

# INDIAN JOURNAL OF LEGAL REVIEW



VOLUME 3 AND ISSUE 2 OF 2023

INSTITUTE OF LEGAL EDUCATION



## INDIAN JOURNAL OF LEGAL REVIEW

APIS – 3920 – 0001 | ISSN – 2583-2344

(Free and Open Access Journal)

Journal's Home Page – <https://ijlr.iledu.in/>

Journal's Editorial Page – <https://ijlr.iledu.in/editorial-board/>

Volume 3 and Issue 2 of 2022 (Access Full Issue on – <https://ijlr.iledu.in/volume-3-and-issue-2-of-2023/>)

### Publisher

Prasanna S,

Chairman of Institute of Legal Education (Established by I.L.E. Educational Trust)

No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

Phone : +91 94896 71437 – [info@iledu.in](mailto:info@iledu.in) / [Chairman@iledu.in](mailto:Chairman@iledu.in)



ILE Publication House is the  
**India's Largest  
Scholarly Publisher**

© Institute of Legal Education

**Copyright Disclaimer:** All rights are reserve with Institute of Legal Education. No part of the material published on this website (Articles or Research Papers including those published in this journal) may be reproduced, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior written permission of the publisher. For more details refer <https://ijlr.iledu.in/terms-and-condition/>

## INCLUSIVE JUSTICE: THE JUDICIARY'S RESPONSIBILITY IN ADVANCING THE MARRIAGE RIGHTS OF THE LGBTQ+ COMMUNITY

**Author** – K R SPANDANA, STUDENT AT BENNETT UNIVERSITY

**Best Citation** – K R SPANDANA, INCLUSIVE JUSTICE: THE JUDICIARY'S RESPONSIBILITY IN ADVANCING THE MARRIAGE RIGHTS OF THE LGBTQ+ COMMUNITY, *Indian Journal of Legal Review (IJLR)*, 3 (2) of 2023, Pg. 64-70, APIS – 3920 – 0001 & ISSN – 2583-2344.

### ABSTRACT

*A culture such as India places a high level of significance on the institution of marriage. Over the course of many millennia, ceremonies have always been performed in the same approach. The idea that a man and a woman are united in some way by means of these rites carries with it a great deal of weight and import. The recognition of a category of people who have always been a part of society but were never accepted is evolving along with the shifting times. These are people who have always been a part of society but were never accepted. The desires and hopes of the members of the LGBTQ+ community to have the same level of recognition and treatment that is accorded to heterosexual people. A person's desire to be legally and spiritually bound to their partner is something that they are still working hard to achieve.*

### INTRODUCTION

Marriage is the coming together of two distinct individuals. The institution of marriage is one that has been maintained for as far back as anyone can remember doing so. This is one that has been upheld for as long as anyone can remember doing so. The performance of this holy rite can take on very different forms, according to the particular religious tradition that one adheres to. A person who does not wish to go through these procedures has the option of getting married in the family court in compliance with certain guidelines that determine from which religion, they associate to. This decision is available to them regardless of whether or not they wish to go through these procedures. Few of India's marriage laws, such as the Hindu Marriage Act of 1955, the Muslim Marriage Act of 1939, and the Christian Marriage Act of 1872, to name a few, have used the words "husband" and "wife" continuously throughout

the entirety of the text of the act. In accordance with the generally accepted norm, a marriage of this type can only be established between a man and a woman.<sup>146</sup>

The LGBTQ+ community has been around since the beginning of documented history; however, they have never received the recognition or acknowledgement that they deserved during their entire existence. In the recent case *Navtej Singh Johar v. Union of India* (2018), the judge found that being a homosexual wasn't a criminal act, the community had experienced a significant amount of accomplishment as a direct consequence of this. Taking things a step further, members of the LGBTQ+ community would want the legal right to be together with their significant other if they have a committed relationship. In order for this to happen, the

<sup>146</sup> Problems Related to Homosexuality and Legal Status of Homosexuality in India, 10 CPJLJ (2020) 47



marriage in question would have to be acknowledged by the highest court in India. In order for the couple to be recognised legally married, the marriage must be registered in accordance with one of India's marriage acts, whether it be the Hindu Marriage Act from 1955 or the Special Marriage Act 1954.

