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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

LEGALIZING SAME SEX MARRIAGE IN INDIA **WITH REFERENCE TO PERSONAL LAWS**

AUTHORED BY - GUNGUN SINGLA

ABSTRACT

However, the issue of bringing in same sex marriage in India is still open, in spite of the progressive court decisions. In the Navtej Singh Johar case the same sex relationships ceased to be criminal under Section 377 of the Indian Penal Code, however, same sex marriages were not given legal status. Some of the theological frameworks of marriage applicable in India are Hindu Marriage Act, Muslim Personal Law, and Special Marriage Act. These acts continue to exclude LGBTQ+ from the definition of a marriage between a man and a woman. This discrimination has meant that same sex couples cannot simply have access to basic legal protections like adoption, spousal benefits and inheritance and many more. By judicial initiatives they demonstrated the need for legal change as in the case of Supriyo Chakraborty v. Union of India (2023), which referred the problem to the legislature. This paper seeks to provide for the constitutional reasons for the entitlement of LGBTQ+ persons for the same set of rights as existing under Indian law in favor of marital equality and suggest amendment of Special marital Act and other legislative amendments.

INTRODUCTION

The core issue of the discussion of legalizing same sex marriage in India rests in its intricate personal laws and ever-changing social norms. Legally, LGBTQ+ people in India cannot get spousal benefits, inheritance, or adoption since marriage is still only allowed in heterosexual partnerships according to Hindu Marriage Act, Muslim Personal Law, and the Special Marriage Act. Although the Navtej Singh Johar ruling of 2018 decriminalized same-sex interactions by striking down Section 377 of the Indian Penal Code, the recognition of same-sex weddings is still a matter of contention.

With a focus on the consequences of expanding marriage rights to same-sex couples in India, this article examines the relationship between personal laws and constitutional principles. As seen in instances such as Supriyo Chakraborty v. Union of India (2023), the court is hesitant

to openly tackle the subject, hence the onus has mostly been on the legislature. Although the issue of marriage equality in India has been resisted culturally and religiously historically, this study attempts to assess how constitutional provisions of equality, personal liberty and nondiscrimination can offer foundation to the equality.

This study advocates for legal reforms, including Uniform Civil Code or modification to Special Marriage Act, in order to bring forth a marriage framework which is same for all the citizens irrespective of their sexual orientation and is beyond religious barriers.

LEGAL FRAMEWORK GOVERNING MARRIAGE IN INDIA

In India, personal rules govern the marriage, which have different characteristics depending upon various sects that represent the rich religious diversity of the country. For example, Hindu Marriage Act of 1955 is an Act that makes rules about marriages of Hindus, Buddhists, Jains and Sikhs. It lays down the minimum age of marriage, the capacity to marry, the impediments to marriage, the prohibition on marriages within certain degrees of relationship, that is, sapinda relationships, etc. This legislation codifies religious practices according to which the legislative also provides for grounds of judicial separation, maintenance and restoration of marital rights and for divorce.

Primary governing documents for a Muslim wedding are The Muslim Personal Law (Shariat) Application Act, 1937 and the concepts found in Islamic texts like Quran and Hadith. Islamic marriage is a legally binding relationship between two people who freely enter into it; there is a custom for the groom to give to the bride a dower called Mahr as a token of his commitment to the union. Muslim law also allows polygamy, marriage within some types of close family connections (mahram) are forbidden, and either spouse has the right to divorce. The judiciary, one example being Supreme Court's 2019 ruling that Talaq-e-Biddat (immediate triple talaq) is unconstitutional, has been reinterpreting the law on divorce and reformed it.

Indian Christian Marriage Act of 1872 governs marriage ties pertaining to Christians while Parsi Marriage and Divorce Act of 1936, Likewise, these laws encode culture and religious teachings into law just like their Muslim and Hindu counterparts. Because personal laws fail to extend any recognition or provision for same sex weddings where LGBTQ+ people are denied the same rights and protections as heterosexual spouses.

Nevertheless, civil weddings in India are secular under the Special Marriage Act, 1954. This legislation is applicable to all the people of India irrespective of caste, creed or religion and also used by the persons of other faiths or those who choose not to get married through religious sacrament. The Act defines marital validity, procedures of divorce or judicial separation or maintenance and the minimum age and the minimum mental ability that has to exist. It also prohibits, by permitting degrees of prohibited relationship, marriage therein.

Interfaith and secular weddings are a huge step towards not being limited by personal religious laws when it comes to marriage, as established by The Special Marriage Act.

