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SAME-SEX MARRIAGE IN INDIA: LEGAL VACUUM VS. SOCIAL REALITY

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ABSTRACT

*The same sex marriage debate in India is an indication of a fundamental clash between the constitution and the society. As the *Navtej Singh Johar v. Union of India* (2018) homosexuality case decriminalized homosexuality was a historic change to the legal area, yet it failed to turn into the appreciation of same-sex couple right to marry. *Supriyo v. Union of India* (2023) by the Supreme Court again stated that right to marry was not a fundamental right and left the issue of marriage equality to the legislature creating a legal vacuum. This vacuum deprives the LGBTQ+ people the right to some basic rights as such as marriage, inheritance, adoption, maintenance, medical consent, and social legitimacy, even though they are treated as equal citizens.*

Meanwhile, Indian social reality is changing. There is an increasing acceptance, greater public visibility, and more support of the urban spaces by younger generations. However, such coexistence with unrelenting stigma, family opposition and cultural conservatism demonstrate that there is transition in the country. The tailing point of the argument is the contrast between constitutional morality which requires equality and dignity and social morality which is opposed to change.

¹ Intern- Lex Lumen Research Journal.

This paper will discuss how the LGBTQ+ rights in India developed, why there was a legal vacuum, and why there were different social reactions. It uses a judicial examination and a comparative approach of similar jurisdictions, such as the US, the UK, South Africa and Taiwan, to assert that marriage equality in India is a constitutional necessity. The article ends with a compromise solution of legislative reform, judicial direction and social sensitisation.

KEYWORDS

Same sex marriage, LGBTQ+, rights, legal vacuum, social reality, equality, Supreme Court of India, constitutional morality.

INTRODUCTION

Same-sex marriage is the question which is actively discussed as the legal and social issue in recent years in India. Although the Supreme Court has acknowledged the dignity, privacy, and equality of the LGBTQ+ people, the law still fails to permit two individuals of the same sex to get married. This creates a big difference between the promises in the constitution and the real life. On the one hand, India is gradually turning into a more accepting country particularly to the younger generation and in major cities. Conversely, the legal framework has yet to grant same sex couples the privileges that are usually associated with marriage like inheritance, maintenance, adoption, making medical choices and social acceptability. This is what is usually referred to as the legal vacuum. It demonstrates that society and law have taken some steps in certain directions but it has failed to go further to give total equality².

It is not just a discussion on marriage as a ritual or cultural practice. It is concerning the identification that the LGBTQ+ individuals are full citizens who should be accorded equal rights and protection as other people. The decisions made by the

² Bhavya Pareek, *Beyond Marriage Equality* (2025), Vidhi Centre for Legal Policy, <https://vidhilegalpolicy.in/blog/beyond-marriage-equality-2/>

Supreme Court in Navtej Singh Johar, Nalsa, Puttaswamy and Supriyo have created significant discourse, yet have demonstrated that there is no legal roadmap towards marriage equality yet. Meanwhile, a same-sex relationship is unacceptable in many families and communities based on traditional values, ignorance and social influence. Consequently, the question of same-sex marriage is on the border of law, society, culture, and human rights.

RESEARCH OBJECTIVES

1. To study the historical and legal evolution of LGBTQ+ rights in India.
2. To examine why a legal vacuum exists regarding the recognition of same-sex marriages.
3. To analyse the social responses to same-sex relationships in India, including acceptance and resistance.
4. To compare India's approach with countries that recognise same-sex marriages.

RESEARCH QUESTIONS

1. Why does Indian law still not recognise same-sex marriage despite constitutional guarantees of equality?
2. What are the major social barriers to accepting same-sex marriages?
3. How do other countries treat same-sex marriage, and what can India learn from them?

METHODOLOGY

This study is doctrinal in nature. It is based on the analysis of the laws, the constitutional acts, and the landmark court decisions, government publications, and scholarly texts on LGBTQ+ rights. The social attitudes and changes in recent times have been understood through secondary sources including journal articles, published research papers, news reports and internet legal databases. This has been

done by conducting a comparative analysis of the reasons as to how same-sex marriage has been recognised in other jurisdictions, including in the United States, the United Kingdom, South Africa, and Taiwan. Combined, the approaches allow determining the loopholes in the Indian legislation and propose a middle ground.