### I. Right to Marry the Person of Choice.

Article 21, which addresses the right to life and personal liberty, includes the innate right to marry the person of one's preference. The Constitution of India has granted this fundamental right to the citizen of the country. The fundamental rights which are said to be the necessity of a citizen is not absolute. Law has the option of putting a restriction to it. But the restrictions should be fair, just, and reasonable on a fundamental, procedural, and intrinsic level. The ability of each citizen to make decisions on matters essential to the pursuit of happiness is inherent to the freedom guaranteed by the Constitution. Belief and faith, as well as the decision to believe or not, are fundamental to constitutional liberty.<sup>147</sup> The fundamental right to life and personal liberty, which includes the right to marry, is recognised in Article 21 of the Indian Constitution.<sup>148</sup> In India, the right to marry is not unqualified and is governed by a number of regulations and constraints. For instance, the right to marry might be limited if doing so would help maintain public morality, health, and order. In addition, the Indian legal system recognises certain personal laws based on religion, which regulate marriage and other personal affairs for various religious communities. These laws can be seen as an example of the kind of laws that can be found in other countries.

Nevertheless, despite these limitations, the Constitution of India makes it illegal to discriminate against people on the basis of their religion, tribe, ethnicity, gender, or location of birth. "There is no part for society to play in

the matter of who we choose to be our life partners." This ensures that none of India's residents are discriminated against in terms of their ability to wed and start a family, regardless of their origins.

In addition, the Indian judicial system recognises that the right to marry involves the right to openly choose one's spouse or companion. This is a fundamental aspect of the right to marry. The Supreme Court of India ruled in the seminal case of *Lata Singh v. State of Uttar Pradesh* (2006)<sup>149</sup> that the right to marry the person of one's choosing is a fundamental right that cannot be limited by either the state or society. This decision was a watershed moment for the legal system in India.

In India, there is a lot of talk and disagreement about same-sex marriage. Even though same-sex marriage is not yet allowed in India, the question of making it a basic right under the Indian Constitution has been brought up in the courts. When it comes to same-sex marriage, the role of society and morality in the right to marry is a complicated problem that needs a careful balance between individual rights and social values.

The Constitution of India says that all of its subjects, including LGBTQ+ people, have the right to equality, freedom, and respect. The right to marry the person of one's choice is an important part of personal freedom, and any limits on this right must be fair and not go against basic rights.

In the case of *Navtej Singh Johar v. Union of India* (2018)<sup>150</sup>, the Supreme Court of India overturned Section 377 of the Indian Penal Code, which made being gay illegal. The court decided that sexual orientation is an important part of privacy, and that any kind of discrimination based on sexual orientation is a violation of basic rights. The decision supported the idea that people should not be treated

<sup>147</sup> *dls, W v W (Physical inter-sex): FD 31 Oct 2000*, SWARB.CO.UK (2022), <https://swarb.co.uk/w-v-w-physical-inter-sex-fd-31-oct-2000/> (last visited Jun 5, 2023).

<sup>148</sup> *W v. W (Physical Inter-sex)*, [2001] 2 WLR 674

<sup>149</sup> MANU/SC/2960/2006

<sup>150</sup> AIR 2018 SC 4321

differently because of who they are or what they look like.

When it comes to same-sex marriage, the role of society and morals in the right to marry is a controversial topic. The concept of marriage has been formed by social norms and values over time, but the Constitution of India supports the principles of non-discrimination and personal freedom. For India to accept same-sex marriage, social norms and ideals would have to change, and the country would have to become more open and modern.

When it comes to same-sex marriage in India, the role of society and morality in the right to marry is a complicated problem that needs a careful balance between individual rights and social values. Even though the Constitution of India says that all Indian citizens have the right to equality, freedom, and respect, accepting same-sex marriage would require a re-evaluation of social norms and beliefs. As the Navtej Singh Johar case shows, the courts have been very important in defending the ideals of non-discrimination and individual freedom. In India, however, the problem of same-sex marriage has not yet been dealt with in a clear way by the courts.

This Honourable Court has always protected inter-faith and inter-caste couples when they chose to marry and has often intervened to protect such couples in situations where their relationships were threatened.

Other than that, societal and familial pressures posed a threat. In *K.S. Puttaswamy v. UOI*, (2017) 10 SCC 1, nine judges of this Honourable Court agreed that the rights of LGBTQ+ individuals – including marriage equality – must be protected.

