even if there has been progress, more court cases, changes to current legislation, or the introduction of new legislation could be necessary on the path to legalization.

Arguments for same-sex marriage:

1. **Social Acceptance:** Legalization may lead to an decrease in stigma and prejudice against the LGBTQ+ population by increasing public acceptance and tolerance.
2. **Legal Protections:** Couples that are same-sex would be granted legal recognition and rights, including those related to inheritance, healthcare, decision-making, and parenting rights.

¹⁷ Navtej Johar, *Supra* at 12, at 6

3. Cultural Evolution: Legalization may lead to debates regarding gender roles, family dynamics, and traditional values in Indian society.
4. Eliminate discrimination: Denying same-sex marriage violates the Fundamental Rights guaranteed under Article 15. To eliminate the discrimination of LGBTQIA+ community India should legally and socially accept the same-sex marriage.
5. Upholding the Constitutional value: To uphold the constitutional values of equality, freedom and justice requires extending marriage right to all citizens, regardless of sexual orientation.

Arguments against same-sex marriage:

1. Cultural and Religious belief: Recognizing same-sex marriage may go against traditional Indian cultural values, which typically prioritize heterosexual unions.
2. Legal complexities: Existing personal laws which it defines that marriage as a union between a man and a women. So without clear and proper recognition, same-sex couples face numerous legal challenges, including marital rights, adoption, maintenance, divorce, etc.
3. Parenting issue: The children raised by the same-sex couples may face social stigma, bully, discrimination when compared to those raised by the heterosexual couple.
4. Health issue: The same-sex marriage may leads to higher health issues and risk, such as Sexually Transmitted Infection (STIs), due to certain sexual practices or promiscuity.
5. Population concerns: Same-sex marriage could potentially contribute to declaim of birth rate, which could impact in long term implication of workforce dynamics, economic growth, and social welfare systems.

The legalization of same-sex marriage in India holds significant potential for positive societal transformation. India can promote a more equal and inclusive society where everyone has the freedom to love and commit to their partners, regardless of their sexual orientation, by supporting marriage equality. This action would represent an important step in the direction of safeguarding basic human rights, encouraging social acceptance, and developing a respectful and diverse culture. Furthermore, granting legal recognition to same-sex unions would grant partners essential legal rights and protections, guaranteeing them legal equality. While conflicts and disputes may exist, the benefits of accepting marital equality far

outweigh any potential drawbacks. Finally, by accepting change and guaranteeing equal rights to all individuals, India can provide the groundwork for a more compassionate, just, and peaceful society for future generations.

RECOMMENDATION:

Despite the Supreme Court's decision to strike down Section 377 of the Indian Penal Code in 2018, which was an important step forward for LGBTQIA+ rights in India, the route to legalizing same-sex marriage remains difficult and challenging. While the verdict decriminalized same-sex interactions and paved the way for the possible legalization of same-sex marriage, the lack of a precise legislative framework leaves the matter in ambiguity.

The government's position on introducing legislation for same-sex marriage remains unidentified, and not a single step has been taken to address the issue. The absence of legal recognition for same-sex marriages in India reflects a stronger societal divide on the topic, with opposing viewpoints among the general people. While some support for equality and acknowledgment of LGBTQIA+ rights, others oppose same-sex marriage due to cultural, religious, or personal beliefs. Moving forward, the government must engage in debate and deliberation to close the legal loopholes and uncertainties around same-sex marriage. It takes a determined effort to achieve unity, foster understanding, and secure equal rights and protections for all people, regardless of sexual orientation or gender identity. As the legal and social landscape continues to change, there is still a possibility for progress toward complete equality and acceptance for the LGBTQIA+ community in India related to same-sex marriage.