Evolution of LGBTQ+ Rights in India

The LGBTQ+ rights in India has been a long and challenging but it keeps evolving with time. Over the last several decades the legal system and society considered same sex relationships as non-existent, wicked, or criminal. Nevertheless, over time, with activism, judicial action, and international pressure, India has been gradually, albeit with any meaningful impact, shifting to acceptance of the dignity and rights of LGBTQ+ members. This chapter follows this development since the colonial period until today and shows how the law changed to criminalisation but did not capture the full development and is still lacking to become equal to marriage³.

LGBTQ+ is a broad term to express the individuals whose sexual orientation or gender identity have not followed the conventional heterosexual and cisgender practices. The acronym is Lesbian (women to women), Gay (men to men and commonly used widely), Bisexual (attracted to more than one gender), Transgender (gendered people whose gender and sex assigned at birth are different), and Queer or Questioning (an expanded or emerging perception of sexual or gender identity). The symbol plus is meant to signify other identities like an intersex, asexual, and non-binary person. This language has been changed with time and can be attributed to the increased

³ Raj, Rishabh. "Discriminated homosexuality in India: the overriding effect of social morality over constitutional morality", *GC Human Rights Preparedness*, 23 January 2025, <https://www.gchumanrights.org/preparedness/discriminated-homosexuality-in-india-the-overriding-effect-of-social-morality-over-constitutional-morality/>

understanding that human gender and sexuality exist in a continuum rather than strict forms⁴.

However, despite the common notion that LGBTQ+ identities are a new and Western-made phenomenon, as the historical evidence shows, different sexual orientations and gender identities have been present in India centuries ago. Same-sex relations and gender fluidity are referred to in ancient texts, sculptures at the temples, folklore, and mythological stories. Traditional communities like Hijras have been recognised to play a social role especially in rituals and cultural practices. Nevertheless, regardless of this historical presence, these identities were either sidelined or relegated to some form of space instead of being treated as equal members of society⁵.

The LGBTQ+ marginalisation was more pronounced during the British colonial regime, notably when the Section 377 of the Indian Penal Code was introduced in 1860 that made a crime out of the act of carnal intercourse against the order of nature. This clause subjected the Indian society to Victorian values of morality, and categorized the same sex relationships as criminal and immoral. Following independence, Section 377 was still in existence and this resulted in decades of legal silence and social fear. Thanks to this, the LGBTQ+ individuals were forced into invisibility, as they were not supposed to be discussed publicly because it was stigmatised, and they risked being criminalised or beaten or discriminated against⁶.

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⁴ Advay Vora & Gauri Kashyap, Plea for Marriage Equality: Judgement Summary, *Supreme Court Observer* (Oct. 18, 2023), <https://www.scobserver.in/reports/plea-for-marriage-equality-judgement-summary/>

⁵ Kajal, Legal Status of Same-Sex Marriage in India: A Comparative Analysis with Global Perspectives, *Indian Journal of Integrated Research in Law*, Vol. V, no. II, (2025), <https://ijirl.com/wp-content/uploads/2025/03/LEGAL-STATUS-OF-SAME-SEX-MARRIAGE-IN-INDIA-A-COMPARATIVE-ANALYSIS-WITH-GLOBAL-PERSPECTIVES.pdf>

⁶ Supra note 5.

Very little was said or legally written on LGB rights in India until recently. This silence may be explained by the strong sense of social conservatism, absence of sex education, pressure in the family, religious views, and the fear of law. The coverage of the media was practically absent, and the discussion of sexuality was an unspoken topic. A lot of people would be repressed to avoid being rejected, harassed, or ostracized. The lack of supportive policies and laws was further used to strengthen the notion that LGBTQ+ individuals were not worthy of being recognized as equals⁷.

However, this has changed in recent decades very much. Greater focus on human rights in the global community, the development of the LGBTQ+ movement, and the expansion of social media platforms have contributed to the emergence of discussion on these issues in society. The transformation of the legal and social attitudes has been done by the Indian courts. *NALSA v. Union of India*⁸ (2014) is one of the landmark cases. Another case that recognised the rights of transgender persons was *Navtej Singh Johar v. Union of India*⁹ (2018). The decriminalisation of consensual same-sex relationships in this case was the turning points of the history of Indian laws. These rulings supported the notion that the question of sexual orientation and the gender identity are inherent in dignity, privacy and individual liberty under the Constitution.

