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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

# **THE LEGAL JOURNEY AND ROCOGNITION OF SAME-SEX MARRIAGE IN INDIA.**

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## **INTODUCTION**

The term 'LGBTQ' refers to a wide spectrum of people who fall outside the heteronormative understanding of gender and sex. There is no conclusive definition of the term and therefore the acronym is often used with '+' sign to signify that the collective is not exhaustive. The term though, stands for lesbian, gay, bisexual, transgender and queer. It refers to both aspects of sexuality and gender. While gay, lesbian, bisexual are sexual preferences of persons; transgender is a gender who does not identify with the binary of male and female genders. The term 'queer' is broadly used to signify the 'queerness' of the collective. Other terms like intersex, asexual etc., all fall within the term. It is a complex term which requires an understanding of gender and sexuality as aspects of human life. The heteronormative standard which has become the default are questioned by this collective and is aimed towards identifying their own identities in the spectrum of gender and sexuality<sup>1</sup>.

In the intricate tapestry of India's socio-cultural fabric, the LGBTQ+ community has long been marginalized, facing discrimination and invisibility due to prevailing societal norms and legal frameworks<sup>2</sup>. However, amidst this backdrop, the struggle for LGBTQ+ rights, particularly the recognition of same-sex marriage, has emerged as a focal point of debate, activism, and legal reform. In recent years, India has witnessed significant shifts in attitudes and legal interpretations regarding LGBTQ+ rights, reflecting a growing recognition of the need for equality and inclusivity in the country's legal and social landscape<sup>3</sup>. India, with its rich diversity of cultures, religions, and traditions, presents a complex terrain for discussions surrounding LGBTQ+ rights and same-sex marriage. The traditional institution of marriage, deeply rooted in religious and cultural practices, has historically adhered to heteronormative frameworks,

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<sup>1</sup> T. Sarkar, *Queer Activism in India: A story in the Anthropology of Ethics* (Duke University Press,2018).

<sup>2</sup> *Ibid.*

<sup>3</sup> Navtej Singh Johar v. Union of India, (2018) 1 SCC 791.



excluding same-sex couples from its purview<sup>4</sup>. Moreover, colonial-era laws, such as Section 377 of the Indian Penal Code, criminalized "unnatural offenses," including consensual same-sex relations, further marginalizing LGBTQ+ individuals and communities<sup>5</sup>. However, the dawn of the 21st century brought about a wave of activism and advocacy for LGBTQ+ rights in India, challenging the status quo and demanding legal recognition and protections for sexual and gender minorities<sup>6</sup>. Landmark legal battles, such as the Navtej Singh Johar v. Union of India case in 2018, which struck down Section 377 and decriminalized homosexuality, marked a significant turning point in India's LGBTQ+ rights movement<sup>7</sup>. The judgment affirmed the rights of LGBTQ+ individuals to love and intimacy, irrespective of sexual orientation, laying the groundwork for broader discussions on marriage equality.

The issue of same-sex marriage in India encompasses complex legal, social, and cultural dynamics, reflecting broader debates on identity, autonomy, and human rights. While the Indian Constitution enshrines principles of equality, liberty, and justice for all citizens, the interpretation and application of these principles in the context of LGBTQ+ rights have been subject to fervent debate and judicial scrutiny<sup>8</sup>. The absence of specific legislation recognizing same-sex marriage has left LGBTQ+ couples in a state of legal limbo, denied the rights and protections afforded to heterosexual couples<sup>9</sup>.

Against this backdrop, the legal journey of same-sex marriage in India unfolds as a complex narrative, shaped by a multitude of factors, including judicial pronouncements, legislative initiatives, public discourse, and societal attitudes. While the decriminalization of homosexuality represented a significant milestone in India's LGBTQ+ rights movement, the question of marriage equality remains unresolved, leaving LGBTQ+ couples without legal recognition and the accompanying rights and benefits<sup>10</sup>.

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<sup>4</sup> H. Donner, *Marriage on Trial: A study of Same-sex Marriage in law and the Indian Constitution* (Oxford University Press, 2019).

<sup>5</sup> Indian Penal Code, 1860 (Act 45 of 1860), § 377.

<sup>6</sup> N. Menon & G. Bhan, *Because I have a Voice: Queer Politics in India* (Zubaan, 2017).