**"145.** ...are not 'so-called', but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and freedom."

In *Navtej Singh Johar & Ors. v. UOI*, (2018) 10 SCC 1 [CB], this Honourable Court determined that –

**"618.2.** Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution.

**618.3.** The choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation.

**618.4.** Members of the LGBT community are entitled to the benefit of an equal citizenship, without discrimination, and to the equal protection of law; ..."

## II. The Lack of Opportunities as Homosexual Partners

The marriage and family law framework in India is primarily based on traditional patriarchal and heteronormative values. Marriage is regarded as a social institution designed to unite a man and a woman. The Hindu Marriage Act, the primary statute regulating marriage in India, reflects this by recognising only heterosexual couples as eligible for marriage. The criminalization of homosexuality in India under Section 377 of the Indian Penal Code, until it was struck down in 2018 by the Supreme Court, reinforced the notion that same-sex relationships were not to be recognised as legitimate or equal to heterosexual relationships.

These laws demonstrate that the legal system in India has yet to completely recognise the need to provide homosexual couples with equal rights and opportunities. By maintaining traditional, heteronormative conceptions of marriage, the law reinforces the strict binary of gender roles and heterosexuality, marginalising and stereotyping other sexual orientations.

However, marriage is one of the primary ways in which society acknowledges, respects, and validates a relationship, and critically, this is a

societal standing that is conferred by law. This brings up an additional point to consider. Marriage is a societal institution that is both established by the state and subject to extensive legal oversight. To have a happy marriage while navigating the ups and downs of life together, any two people will need to put in significant effort. This task is made significantly more difficult for partners who are unable to marriage due to societal obstacles imposed by society or religion. The legislation imposes a hardship on same-sex couples that is in violation of the constitution because it does not allow them to marry because they are not allowed to marry other people of the same gender.

#### **A. The Perks of Marriage**

Legal unions between two people result in a plethora of rights, advantages, and responsibilities, all of which are conferred upon and safeguarded by the law. They have the option of becoming parents through surrogate, ART, or adoption. They are automatically entitled to benefits in the areas of partnership, inheritance, maintenance, and taxes. They qualify for benefits under a variety of employment laws and regulations. Even after a partner has passed away, the State will continue to provide protection for the surviving spouse in the form of a pension or compassionate appointments for the children of the deceased spouse.

##### **1. Couples can file taxes jointly-**

It may be in the best interest of the partnership to submit their taxes equally if only one of the partners is actively participating in the labour market and the other partner is remaining at home. If the couple chooses to submit their taxes individually, it is possible that they will not be able to take advantage of the benefits associated with being able to deduct two exemption amounts from the income.

##### **2. Couples can avail marital tax benefits-**

In India, married individuals can deduct a limitless amount from their taxes due to their marriage. You are free to give your companion an unlimited quantity of assets at any moment

without incurring any additional tax liability. Creating Family Partnerships in accordance with federal tax rules is another excellent way to assist family members distribute the revenue from the family business.

##### **3. Couples can avail governmental benefits-**

When a couple in India gets married, they are eligible to receive advantages such as medical insurance, unemployment insurance, and social security for each other. There are also other types of advantages, such as financing, which can be used for things like purchasing a house or paying for school, among other things.

##### **4. Couples have legal decision-making benefits-**

When you get married, you automatically have the position of next-of-kin for hospital appointments, and you can even make significant decisions regarding your spouse's health care on their behalf. Your choice in important matters relating to other aspects of life, such as schooling, finances, and social security, will be given significance, either equivalent to or after that of your spouse's.

##### **5. Inheritance-**

If there are no offspring, relations, or distant cousins, then both parties are eligible to receive the entire property. If the departed person's partner is still living, then the children each receive an equitable portion of the remaining two-thirds of the property. In the event that the surviving partner of the deceased does not survive, the decedent's offspring are entitled to an equitable share of the entire estate. The privilege of inheriting your partner's inheritance free of any obligation to pay estate tax.

##### **6. Adoption-**

Adoptions between people of the same sexual orientation are not yet recognised officially in India. According to the rules of this country, the only people who are allowed to foster a child are married couples or solitary adults. The legislation does not recognise partners of the same sexual orientation, and such couples cannot foster children.



In 2017, a petition was submitted to the Delhi High Court requesting that same-sex couples be granted identical rights when it comes to the adoption of children. However, the petition was rejected by the court because, according to its reasoning, it is up to the legislative to determine how to proceed with the matter.