None of these legal systems, including personal religious laws and the secular Special Marriage Act, at present recognize same sex weddings. LGBTQ+ people continue to be denied many basic rights of married people like whom to inherit, who to adopt, how to own property jointly, taking part in health care decisions and providing financial protections. In light of the landmark decision in Navtej Singh Johar v. Union of India (2018) which knocked down Section 377 of the Indian Penal Code that criminalized consensual same sex interactions. This legislation sidestepped great victories for the LGBTQ+ community including legalized same-sex marriage, legalized adoption, and the legalization of homosexuality.

In the last couple of years, LGBTQ+ campaigners in India have been picking up pace in attempts to either recognize same sex weddings under the Special Marriage Act or revise the past personal laws for legalization of same sex marriage.¹ Apart from being a right to equality violation under Article 14 of the Indian Constitution, denial of marriage rights to LGBTQ+ persons also precludes enjoyment of the same social and legal benefits as heterosexual couples. For many reasons such as safety net, accepted by others, and the option to have children through adoption we need marriage in the LGBTQ+ community.

Furthermore, as the world is moving towards marriage equality, it is now more necessary than ever for India to refrain from discriminating based on sexual orientation and granting equal rights to all its residents as well. While legalizing same sex weddings is a step in the right

¹ “<https://blog.ipleaders.in/marriage-laws-india-analysis-legal-solemnization-marriages/> (last visited on 20th January 2025)”

direction toward equality and human rights for many countries including the United States, United Kingdom, Canada and several European ones. India having always been a democratic country aspiring to salvage justice, liberty and equality from the very sign which starts the world then has to take steps to pass laws that are comprehensive and updated.

Last but not least, present legal system in India that is on the basis of personal laws and Special Marriage Act does not provide same sex couples with any additional rights associated with married couple. This exclusion has led to a lack of legal safeguards and continued injustice. Therefore, it is important and urgent to legalize same sex weddings to allow LGBTQ+ people to have kids, to get married and to have access to the same social and rights as heterosexual people. Amending current marriage laws to include same sex couples or expanding the scope to recognize same sex partners under the Special Marriage Act is a major step to make the legal system of India more inclusive and egalitarian. Supporting same sex marriage by the Indian government is a proclamation of its adherence to the cause of social justice and equality of all its residents and as a basic human right.

Overview of Personal Laws

In India, unlike for example in the UK where a secular option exists for non-religious or inter faith relationships, weddings are controlled by a patchwork of personal laws based on faith and culture.

The law regulating weddings between Hindus, Buddhists, Jains and Sikhs is the Hindu Marriage Act of 1955. All this statute does is spell out monogamy, minimum age of 21 years for males and 18 years for women, mental competency, prohibition of weddings in forbidden degrees of connection, sapinda ties and provided the social norms permit weddings in such sapinda kin.

As per Islamic law and the Muslim Personal Law (Shariat) Application Act, 1937, civil law is different from Muslim personal law. A Mahr (dower) given to a bride is a mandatory part of a Muslim marriage or Nikah which is a legally binding contract between two free and consenting people. According to the legislation, there is no problem with a Muslim male having up to four wives, but only if they are treated equally. Talaq can start a divorce by one spouse while Khula or mutual agreement can commence by the other spouse.

Christian marriages are governed by the Indian Christian Marriage Act, 1872 which lays down the provisions of consent, age (21 years for men and 18 years for women) and a license minister or Marriage Registrar has to be involved in such a marriage. It also requires one to have a notice period, as well as certification upon solemnization.

Under Special Marriage Act of 1954, everyone, irrespective of their religious beliefs, can be married only in a civil ceremony. Essentially, a 30-day notice period with the Marriage Officer is needed and it is mainly preferred for interfaith or intercaste marriages. This statute incorporates clauses of maintenance, of inheritance under the Indian Succession Act of 1925, and divorce.

Definition of Marriage in Current Laws

There is a secular option for civil weddings in India, and there are also personal rules that are specific to religious groups that regulate marriages. A precise definition of marriage, however, is absent from these statutes. Marriage is understood through the provisions and conditions outlined in these legal frameworks. While the statutes regulate marriages, scholars and sociologists have provided definitions to capture the essence of this institution.

According to **Edward Westermarck**, *“Marriage is a relation of one or more men to one or more women which is recognized by custom or law and involves certain rights and duties both in the case of the parties entering the union and in the case of the children born of it.”*² This definition emphasizes the legal and customary recognition of marriage as a union between men and women, highlighting the duties and responsibilities of spouses, as well as their role in procreation and child-rearing.