The growing level of LGBTQ+ topics featuring in modern India is thus no coincidence, but the culmination of decades of battles at last being brought into the limelight. Older prejudices have been challenged by pride marches, scholarly studies, inclusive policies in the workplace and judicial actions. Although no full acceptance of same-sex marriage has yet emerged, especially in the rural and conservative communities, the increased discussion shows how constitutional morality has replaced social

⁷ Prithwiraj Laha, Legal and Social Perspective of Same-Sex Marriage in India, *J. Emerging Techs. & Innovative Res. (JETIR)*, Vol. 7, Issue 4 (2020), <https://www.jetir.org/papers/JETIR2004043.pdf>

⁸ NALSA v. Union of India (2014) 5 SCC 438.

⁹ Navtej Singh Johar v. Union of India AIR 2018 SC (CRI) 1169.

morality. It is this changing environment that sets the groundwork upon which the debate over same-sex marriage today exists indicating the discrepancy between the reality of growing social circumstances and the lack of legalization¹⁰.

In *Naz Foundation v. Government of NCT of Delhi*¹¹ (2009) the first breakthrough was made regarding equality of same sex marriage. In this case the Delhi High Court declared that Section 377 was unconstitutional to the extent that it breached Articles 14, 15, and 21. The court realised that the LGBTQ+ individuals had a right to dignity, privacy, and equality. This ruling was representative of hope and the openness of sexuality and rights in the population. However, it was short-lived.

In *Suresh Kumar Koushal v. Naz Foundation*¹² (2013). The Supreme Court reversed the ruling of the Delhi High Court and reinstated Section 377. According to the court, the LGBTQ+ population is a tiny minority, and as such, their rights were not considered significant enough to be safeguarded in court. This verdict was massively criticised as retrogressive and against the constitutional values.

One of the milestones was reached with the ruling on *K.S. Puttaswamy v. Union of India*¹³ (2017), the right to privacy was proclaimed by a nine-judge bench as a fundamental right. Notably, the Court argued that sexual orientation is vital as far as privacy and human dignity are concerned. This ruling undermined the law of Koushal and led to the decriminalisation.

The case of *Navtej Singh Johar v. Union of India*¹⁴ (2018) is a landmark ruling in which Supreme Court overturned Section 377 to the degree that it made consensual same-

¹⁰ Wikipedia, LGBTQ Rights in India, https://en.wikipedia.org/wiki/LGBTQ_rights_in_India

¹¹ *Naz Foundation v. Government of NCT of Delhi* 2009 (6) SCC 712.

¹² *Suresh Kumar Koushal v. Naz Foundation* AIR 2014 SC 563.

¹³ *K.S. Puttaswamy v. Union of India* AIR 2017 SC 4161.

¹⁴ *Navtej Singh Johar v. Union of India* AIR 2018 SC (CRI) 1169.

sex intercourse between adults a decriminalise offense. The Court acknowledged that LGBTQ+ people deserve equality, dignity and right to select their partners. The decision was based on constitutional morality- i.e. the values of the Constitution should outweigh the social prejudice. Although this was a historic win, the same-sex couples did not receive any civil rights, whether it was marriage, adoption, and inheritance.

There was another significant decision, *National Legal Services Authority v. Union of India*¹⁵ (NALSA) (2014). The Supreme Court acknowledged the rights of transgender individuals and embraced the right of self-identifying gender as male, female or third gender. This verdict formed the basis of gender rights, which is fundamental in describing same-sex marriage particularly, individuals where one of the partners is a transgender.

After the 2018 judgment there was a certain social shift in India: Pride events grew in larger cities, Media started to feature LGBTQ+ characters in a better light, educational establishments started offering gender-sensitisation courses, and a significant number of families gradually started accepting their LGBTQ+ children. But acceptance is uneven. Traditional families, rural areas and conservative communities are usually resistant. A lot of gay and lesbian individuals continue to experience stigma, violence, and ostracism.