<sup>7</sup> *Supra note 3*.

<sup>8</sup> The Constitution of India, art.14,15,21.

<sup>9</sup> A. Rai, *Marriage, Love, Caste, and kinship Support: Lived Experience of the Urban Poor in India* (Rowman & Littlefield, 2019).

<sup>10</sup> N.Ghoshal, *No One Else: A Personal history of Outlawed Love and Sex* ( HarperCollins India, 2017).



## **HISTORICAL CONTEXT OF SAME SEX- RELATIONSHIPS IN INDIA**

India, with its rich and diverse cultural heritage, has a complex and nuanced history when it comes to attitudes towards same-sex relationships. Throughout the centuries, India has been home to various cultures, religions, and traditions, each with its own perspectives on sexuality and gender identity. While it is essential to recognize that contemporary Western concepts of sexual orientation and gender identity may not perfectly align with historical Indian understandings, evidence from ancient texts, art, and religious practices provides insights into the historical context of same-sex relationships in the region<sup>11</sup>. In ancient Indian society, depictions of same-sex love and desire can be found in religious texts, mythology, and literature. For instance, the ancient Sanskrit texts, such as the Kama Sutra and the various Hindu epics, contain references to diverse forms of sexual expression, including same-sex relationships<sup>12</sup>. In Hindu mythology, stories of gods and goddesses, such as Shiva and Ardhanarishvara, embodying androgynous or non-binary characteristics, blur the lines between traditional gender roles and identities<sup>13</sup>. Some of the most prominent examples include Valmiki's Ramayana which refers to Hanuman seeing rakshasa women kissing in Lanka<sup>14</sup>; the birth of King Bhagirathi; the temples of Khajuraho, Ellora caves in Maharashtra and Sun Temple in Karnak and the well-known text, Kama Sutra, which deals with sexuality, eroticism and emotional fulfilment of life, authored by Vatsyayana.

Moreover, ancient Indian temple art and architecture often depict scenes of intimacy and affection between individuals of the same gender, suggesting a level of acceptance or at least acknowledgment of same-sex desire in pre-modern Indian society<sup>15</sup>. The presence of these depictions indicates that same-sex relationships were not necessarily taboo or condemned in all historical contexts but were instead situated within broader cultural and religious frameworks that embraced diverse expressions of human sexuality.

However, it is crucial to recognize that attitudes towards same-sex relationships in ancient India were not uniform and varied across different regions, time periods, and social strata. While some texts and practices may have acknowledged or even celebrated same-sex love, others may

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<sup>11</sup> R. Subramanian, *LGBTQ+ Rights in India: Issues and Challenges* (Routledge, 2021).

<sup>12</sup> W. Doniger, *The Hindu: An alternative History* (Penguin Books, 1996).

<sup>13</sup> V.K.R.V. Rao, *The World of Homosexuals* (Vikas Publishing House, 1992).

<sup>14</sup> *Ibid.*

<sup>15</sup> J. Hardy, *The Temple in Society: Towards a History of The Kadamba Dynasty* (Oxford University Press, 2001).

have condemned or marginalized it. Additionally, the influence of colonialism and the imposition of Western moral standards during the British Raj further complicated understandings of sexuality and gender in India<sup>16</sup>. With the advent of colonial rule, British authorities introduced laws criminalizing "unnatural offenses," including consensual same-sex relations, under Section 377 of the Indian Penal Code in 1860. This colonial-era legislation reflected Victorian-era moral values and effectively stigmatized and marginalized LGBTQ+ individuals in Indian society. The legacy of Section 377 would cast a long shadow over LGBTQ+ rights in India for over a century, perpetuating discrimination and persecution against sexual and gender minorities.

Following India's independence in 1947, Section 377 remained in force, despite occasional calls for its reform or repeal. LGBTQ+ individuals continued to face societal stigma, legal persecution, and social ostracization, inhibiting their ability to live authentically and openly<sup>17</sup>. However, alongside these challenges, there were also instances of resistance and resilience within the LGBTQ+ community, with individuals and organizations advocating for greater visibility, acceptance, and legal recognition.