For LGBTQ+ partners in India who desire to establish a family, the absence of formal acknowledgment for same-sex adoption has produced a number of obstacles that can be difficult to overcome. To realise their ambitions of starting a family, many people have turned to alternative methods such as surrogate or international adoption.

These are some of the advantages enjoyed by married couples on a daily basis. It is not possible for homosexual partners to take advantage of these privileges. Aside from the fact that they would not be legally committed to their partner, they would not be able to experience the same privileges as a heterosexual marriage.

### **B. The Perspective from Legal Positivism**

A legal theory known as legal positivism places more emphasis on the significance of the law in its textual form than it does on the law's potential moral or ethical consequences. Legal positivism would propose that the law should be interpreted and implemented as it is written, without consideration of moral or ethical considerations, in regard to the normalisation of heterosexual partners in marriage and not homosexual partners in India. This is because the law favours the normalisation of heterosexual partnerships.

Marriage between a man and a woman is the only kind of union that can be legally recognised in India. The Indian Constitution, which is the highest authority in the country, does not reference homosexuality or marriage between people of the same gender anywhere in the document. Therefore, according to the tenets of legal positivism, the existing legal structure in India does not acknowledge marriages between people of the same sexual orientation as valid legal unions.

However, it is essential to keep in mind that positivism in legal theory does not imply that the law is unchangeable or that it cannot be improved. It is possible for laws to evolve over time in reaction to shifting societal and cultural standards, and this does in fact happen. As a matter of fact, in recent years many countries around the globe have made marriages between people of the same gender lawful, which reflects a change in public sentiments towards homosexuality.

It's also important to keep in mind that positivism isn't the only viable legal theory out there. There are other legal theories, such as natural law, which contend that the law ought to be founded on moral and ethical principles. One example of such a theory is the contract theory. Legalizing marriage between people of the same gender would be regarded as an ethical requirement if viewed through the lens of natural law.

Legal positivism proposes that the existing legal structure in India does not acknowledge marriages between people of the same sexual orientation as valid legal unions. The fact that sentiments towards homosexuality and marriage between people of the same gender are continuing to develop does not, however, indicate that the law will never change in the future.

### **C. The Perspective from Natural Law**

In accordance with the principles of natural law, a marriage is understood to be a partnership between a man and a woman. This is because, in the natural world, the process of reproduction necessitates the involvement of both sexes in order to result in the birth of successors. According to natural law, the point of getting married is to establish a secure setting for having children and bringing them up, as this is the primary function of marriage.

On the other hand, offspring cannot be organically produced through the union of a man and a woman who are homosexual. Therefore, since they do not serve the same purpose as heterosexual relationships, they

cannot be compared to marriage according to natural law.

In addition, the conventional understanding of marriage, which is predicated on the concept of natural law, has served as the cornerstone of society for many generations. Any attempt to alter it could have significant repercussions for society as a whole because it is so profoundly entrenched in both societal and religious practises.<sup>151</sup>

Having said that, it is essential to keep in mind that natural law is merely one viewpoint, and that it can be interpreted in a variety of different ways. In addition, societal and cultural standards are not set in stone; rather, they can shift and develop over the course of time in response to alterations in attitudes and values.

It is essential to keep in mind that the concept of natural law is not universally acknowledged, despite the fact that some individuals may use natural law as a justification against the normalisation of marriages between people of the same gender. Even within the same society, there may be a variety of perspectives on what constitutes natural law due to the fact that natural law is interpreted differently depending on the culture and community being discussed.

In addition, there are those who believe that natural law is overly strict and that it does not take into consideration the complications of interpersonal relationships. They contend that love and reciprocal respect ought to be the primary motivating factors in romantic partnerships rather than a person's ability to bear children. According to this point of view, the function of marriage is not limited to the production of offspring; rather, it also serves the purposes of emotional support, companionship, and the maintenance of a consistent setting for all partners, irrespective of their sexual orientation.

In addition, despite the fact that conventional ideas regarding marriage may have served as the cornerstone of society for hundreds of years, it is essential to recognise that communities

and civilizations develop over the course of time. Norms in both society and culture are not immutable; rather, they can shift to accommodate shifting perspectives and principles. There is an increasing tendency towards the normalisation of same-sex marriage, which is expanding as society becomes more welcoming of LGBTQ+ individuals. Legal acknowledgment of same-sex partnerships is making headway in a growing number of countries around the globe, including India, where social attitudes towards same-sex relationships are shifting in a positive direction.