Similarly, **H.M. Johnson** defines marriage as, *“a stable relationship in which a man and a woman are socially permitted without loss of standing in community, to have children.”* This definition upholds the conventional wisdom that marriage is a socially legitimate relationship between a man and a woman, especially when it comes to issues of reproduction and family life.

² “<https://www.slideshare.net/slideshow/definition-forms-of-marriage-family/127681058> (last visited on 21st January 2025)”

Although the term “marriage” is not used in Indian law, the regulations surrounding it are founded on the long-held belief that it is a union between people of different sexes. Marriages between Hindus, Buddhists, Jains, and Sikhs are regulated by the Hindu Marriage Act, 1955, which prohibits intimate family ties, has an age limit for marriage, and emphasizes monogamy. Under the Muslim Personal Law (Shariat) Application Act, 1937, polygamy is permitted under certain circumstances, and marriage is seen as a contract between a man and a woman, requiring permission and the supply of Mahr (dower). A licensed preacher or registrar is responsible for solemnizing the marriage of a man and a woman according to the Indian Christian Marriage Act, 1872, which governs Christian weddings. With an emphasis on marriage registration, dissolution, and the Indian Succession Act, 1925's inheritance regulations, the Special Marriage Act, 1954 establishes a secular framework for civil marriages between males and females.

All of these statutes and explanations have one thing in common: they all define marriage as including only a man and a woman. Similar to how same-sex couples are not officially recognized under Indian marital law, these definitions and legal frameworks fail to acknowledge same-sex unions or weddings. However, progressive judicial beginnings like the decriminalization of consensual same sex relationships in the landmark case of *Navtej Singh Johar v. Union of India* has failed to couple with legal or custom based institution of marriage to heterosexual unions only. *Union of India* (2018). The laws on marriage in India do not have any provision or acknowledgements for same sex couples.

Limitations of Existing Frameworks for Same-Sex Couples

A result of the 5-judge bench comprising of Chief Justice D.Y. Chandrachud, Justices S. Ravindra Bhat, Hima Kohli, P.S. Narasimha, and Sanjay Kishan Kaul striking down certain provisions of the Indian constitution relating to the same sex couples shook the spots. There were four different opinions, including a combined opinion from Justices Bhat and Kohli. Particularly in cases involving the institution of marriage, the decision highlighted the Supreme Court's unwillingness to legislate from its seat.

In answering the central issue of whether same-sex couples had a basic right to marry, the court unanimously decided that it lacked the jurisdiction to force politicians to establish a “institution of marriage they have not created.” As a matter of personal liberty and freedom of expression,

Chief Justice Chandrachud and Justice Kaul believe that Article 19 upholds the right of LGBT individuals to establish civil partnerships. However, Justices Bhat, Kohli, and Narasimha disagree, referring to the idea of separation of powers. It is the duty of the government, not the court, to provide additional legal protections for same-sex partnerships, they said.

When deciding whether the Special marital Act (SMA), 1954, was discriminatory or whether the freedom to marry might be inferred within its terms, the court continued its cautious approach to the subject of marital equality. The court ruled that the SMA was not discriminatory but did state that the power to change the legal framework lay with the legislature due to the “*limited institutional capacity*” of the judiciary.³ Furthermore, the court explicitly denied the possibility of granting legal recognition to same-sex marriages, as doing so would encroach on the legislative domain without the state's recognition of a “*bouquet of entitlements*” for queer persons.

The court also touched upon related issues, including adoption by queer couples and marriage for transgender and intersex persons. While Chief Justice Chandrachud asserted that the current adoption guidelines were discriminatory as they only allowed single individuals or married heterosexual couples to adopt, most of the bench expressed concerns that without a formal marriage framework, children adopted by queer couples might lack legal protections such as maintenance, custody, and guardianship. The bench urged the state to create a statutory framework to address this. Nonetheless, the court's majority decision upheld the freedom to marry for transgender and intersex people in heterosexual partnerships.