Although homosexuality has ceased to be a criminal offense, same sex couples have continued to be denied: the right to legally marry, adopt children, inherit property as husband and wife, obtain maintenance, receive spousal consent regarding medical matters and gain access to government schemes designed to support families. This gap indicates the disparity of decriminalisation and recognition. The LGBTQ+

¹⁵ National Legal Services Authority v. Union of India (2014) 5 SCC 438.

individuals are at liberty to love, yet not to create a family that is legally recognised. This loophole in the law preconditions the realization of why same-sex marriage fight would be the next milestone in the Indian constitutional adventure¹⁶.

THE LEGAL VACUUM AND INDIA'S SOCIAL REALITY

Understanding LGBTQ+ individuals as equal persons in India has also increased significantly with a number of constitutional decisions, yet there has been no reflection of such developments in legalizing same-sex marriages. Such a lack of recognition by the judiciary and legislative silence is commonly referred to as a legal vacuum. To put it simply, LGBTQ+ members are no longer criminals, yet the law does not consider them as families. This vacuum is explained by the fact that the Indian laws of marriage continue to be premised under the assumption that marriage is only between a man and woman, with genderized words such as husband, wife, bride, and bridegroom. Even the secular Special Marriage Act (SMA) was drafted all the major personal laws such as the Hindu marriage act, the Muslim personal law, Christian marriage act and even the Parsi marriage and divorce act, were all written in a time when even same sex relationship was inconceivable. Consequently, the legal system has failed to change and adapt to the emerging conception of sexual orientation and gender identity. Lack of a gender or neutral or inclusive definition means that the same-sex couples do not have any legal path to marry or exercising marital rights¹⁷.

The reluctance of the legislators is another cause of the legal vacuum. Parliament has not presented any bill to deal with marriage equality or civil unions even after the decriminalisation of homosexuality in *Navtej Singh Johar*¹⁸ (2018). This limitation was

¹⁶ Ashutosh Bairagi, Same-Sex Marriage in India: A Socio-Legal Appraisal, *International Journal of Humanities Social Science and Management (IJHSSM)*, Vol. 4, no. 3, 2024, pp: 563-567

¹⁷ Supra note 16.

¹⁸ *Navtej Singh Johar v. Union of India* AIR 2018 SC (CRI) 1169.

admitted even by the Supreme Court itself in *Supriyo v. Union of India*¹⁹ (2023), in which it was decided that courts cannot amend the law on marriage or in any way establish a privilege to marry, by judicial order. The Court in this case stated that this is a legislative policy and it is only the Parliament that can give rights to marriage or can set up systems like a civil union. This ruling was legally cautious, deprived the same sex couples of the benefits that come with a marriage union, including inheritance, adoption, maintenance, guardianship, medical permission and next-of-kinship rights. What is achieved is partial equality, that is, equality that acknowledges identity but denies relationships.

Such a vacuum is further complicated by the social reality of India. There is a gradual but noticeable change of attitudes in Indian society, particularly in the metropolitan and semi-urban areas. Education, online discourse, cultural exposure, and representation of the LGBTQ+ in films and media have contributed to the increased tolerance of many young people. Pride parades, corporate inclusivity programmes, gender-sensitisation workshops and the emergence of LGBTQ + student organisations are indications to a society that is slowly adopting diversity. Some of these families, albeit not directly in support of homosexuals, are growing more tolerant and are giving their children a free hand to live with their partners. These are good signs that demonstrate that the society is already changing even though incomplete²⁰.

Nevertheless, opposition is still high in most regions of the nation. Several people are brought up in families and societies where homosexuality is regarded as immoral,

¹⁹ Supriyo @ Supriya Chakraborty & Anr. v. Union of India, Writ Petition (Civil) No. 1011 of 2022, 2023 INSC 920 (India: Supreme Court, Oct. 17, 2023), https://api.sci.gov.in/supremecourt/2022/36593/36593_2022_1_1501_47792_Judgement_17-Oct-2023.pdf

²⁰ Bhavya Pareek, Beyond Marriage Equality (2025), Vidhi Centre for Legal Policy, <https://vidhilegalpolicy.in/blog/beyond-marriage-equality-2/>

unnatural or rather against culture. LGBTQ+ individuals are usually pressured into heterosexual unions by society which causes them to experience a lifetime of emotional distress. Their lives are still impacted by housing discrimination, harassment at work, bullying in educational institutions, honour-based violence, and fear of social rejection all the time. Acceptance is low in the rural and conservative regions and LGBTQ + individuals might be compelled to conceal their identities to protect themselves socially and physically. Accordingly, the social environment in India is defined by both increasing approval and embedded opposition- that is a nation that is evolving- but not homogenously²¹.