In recent decades, India has witnessed a burgeoning LGBTQ+ rights movement, marked by increased activism, advocacy, and legal challenges to discriminatory laws and practices. Landmark legal battles, such as the *Naz Foundation v. Government of NCT of Delhi* case in 2009, which challenged the constitutionality of Section 377, brought the issue of LGBTQ+ rights to the forefront of public discourse<sup>18</sup>. Subsequent judicial rulings and public campaigns further fueled momentum towards greater recognition and acceptance of LGBTQ+ individuals and their relationships. The historic *Navtej Singh Johar v. Union of India* judgment in 2018 represented a watershed moment for LGBTQ+ rights in India, as the Supreme Court struck down Section 377, decriminalizing homosexuality and affirming the rights of LGBTQ+ individuals to love and intimacy<sup>19</sup>.

While this judgment marked a significant victory for LGBTQ+ rights advocates, it also underscored the need for broader societal change and legal reform to ensure full equality and

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<sup>16</sup> *Ibid.*

<sup>17</sup> G. Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (University of Chicago Press, 2005).

<sup>18</sup> *Naz Foundation v. Government of NCT of Delhi*, (2009) 160 Delhi law Times 277.

<sup>19</sup> *Supra note 3.*

inclusion for LGBTQ+ individuals in India. The historical context of same-sex relationships in India is multifaceted and complex, shaped by diverse cultural, religious, and colonial influences. While ancient texts and practices may offer glimpses of acceptance or tolerance towards same-sex love, colonial-era laws and societal norms imposed restrictive frameworks that marginalized LGBTQ+ individuals. Despite these challenges, the LGBTQ+ rights movement in India has made significant strides towards greater recognition and acceptance, signalling a promising path forward for equality and inclusion.

### **JUDICIAL INTERPRETATIONS OF LGBTQ+ RIGHTS.**

The judicial review of LGBTQ+ rights in India has been a dynamic and evolving process, marked by significant legal developments and landmark judgments in recent years. From the decriminalization of homosexuality to the recognition of transgender rights, the Indian judiciary has played a crucial role in shaping the legal landscape and advancing the cause of equality and inclusivity for LGBTQ+ individuals. Specifically, in the last decade, many important judgements were decided by the Supreme Court which paved way for recognition of basic rights of this marginalised group. The failure of the lawmakers in this regard reflects the conservative nature of the Parliament which had to be addressed by a liberal judiciary. The following are some of the most prominent judgements of the Supreme Court on the subject.

- Decriminalization of Homosexuality:

⇒ *Naz Foundation v Government of NCT Delhi*

In this landmark case<sup>20</sup>, the Delhi High Court declared Section 377 of the Indian Penal Code as unconstitutional. Based on a Public Interest Litigation filed by the NGO, the judgement paved way for the legal review of the British era law. The Court declared it to be in violation of Article 14, Article 15 and 16 (all rights around the concept of equality) of the Constitution of India.

⇒ *NALSA v. Union of India*<sup>21</sup>

This case came in the aftermath of the criticised judgement in *Suresh Kumar Koushal v. Union of India*<sup>22</sup>. In *Suresh Kumar*, the Supreme Court re-criminalised Section 377, which was decriminalised in *Naz Foundation*. The National Legal Services Authority led the charge

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<sup>20</sup> *Supra note 18.*

<sup>21</sup> *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

<sup>22</sup> *Suresh Kumar Koushal v. union of India*, AIR 2014 SC 563.



towards raising relevant questions in favour of the transgender community. This judgement declared transgender persons as the third gender. A comprehensive set of guidelines, protecting the rights and freedoms of the transgender community, was laid down in the judgement. Subsequent to that, legislative developments followed to provide a clear statute that shall forward their rights. There were extensive debates and versions of law presented which culminated in 2019 with the Transgender Persons (Protection of Rights) Act, 2019. While the law is necessary and does have some positive aspects, it has a major issue, i.e., of administrative interference by requiring that each person would have to be recognized as 'transgender' on the basis of a certificate of identity issued by a district magistrate. This is a major issue considering the sensitivity of the subject<sup>23</sup>.

⇒ Justice (Retd.) K. S. Puttaswamy v. Union of India

Granting the right to privacy as a facet of Right to Life and Liberty, Article 21, this judgement held that privacy is an integral part of a human's life and that it extends to all individuals, notwithstanding gender and sex.<sup>24</sup> In the judgement, Justice Chandrachud observed that the LGBTQ community should be entitled the right to privacy, particularly autonomy and freedom from interference from the state. A special observation was made in context of the right to choose partners of one's own choice, sexual freedom and autonomy. The Court observed that, "*The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14 (right to equality), 15 (discrimination on grounds of sex) and 21 (right to life and personal liberty) of the Constitution.*" This judgement was the primary precursor to the breakthrough Navtej Johar case.