The Supreme Court did not recognize same-sex marriages legally despite these discussions, therefore the burden is on the legislation. Solicitor-General Tushar Mehta, speaking on behalf of the government, stressed that religious, cultural, and societal conventions in India have long held the view that marriage is essentially a relationship between a man and a woman. The government argued that legalizing same-sex marriages could destabilize -sex marriage through the landmark *Obergefell v. Hodges*⁴ decision led to broader society and erode cultural values, further stating that there is no social consensus for such a change, as only 34 countries

³ <https://www.mpdnl.ac.in/assets/pdf/4.%20Challenges%20in%20the%20Existing%20Legal%20Framework> (last visited on 11th February 2025)

⁴ https://medium.com/%40publicpolicy_36001/institutional-limitations-and-the-conundrum-of-same-sex-marriage- (last visited on 17th February 2025)

worldwide have legalized same-sex marriage.

This brings to light the core conundrum of marriage equality: while legal acceptance often precedes social acceptance, the government's argument relies on the absence of social support as the reason for not granting legal recognition. This circular argument makes it difficult for LGBTQ+ individuals to attain marriage rights in a society where legal reforms are needed to foster social acceptance. One example is the growing popular support for same-sex marriage in the US, which has led to the legalization of same-sex social acceptability. This is why it is so hard to get any kind of legal recognition for the gay community, as the latest ruling in India shows. As a result, since the government, representing the majority, does not want to pass a bill, the community remains without legal redress, and the Supreme Court's insistence on regard for the separation of powers merely made the problem worse. Despite that, and thanks to the persistence of LGBTQ+ activists for their right to marry, it seems there is a long and difficult road ahead to achieving their right to marry.

In addition, lack of recognition of same sex couples is an indication of the limitations of existing legal frameworks for same sex couples in India as it leads to denial of matrimonial rights, adoption and parental rights, social security and benefits, inheritance and succession, legal protection and discrimination and stigmatization of same sex couples. The 2018 *Navtej Singh Johar v. The State of India* Supreme Court decision decriminalized the same sex partnership, but the road to marriage equality is still blocked, thus preventing the LGBTQ+ people from taking the legally or privilege of being heterosexual persons. Every individual, regardless of his sexual orientation, must be equally protected and provided with absolute rights, through immediate and complete legislative changes.

JUDICIAL DEVELOPMENTS

The efforts of the Indian judiciary in the past few years to legitimize same sex marriage have been major strides in the area of personal laws. In the seminal case of *Navtej Singh Johar v. The State of India*, the Supreme Court made an important win for LGBTQ+ rights. The *Union of India* (2018), which decriminalized same sex partnerships under the decriminalizing of Section 377 of the Indian Penal Code. The Hindu Marriage Act, 1955, the Muslim Personal Law, and the Special Marriage Act, 1954 specify that the marriage is between a man and a woman but this verdict does not suffice to include such privileges to marriage in case of same sex couples, they are

not recognized legally by these statutes.

In **Supriyo Chakraborty v. Union of India (2023)**, The petitioners in their demand for recognition of same sex weddings invoked the constitutional guarantee of the equality (Article 14), liberty (Article 21) and nondiscrimination (Article 15). However, the Supreme Court didn't rule on the issue of same sex weddings and instead suggested to the lawmakers to sort out things. While precedents such as *Naz Foundation v. In 2013*, a case called *Suresh Kumar Koushal v.* had been decriminalized by the Government of NCT of Delhi (2009). In the *Navtej Johar* case, Section 377 was overturned, but *Naz Foundation's* use of the temporary rollback was revived until it's overturned. Although legal decisions have allowed conversation on marriage equality, it will be a long process from allowing same sex weddings in India, as much will require the old process of changing India's personal laws through legislative action.

CONCLUSION

However, even the *Navtej Singh Johar* decision, which decriminalized same-sex relationships, cannot be said to have decided whether a legal term for same sex marriage is extended in India. All of the personal laws including special marriage act, Muslim personal law and Hindu marriage act, perpetuates inequality and denied precious rights and protections to the LGBTQ+ i.e., to spousal benefits, inheritance and adoption etc, to same sex couples by stopping them from being in the institution of marriage. For years, the judiciary has been progressive in recognizing LGBTQ+ rights, but it has always pushed toward marriage equality to the legislature: *Supriyo Chakraborty v. Union of India* case.

Recommendations

In bridging this divide, a secular, inclusive legal framework has to be institutionalized and the Special Marriage Act has to be amended to recognize same sex marriages. The enactment of a Uniform Civil Code, may further promote equal rights of all people irrespective of sexual orientation, and might further remove religious inequalities in the marriage regulations. It is equally as important that public awareness campaigns that aim to decrease stigma and increase acceptance of LGBTQ+ rights exist to propel this social and legal change.