This is the contradiction of social and constitutional morality in the centre of the argument. Most notably, the Supreme Court under *Navtej Johar*²² stressed that constitutional morality equality, dignity, liberty, have to supersede the majority prejudices. However, in *Supriyo*²³ ruling, the Court refused to grant a right to marry, partly, due to the fear of the social acceptance of this. Consequently, LGBTQ+ individuals are constitutively recognized but not practically in the real world. Their freedom of choice of a partner, in spite of its recognition, is not guaranteed by any legal safeguards to ensure relationships to be sustainable and secure.

This chapter also necessitates an analysis of what courts have done with questions regarding the rights of the LGBTQ+. The case of *NALSA*²⁴ (2014) and *Navtej Johar*²⁵ (2018) and other courts acknowledged the very existence of the rights of LGBTQ+

²¹ Supra note 20.

²² *Navtej Singh Johar v. Union of India* AIR 2018 SC (CRI) 1169.

²³ *Supriyo @ Supriya Chakraborty & Anr. v. Union of India*, Writ Petition (Civil) No. 1011 of 2022, 2023 INSC 920 (India: Supreme Court, Oct. 17, 2023),

https://api.sci.gov.in/supremecourt/2022/36593/36593_2022_1_1501_47792_Judgement_17-Oct-2023.pdf

²⁴ *National Legal Services Authority v. Union of India* (2014) 5 SCC 438.

²⁵ *Navtej Singh Johar v. Union of India* AIR 2018 SC (CRI) 1169.

members, as equality is not a matter of common sense. This has been further reinforced by *Puttaswamy*²⁶ (2017) who identified privacy and sexual orientation as the part of personal liberty. The *Supriyo*²⁷ ruling, though, did establish a limit though the ruling established dignity and protection against discrimination but did not go further to provide marriage recognition or the establishment of a legal framework of same sex relationships. This development indicates that the judiciary could only stretch the rights limit but it still requires the legislature to fully enforce the rights.

The legal approach to the LGBTQ+ rights in India has been expanded more by the judicial system, rather than laws, which has left a gap between the constitutional principles and reality on the ground. Article 14 ensures equality, but Article 15 does not permit any discrimination, and Article 21 secures the liberty of personalities, but without the proportion of the laws about same-sex relationships, many rights remain unclear. Similar concerns have been dealt with by the Supreme Court. In *Lata Singh v. State of Uttar Pradesh*²⁸, (2006) the Court approved that all adults, possess the basic right to select their partner, as family or societal pressure could not interfere with individual freedom. Although the case was of an inter-caste heterosexual couple, the principle became the basis of subsequent LGBTQ+ cases. In *Shakti Vahini v. Union of India*²⁹ (2018) the Court identified the risk of harm to couples who do not adhere to social norms and required states to shield consenting adults against honour-based violence. This ruling also indirectly enhanced the defence of same-sex couples.

One of the biggest developments was that the courts started looking directly at the same-sex relationships. In *Sreeja v. Commissioner of Police*³⁰ (2018) Kerala High Court

²⁶ K.S. Puttaswamy v. Union of India AIR 2017 SC 4161.

²⁷ Supra note 23.

²⁸ Lata Singh v. State of Uttar Pradesh AIR 2006 SC 2522.

²⁹ Shakti Vahini v. Union of India AIR 2018 SC 1601.