### III. Marriage Under Special Marriage Act 1954

The LGBTQ+ community would stand to gain substantial legal and societal advantages if the Special Marriage Act of India were amended to permit the certification of marriages between people of the same gender. Legal acknowledgment of same-sex marriage would give partners of the same gender access to a variety of legal rights and benefits, including rights to inheritance, tax benefits, and social security benefits. It would also provide a legal foundation for the termination of marriages between people of the same sexual orientation, which would reduce the complications and legal conflicts that can emerge from the absence of legal acknowledgment.

In addition, the legalisation of marriages between people of the same gender would aid in the fight against bigotry and intolerance directed at the LGBTQ+ community. The misconception that relationships between people of the same sexual orientation are not valid or appropriate in society frequently serves as the impetus for discrimination against same-sex partners. It would be beneficial to the fight against these stereotypes and the advancement of same-sex relationships if marriages between people of the same gender were legally recognised.

The preceding discussion of case laws provides a solid legal foundation for the acknowledgment of marriages between people

<sup>151</sup> Kurt Blankschaen, *Rethinking Same-Sex Sex in Natural Law Theory*, 37 JOURNAL OF APPLIED PHILOSOPHY 428 (2020).



of the same gender under the Special Marriage Act. The judgement in the case of Navtej Singh Johar v. Union of India recognised the right to privacy and personal sovereignty of individuals. This included the right to choose one's sexual orientation as well as the right to engage in consenting sexual intercourse with a companion of one's choosing. The court reached the conclusion that it is an infringement of fundamental rights guaranteed by the Indian Constitution to criminalise homosexuality and discriminate against individuals based on their sexual orientation.<sup>152</sup>

Both the Arun Kumar & Sreeja v. Inspector General of Registration and the Kavita Arora v. Union of India judgements acknowledged the right of same-sex couples to equality as well as the right of same-sex couples to choose their companions regardless of the gender of their partner. The judgements determined that the Special Marriage Act does not mention gender as a requirement for marriage and that refusing same-sex couples the right to marry is an infringement of their fundamental rights guaranteed by the Indian Constitution. Additionally, the judgements found that the Special Marriage Act does not specify gender as a prerequisite for marriage.

### CONCLUSION

Despite the fact that there has always been a homosexual community, members of that community have never been granted the right to conduct their lives according to their own preferences. The discussion about their fundamental rights, such as the right to life, the right to marry whoever they choose, and the right to privacy, The discussion regarding their rights has only just begun, but it has already produced a favourable result in the case of Navtej Singh Johar vs. the Union of India, which was decided in 2018.

It's a shame there aren't more Indian precedents here to bolster their argument.

There is still a substantial distance to travel before a noticeable shift can be made in the lives of these individuals. In the recent case of Supriya Chakraborty and another v. Union of India, a homosexual couple petitioned the Supreme Court of India to recognise marriages between people of the same sexual orientation. This was done in accordance with the Special Marriage Act. In this particular instance, it was mentioned that the Indian Supreme Court has always safeguarded the rights of intercaste and interracial partners to marry a person of their choosing, regardless of the circumstances of their relationship.

This constitutional process has simply reached another milestone with the legalisation of same-sex marriage. It was then stated that in the cases of Navtej Singh Johar and the Puttaswamy case, it was held by the Supreme Court that the people of the LGBTQ+ community enjoy the same rights to equality, dignity, and privacy that are granted and guaranteed by the Constitution of India to all of its citizens. This was the conclusion that was reached by the Supreme Court in both of these cases. The ability to marry the individual of one's choosing should be made available to LGBTQ+ individuals as well, as stated in the following statement. It has been pointed out that there are societal and moral reasons why the proposal for same-sex marriage should not be approved. This is the primary reason. It is commonly held that marriage is a sacred institution that should solely involve a man and a woman as partners in the relationship. In light of the aforementioned justifications, Articles 14, 15, 19, and 21 of the Constitution of India are being violated.

The circumstances of the LGBTQ+ population will evolve with the passage of time, as will their current position. Acceptance of this community will take an extended period of time because it has been criticised for an extensive period of time; consequently, the acceptance of them getting married will take a considerable amount of time.

<sup>152</sup> Scope of same-sex marriages and gender neutrality of the Special Marriage Act [Part I] – The Leaflet, (2020), <https://theleaflet.in/scope-of-same-sex-marriages-and-gender-neutrality-of-the-special-marriage-act-part-i/> (last visited Jun 5, 2023).