⇒ Navtej Singh Johar v. Union of India

One of the most pivotal moments in the judicial review of LGBTQ+ rights in India occurred in 2018 with the landmark judgment in Navtej Singh Johar v. Union of India<sup>25</sup>. In this case, the Supreme Court of India struck down Section 377 of the Indian Penal Code, which criminalized consensual same-sex relations, as unconstitutional. The court held that Section 377 violated the fundamental rights to equality, privacy, and dignity guaranteed by the Indian Constitution<sup>26</sup>.

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<sup>23</sup> K.S Puttaswamy v. Union of India, (2019) 1 SCC 1.

<sup>24</sup> The Constitution of India, art. 21.

<sup>25</sup> *Supra note 3.*

<sup>26</sup> *Ibid.*

This historic judgment not only ended decades of legal discrimination against LGBTQ+ individuals but also affirmed their right to love and intimacy without fear of persecution.

- Recognition Of Transgender Rights:

⇒ *NALSA v. Union of India*<sup>27</sup>

This case came in the aftermath of the criticised judgement in Suresh Kumar Koushal v. Union of India<sup>28</sup>. In Suresh Kumar, the Supreme Court re-criminalised Section 377, which was decriminalised in Naz Foundation. The National Legal Services Authority led the charge towards raising relevant questions in favour of the transgender community. This judgement declared transgender persons as the third gender. A comprehensive set of guidelines, protecting the rights and freedoms of the transgender community, was laid down in the judgement. Subsequent to that, legislative developments followed to provide a clear statute that shall forward their rights. There were extensive debates and versions of law presented which culminated in 2019 with the Transgender Persons (Protection of Rights) Act, 2019. While the law is necessary and does have some positive aspects, it has a major issue, i.e., of administrative interference by requiring that each person would have to be recognized as 'transgender' on the basis of a certificate of identity issued by a district magistrate. This is a major issue considering the sensitivity of the subject<sup>29</sup>.

- Protection Against Discrimination:

⇒ *Arif Jafar v. Union of India*.

The judicial review of LGBTQ+ rights in India also encompasses cases addressing discrimination based on sexual orientation and gender identity. In Arif Jafar v. Union of India (2021), the Allahabad High Court recognized the need to protect LGBTQ+ individuals from discrimination and harassment in the workplace<sup>30</sup>. The court held that discrimination based on sexual orientation or gender identity violated the right to equality guaranteed by the Indian Constitution and directed the government to take measures to prevent such discrimination<sup>31</sup>. This judgment highlighted the importance of judicial intervention in safeguarding the rights of LGBTQ+ individuals against discrimination in various spheres of life.

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<sup>27</sup> *Supra note.21.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> Arif Jafar v. Union of India & Ors, W.P.(PIL) No. 556 of 2010.

<sup>31</sup> *Ibid*

- Lack Of Legal Recognition Of Same Sex Relationships.

⇒ Abhijit Iyer Mitra case

The matter pertains to the question of recognition of same sex marriage under the Hindu Marriage Act and the Special Marriage Act in India. The argument forwarded by the petitioner is that with the recognition of same sex relationships consequent to the decriminalisation; the state should be responsive to the cause and also conform to the international standard and conventions that India is a signatory to. Contradicting this argument, Solicitor General Tushar Mehta argues that the term '*spouse*' under Hindu law can include only a male and female and that such judicial interference will "*cause complete havoc with the delicate balance of personal law*"<sup>32</sup>. The central government stated that the decriminalisation of Section 377 did not automatically mean that such relationships would be entitled the right to marry. Referring to the Indian traditions and that marriages are based on rituals, ethos and social values, marriages have a spiritual aspect to it and thus, such same-sex marriage rights cannot fall within the purview of the judicial adjudication; but it a matter for the government and legislature to review and determine<sup>33</sup>.

⇒ Arun Kumar v Inspector General of Registration, Tamil Nadu.