³⁰ Sreeja v. Commissioner of Police W. P. (CRL) No. 372 of 2018.

ruled that two adult women were entitled to live together and that sexual orientation is in personal autonomy under Article 21. The Court denied the family request to part the couple, which was one of the first times when same-sex cohabitation was recognized in India. Nevertheless, regarding the issue of marriage equality, the Supreme Court sent mixed signals with *Supriyo v. Union of India*³¹ (2023). Although the Court recognised that LGBTQ + people had a right to dignity, love and non-discrimination, it did not legalise same-sex marriage, believing that this was the role of Parliament. However, the Court emphasized the necessity to put an end to discrimination in housing and medical decision-making, access to financial services, and protection of queer couples.

Nevertheless, with such judicial gains, there is still a legal vacuum since India does not have a cohesive civil rights system of LGBTQ+ individuals. Lack of legislation implies that they will still be left to the mercy of judicial interpretation of the fundamental rights of inheritance, adoption, employment benefits, medical consent, domestic violence protection and partnerships. This loophole brings ambiguity and incoherence among states. Another comparative perspective indicates that in countries such as the US, the UK, and South Africa, marriage equality or civil unions have been progressed and LGBTQ + people have reliable legal coverage. Meanwhile, India is in the stalemate between constitutional pledges and legislative stagnancy. Until Parliament establishes an explicit statutory framework, the rights of LGBTQ+ people will still be developed in a piecemeal form, as opposed to an integrated policy³².

³¹ Supra note 23.

³² Ashutosh Bairagi, Same-Sex Marriage in India: A Socio-Legal Appraisal, *International Journal of Humanities Social Science and Management (IJHSSM)*, Vol. 4, no. 3, 2024, pp: 563-567

There is evidence of marriage equality emerging as a result of both judicial interpretation and legislative reform in other countries. In *Obergefell v. Hodges*³³ the United States Supreme Court argued that marriage is a right, legalised same sex marriages in the country. The Constitutional Court of South Africa instructed Parliament to change the laws on marriage to accommodate same-sex couples. Same-sex marriage was legalised in Taiwan when its Constitutional Court ruled that the restriction of marriage to heterosexual couples was discriminating against equality. The model that was followed in the United Kingdom was gradual whereby civil partnerships were first recognised and subsequently full marriage rights were granted. The world experiences indicate that marriage equality is not accepted in the beginning, but it is accepted over time once it is legalized.

These experiences can teach India something. Civil unions can be a gradual way of getting social acceptance, but should not entirely replace marriage equality. The changing of the Special Marriage Act through legislative changes to use the term spouse instead of gendered terms can offer a neutral and secular route of seeking marriage to all couples. Above all, legalization should be followed by the consciousness of the society, education, and the removal of the discriminative attitude toward LGBTQ+ individuals, so that LGBTQ+ people do not only become equal in law but also in the society³⁴.

Conclusion

India has gone a long way through its legal system where the right of people in choosing their life partners, without emphasis on social pressure, family resistance,

³³ *Obergefell v. Hodges* 576 U.S. 644.

³⁴ Prithwiraj Laha, Legal and Social Perspective of Same-Sex Marriage in India, *J. Emerging Techs. & Innovative Res. (JETIR)*, Vol. 7, Issue 4 (2020), <https://www.jetir.org/papers/JETIR2004043.pdf>

caste disparity or even sexual orientation. Despite the Hindu Marriage Act setting varying minimum ages, between men and women, the courts have always stressed upon the fact that freedom of choice of a partner is a basic right under Article 21 and the State must guard the freedom.

Criminal cases such as *Shakti Vahini* and *Lata Singh* reinforced the Court opinion that adults possess the complete freedom of choosing their marriage partner and that honour-based violence or family interference goes against constitutional rights. Similarly, in *Sreeja v. Commissioner of Police* the judiciary reinforced the fact that even same-sex couples have a right to live together as they have the autonomy and dignity. The recent *Supriyo v. Union of India* (2023) judgment further revealed that same-sex marriage is not legalised yet but the right to love, establish relationships and cohabit is still safeguarded in the constitution.

The development of case law generally depicts that the judiciary has been devoted to protecting the freedom of individuals, equality and dignity. Although laws such as various ages of marriage still represent socio-legal dilemmas, the courts have clarified that the meaning of individual freedom is in choice. With India developing, it is a strong belief that legal changes will finally be more in tune with constitutional values, which would guarantee equal protection and consideration of marriage and relationships toward all people.

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