The rise in crimes against the LGBTQIA+ community underscores the urgent need to address societal prejudices and protect fundamental rights. Same-sex couples face heightened risks, including the threat of honour killings, due to societal resistance to accepting their relationships. The landmark decision by the Supreme Court in the *Shakti Vahini Case*¹⁸ highlights the gravity of honour killings and reaffirms the state's obligation to safeguard citizens' rights to life, equality, and freedom of choice. Similarly, advocating for same-sex marriage entails promoting the freedom to love and choose partners without discrimination based on sexual orientation. Both issues demand proactive measures to combat discrimination

¹⁸ Shakti Vahini, supra note 8, at 4

and ensure the protection of human rights, emphasizing the imperative for societal acceptance and legal recognition of LGBTQIA+ relationships.

Here some of the suggestions are:

1. To legalisation of same-sex marriage in India: India currently does not recognize same-sex marriage. In case the case of *Supriya Chakraborty vs UOI*¹⁹, Justice Bhat, who led the majority ruling, stated that all LGBT people have the right to choose their partner, cohabit, and live together as an intrinsic part of their choice. This is already recognised under Article 21. "Ordering a social institution" would necessitate a whole distinct legal framework, with a "new universe of rights and obligations." Justice Bhat stated that this would necessitate a separate regime for civil union registration, which would establish the conditions of a lawful union, including eligibility, age, limits, divorce, alimony, and a slew of other rights supplementary to marriage. The state is not required to recognize this "bouquet of entitlements". Where CJI Chandrachud pointed out that the law relating to the institution of marriage are enacted by the parliament. State legislatures are permitted to make amendments to such laws. Also highlighted that some state legislature who have not created an institution of marriage in exercise of their powers would be obligated to create an institution because of positive postulate encompassed in the right to marry. Justice S.R Bhat agreed with the CJI statement. It is not the duty of the judiciary to legislate for same-sex marriage it should be done by the legislation.
2. To enact a new law for same-sex marriage in India: The Indian Parliament should proactively introduce legislation to legalize same-sex marriage. This legislation should ensure equal rights and protections for all individuals, regardless of sexual orientation or gender identity.
3. To amend the existing personal laws and Special Marriage Act related to same-sex marriage: The provisions related to "marriage" should be amended with inclusion of LGBTQIA+ community.
4. To eliminate discrimination on LGBTQIA+ community: If India legalised the same-sex marriage it would eliminate the discrimination faced by the LGBTQIA+ individuals.

¹⁹ Supriya Chakraorty, supra note 11, at 4

5. To educate the proper awareness to the public: Creating public awareness campaigns to educate people about the importance of equality and inclusivity of same-sex marriage by adopting specific policies and practices.

As a recommendation to the legislation, we propose drafting a specific statute for the LGBTQIA+ community, drawing inspiration from legislative models such as the Respect for Marriage Act 2022 in the United States, the Marriage (Same Sex Couples) Act 2013 in the UK, as well as referencing the Draft for a Progressive Uniform Civil Code 2017 and the Special Marriage Act, 1954. That we attached the newly proposed bill below for consideration and review

CONCLUSION:

More than 30 countries around the world have legalized same-sex marriage. This number continues to evolve as more nations recognize the rights of LGBTQ+ individuals to marry regardless of their sexual orientation or gender identity. The same-sex marriage legalization has been achieved through court decisions. This judicial approach highlights the role of the judiciary in interpreting constitutional principles and ensuring the protection of LGBTQIA+ rights, even in the absence of legislative action. These diverse paths to legalization underscore the global evolution towards recognizing and affirming the rights of LGBTQIA+ individuals to marry whomever they love, regardless of gender. It has been suggested that lawmakers in order to legislate the same-sex marriage they should focus on changing secular laws, like the Special Marriage Act , which simplifies marriage for individuals of different religious backgrounds or who choose not to follow the personal laws of their religion. This technique may seem reasonable, but it ignores the main issue, which is the obvious inconsistency between fundamental rights and gender/sex discrimination in personal law that our culture and legal system have failed to adequately address.