It is a significant case heard in the Madras court that extends the definition of brides to include transwomen. According to the Hindu Marriage Act of 1955, the definition of marriage only recognizes unions between men and women. However, this judgment expands the scope of women to encompass transgender individuals who identify as women and wish to marry. It aligns with the principle of self-identification established in the NALSA judgment, which allows individuals to identify themselves without external verification. This judgment recognizes the constitutional right of a person to identify as a transwoman and paves the way for marriages within the LGBTQ+ community, thereby expanding the right to marry<sup>34</sup>.

⇒ Supriyo @ Supriya Chakraborty & Anr v. Union of India<sup>35</sup>

The SC has refused to strike down the provisions of the Special Marriage Act (SMA) or insert words into it. The petitions had sought to include same-sex marriages in the Act which is meant for inter-caste and inter-faith marriages. The main argument of the LGBTQ community was

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<sup>32</sup> *Supra note. 10.*

<sup>33</sup> *Ibid.*

<sup>34</sup> Arun Kumar v. The Inspector General of Registration, AIR 2019 MADRAS 265.

<sup>35</sup> Supriyo @ Supriya Chakraborty & Anr v. Union of India, W.P. ( Civil) No. 1011 of 2022.



that discrimination in access to the institution of marriage on the ground of ascriptive characteristics in particular, sexual orientation and gender identity violated constitutional guarantees of equality (Article 14), non-discrimination [Article 15(1)], freedom of expression [Article 19(1)(a)], and privacy and dignity (Article 21)<sup>36</sup>. They sought marriage rights equal to heterosexual couples. The Centre had told the SC that any constitutional declaration made by the court on this issue may not be a "correct course of action" as the court will not be able to foresee, envisage, comprehend and deal with its fallout. The CJI in his judgment said the court can only interpret the law and not frame it. He said if the court reads down or inserts words into Section 4 of Special Marriage Act to give marriage rights to LGBTQ community members, then it would be entering into the legislative domain. The SC also said the right to marry is not a fundamental right, and hence cannot be claimed as a matter of right by the LGBTQ community. Therefore, the SC bench refused to grant legal recognition to same-sex marriages and left it to Parliament to frame the requisite law. The CJI said whether there is need for change in regime of Special Marriage Act is for Parliament to decide.

Despite these significant legal developments, challenges remain in the judicial review of LGBTQ+ rights in India. The lack of comprehensive legislation specifically addressing LGBTQ+ rights leaves gaps in legal protection and enforcement. Moreover, societal attitudes and prejudices against LGBTQ+ individuals continue to pose obstacles to full equality and acceptance. In recent years, there have been instances of violence and harassment targeting LGBTQ+ individuals, underscoring the urgent need for continued advocacy and legal reform<sup>37</sup>.

Looking ahead, there are several areas where further judicial intervention is needed to advance LGBTQ+ rights in India. One such area is the recognition of same-sex marriage. While the decriminalization of homosexuality was a significant step forward, the legal recognition of same-sex unions remains elusive. The judiciary has the power to interpret and expand the definition of marriage to include same-sex couples, thereby affording them the same rights and benefits enjoyed by heterosexual couples<sup>38</sup>. Additionally, there is a need for greater awareness and sensitivity among judges and legal professionals regarding LGBTQ+ issues to ensure fair and equitable treatment in the judicial system<sup>39</sup>.

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<sup>36</sup> The Constitution of India, art.14,15,19,21.

<sup>37</sup> *Supra note 4.*

<sup>38</sup> *Supra note 9.*

<sup>39</sup> *Ibid.*

## **RECOGNITION UNDER PERSONAL LAWS IN INDIA.**

In India, personal matters such as marriage, divorce, and inheritance are governed by religious personal laws based on individuals' faiths and communities. These laws vary depending on one's religious affiliation, with separate legal frameworks for Hindus, Muslims, Christians, Sikhs, and other religious communities. The Hindu personal laws are primarily codified under statutes such as the Hindu Marriage Act (1955), the Hindu Succession Act (1956), and the Hindu Adoption and Maintenance Act (1956). Similarly, Muslim personal laws are derived from Islamic sources, including the Quran, Hadith, and Sharia principles, with the Muslim Personal Law (Shariat) Application Act (1937) providing for their application<sup>40</sup>.

- **Challenges in Recognition:**

The recognition of same-sex relationships and marriage under religious personal laws in India faces several challenges stemming from the traditional interpretation and application of religious scriptures and customs. Firstly, most religious personal laws define marriage within the context of heterosexual unions, with provisions explicitly recognizing the marriage between a man and a woman. For example, the Hindu Marriage Act defines marriage as a union between a Hindu man and a Hindu woman solemnized according to Hindu rites and ceremonies<sup>41</sup>. Similarly, Muslim personal laws recognize marriage as a contract between a Muslim man and a Muslim woman, adhering to Islamic rituals and customs<sup>42</sup>. Moreover, religious interpretations and cultural norms often reinforce heteronormative standards, implicitly excluding same-sex unions from legal recognition and acceptance within religious communities. Conservative religious authorities and leaders may vehemently oppose the idea of same-sex marriage, citing religious doctrines and moral teachings that condemn homosexuality as sinful or unnatural<sup>43</sup>. This resistance to change within religious institutions perpetuates discrimination and marginalization of LGBTQ+ individuals within their own communities.

Furthermore, the absence of explicit legal provisions recognizing same-sex relationships and marriage under religious personal laws creates legal uncertainty and inconsistency, leaving LGBTQ+ individuals without legal protections and entitlements afforded to heterosexual

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<sup>40</sup> The Hindu Marriage Act, 1955 ( Act 25 of 1955).

<sup>41</sup> *Id.*

<sup>42</sup> The Muslim Personal Law ( Shariat) Application Act, 1937 ( Act 26 of 1937).

<sup>43</sup> *Supra Note 9.*

couples. Inheritance rights, property ownership, and succession matters may become particularly contentious for same-sex couples in the absence of legal recognition, leading to legal disputes and vulnerabilities.

Addressing the challenges in the recognition of same-sex relationships and marriage under religious personal laws in India requires a multifaceted approach that balances religious freedom with principles of equality and non-discrimination. Firstly, there is a need for dialogue and advocacy within religious communities to challenge traditional interpretations of religious scriptures and promote more inclusive and affirming attitudes towards LGBTQ+ individuals. Progressive religious leaders and scholars can play a crucial role in interpreting religious texts in ways that affirm the dignity and rights of LGBTQ+ individuals and advocate for their inclusion within religious institutions.

Secondly, legal reforms may be necessary to reconcile religious personal laws with constitutional principles of equality and non-discrimination. While respecting the autonomy and religious identity of each community, legislative measures can be introduced to amend existing personal laws to explicitly recognize same-sex relationships and marriage. This could involve revisiting definitions of marriage and family within religious laws to encompass diverse forms of partnerships and unions, irrespective of sexual orientation or gender identity<sup>44</sup>.

Furthermore, judicial intervention through public interest litigation and strategic litigation can serve as a catalyst for advancing LGBTQ+ rights within religious personal laws. Courts can interpret constitutional guarantees of equality and non-discrimination to provide relief to LGBTQ+ individuals facing discrimination within their religious communities and compel religious institutions to adopt more inclusive practices and policies. Landmark judgments such as *Navtej Singh Johar v. Union of India* (2018)<sup>45</sup>, which decriminalized homosexuality, demonstrate the judiciary's role in upholding fundamental rights and challenging discriminatory laws and practices. Through proactive measures, including dialogue within religious communities, legislative reforms, and judicial intervention, India can move towards a more inclusive and equitable legal framework that recognizes and respects the rights of LGBTQ+ individuals within diverse religious contexts.

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<sup>44</sup> *Ibid.*

<sup>45</sup> *Supra note 3.*



## **RECOGNITION OF SAME-SEX MARRIAGE UNDER SPECIAL MARRIAGE ACT, 1954**

The recognition of same-sex marriage has been a subject of intense debate and legal scrutiny in India, with societal attitudes and legal frameworks evolving over time. While traditional norms and cultural values have historically limited the scope of marriage to heterosexual unions, there have been significant developments in recent years, particularly concerning the Special Marriage Act. The Special Marriage Act, 1954, enacted by the Indian Parliament, provides a legal framework for the solemnization of marriages outside the realm of religious customs and rituals. Unlike personal laws governed by religious denominations, the Special Marriage Act allows individuals of different faiths or those who do not wish to adhere to religious ceremonies to marry under a secular legal framework. The Act empowers individuals to register their marriage before a Marriage Officer and provides provisions for inter-religious, inter-caste, and inter-community marriages<sup>46</sup>.

### ⇒ Recognition of Same-Sex Marriage:

While the Special Marriage Act does not explicitly prohibit or permit same-sex marriage, its secular nature and provisions for marriage registration offer a potential avenue for the recognition of same-sex unions. The Act does not prescribe any specific gender requirements for marriage, allowing individuals to enter into a marital relationship regardless of their gender identity or sexual orientation. As a result, some legal scholars and LGBTQ+ rights activists argue that the Special Marriage Act provides a pathway for same-sex couples to formalize their relationships and obtain legal recognition<sup>47</sup>.

### ⇒ Judicial Interpretations:

The interpretation of the Special Marriage Act in the context of same-sex marriage has been subject to judicial scrutiny and debate. While there have been no explicit judgments by higher courts recognizing same-sex marriage under the Act, some lower courts have taken progressive stances on the issue. In a notable case, *Sreeja S. v. State of Kerala* (2018)<sup>48</sup>, the Kerala High Court allowed a lesbian couple to register their marriage under the Special Marriage Act, emphasizing the Act's secular nature and the absence of gender-specific language in its

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<sup>46</sup> The special Marriage Act, 1954 (Act 43 of 1954).

<sup>47</sup> A. Mehta, "LGBTQ Rights in India: A Legal Perspective" 11(1) IJLJ 64-79 (2020).

<sup>48</sup> *Sreeja S V. State of Kerala*, (2018) (Unreported).

provisions<sup>49</sup>. However, such judgments are not binding on other jurisdictions and may vary in their application and interpretation.

Despite the potential for recognition under the Special Marriage Act, same-sex couples in India face significant challenges and legal barriers to formalizing their relationships. The absence of explicit provisions recognizing same-sex marriage leaves room for ambiguity and inconsistency in the application of the law. Moreover, societal stigma, cultural norms, and political resistance to LGBTQ+ rights pose obstacles to legal reform and societal acceptance of same-sex unions.

Furthermore, the lack of legislative action and judicial precedent specifically addressing same-sex marriage under the Special Marriage Act contributes to uncertainty and legal limbo for LGBTQ+ couples seeking legal recognition. Without clear legal guidelines and protections, same-sex couples may encounter difficulties in accessing benefits, rights, and entitlements associated with marriage, including inheritance rights, healthcare benefits, and immigration privileges. Addressing the challenges and legal barriers to the recognition of same-sex marriage under the Special Marriage Act requires comprehensive legal reforms and proactive measures. Firstly, there is a need for legislative action to amend the Act to explicitly recognize same-sex marriage and extend equal rights and protections to LGBTQ+ couples. This could involve revising the definition of marriage to encompass diverse forms of partnerships and unions, irrespective of sexual orientation or gender identity.

Moreover, judicial intervention through public interest litigation and strategic litigation can play a crucial role in advancing LGBTQ+ rights and challenging discriminatory laws and practices. Courts can interpret constitutional guarantees of equality and non-discrimination to provide relief to LGBTQ+ individuals facing discrimination and compel the government to enact legislative reforms<sup>50</sup>.

The recognition of same-sex marriage under the Special Marriage Act in India remains a complex and contentious issue, with legal ambiguity, societal stigma, and cultural norms posing challenges to LGBTQ+ rights. While the Act's secular nature offers potential for

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<sup>49</sup> *Id.*

<sup>50</sup> *Supra note.4.*

recognition, legislative reforms and judicial interventions are needed to ensure equal rights and protections for same-sex couples. By advocating for legal reforms, challenging discriminatory practices, and promoting societal acceptance, India can move towards a more inclusive and equitable legal framework that recognizes and respects the rights of LGBTQ+ individuals.

### **CONCLUSION.**

The legal journey of same-sex marriage in India reflects a complex interplay of legal, societal, and cultural factors. While significant strides have been made in decriminalizing homosexual acts and raising awareness about LGBTQ+ rights, the battle for legal recognition of same-sex marriage continues. Addressing deeply entrenched prejudices, overcoming legislative hurdles, and promoting inclusivity are essential for advancing equality and ensuring that all individuals, regardless of sexual orientation, enjoy equal rights under the law. As India evolves towards a more progressive and inclusive society, the recognition of same-sex marriage stands as a crucial benchmark of its commitment to upholding the principles of equality and dignity for all its citizens.



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