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THE LEGAL STATUS OF SAME-SEX MARRIAGE IN INDIA

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ABSTRACT

Same-sex marriage remains one of the most debated legal and social issues in India. While India took a historic step in 2018 by decriminalising homosexuality through the landmark judgment in *Navtej Singh Johar v. Union of India*, the legal recognition of same-sex marriage continues to be denied. The Supreme Court's 2023 verdict in *Supriyo @ Supriya Chakraborty v. Union of India* slefth the matter to Parliament, creating a significant legal gap. This article traces the historical journey of LGBTQ+ rights in India, analyses the current legal position, compares India's stance with countries that have achieved marriage equality, examines the potential social impact of legalisation, and critically evaluates arguments for and against same-sex marriage in the Indian context.

Keywords: *Same-Sex Marriage, LGBTQ+ Rights, Special Marriage Act, Decriminalisation, Marriage Equality, India, Global Perspectives.*

“They do not ask for special rights. They ask for the same rights — nothing more, nothing less.”

THE FUNDAMENTAL QUESTION: WHY MUST THEY FIGHT AT ALL?

At the heart of the same-sex marriage debate lies a question that is simple yet deeply uncomfortable why must the LGBTQ+ community fight for rights that every other citizen of India enjoys automatically? A heterosexual couple does not need to approach a court, file a petition, or justify their love to the State or to society. They marry, build families, inherit property, and live their lives freely all backed by the full force of the law. A same-sex couple, doing nothing different except loving a person of the same gender, must fight every step of the way for the same basic recognition. They are human beings first. They pay taxes, contribute to society, feel joy and grief, and seek companionship and stability just like everyone else. The right to live with dignity, the right to choose a life partner, and the right to build a family are

not special privileges they are fundamental to what it means to be human. The Indian Constitution itself recognises this through Articles 14, 19, and 21, guaranteeing equality, freedom, and personal liberty to every person, without exception. Society's discomfort with same-sex relationships does not erase the humanity of LGBTQ+ individuals, nor does it give anyone the State or society the right to treat their love as lesser. As the Supreme Court itself acknowledged in *Navtej Singh Johar* (2018),¹ sexual orientation is not a choice, it is a natural and immutable part of a person's identity. To deny a person legal recognition of their relationship on this basis is not tradition, it is discrimination.

“Sexual orientation is not a disorder to be cured, a crime to be punished, or a choice to be judged, it is simply a part of who a person is.”

INTRODUCTION

Same-sex marriage is a topic that touches upon fundamental questions of human rights, equality, dignity, and the role of law in a changing society. In India, a country of immense cultural diversity and legal complexity, this question has come to the forefront of public discourse in recent years. The journey from the criminalisation of homosexuality under the British-era Section 377 of the Indian Penal Code, 1860², to its decriminalisation in 2018, has been long and hard-fought. Yet even after this historic milestone, the legal recognition of same-sex marriage remains out of reach for millions of LGBTQ+ Indians.

This article provides a comprehensive analysis of the legal status of same-sex marriage in India. It begins by tracing the historical background, examines the current legal landscape including the Supreme Court's 2023 verdict, compares India's position with countries that have legalised same-sex marriage, discusses the potential social impact of legalisation, and evaluates the arguments on both sides of the debate.

HISTORICAL BACKGROUND: FROM CRIMINALISATION TO DECRIMINALISATION

To understand the current legal status of same-sex marriage in India, it is essential to trace the history of LGBTQ+ rights in the country. This journey can be divided into four key phases.

¹ (*Navtej Singh Johar*) — *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321 (India).

² (Section 377 / IPC) — Indian Penal Code, 1860, § 377 (India).

1. ANCIENT INDIA - A MORE ACCEPTING PAST: Contrary to popular belief, ancient Indian culture was not always hostile to same-sex relationships. Classical texts such as the *Kama Sutra* acknowledged diverse forms of sexuality, and ancient literature and temple art contain references to same-sex relationships and gender fluidity. The rigid criminalisation of homosexuality was not a product of Indian tradition but of British colonial rule.³

2. THE COLONIAL ERA - INTRODUCTION OF SECTION 377 (1860): The British colonial government introduced Section 377 of the Indian Penal Code in 1860, criminalising 'carnal intercourse against the order of nature.' This vague provision was consistently used to target and prosecute homosexual individuals, imposing criminal penalties including imprisonment on consensual same-sex relations between adults, reinforcing deep social stigma that lasted for over 150 years. After India's independence in 1947, Section 377 was retained, and homosexuality remained both a criminal offence and a social taboo with no significant legal movement for LGBTQ+ rights in the early post-independence decades.

3. THE EARLY 21ST CENTURY - THE BEGINNING OF CHANGE: The first major turning point came in 2001, when the Naz Foundation filed a Public Interest Litigation in the Delhi High Court challenging the constitutional validity of Section 377⁴. In 2009, the Delhi High Court declared Section 377 unconstitutional to the extent it criminalised consensual same-sex acts between adults, holding that it violated Articles 14, 15, and 21 of the Constitution⁵. However, in 2013, the Supreme Court overturned this ruling in *Suresh Kumar Koushal v. Naz Foundation*⁶, reinstating Section 377 and once again criminalising homosexuality. This decision was widely criticised by legal scholars, human rights organisations, and LGBTQ+ activists worldwide.

4. THE 2018 LANDMARK - DECRIMINALISATION: On 6 September 2018, a five-judge Constitution Bench of the Supreme Court, in *Navtej Singh Johar v. Union of India*, unanimously struck down Section 377, permanently decriminalising consensual homosexual relations between adults. The Court held that sexual orientation is a natural and immutable characteristic of personal identity and that criminalising it violated the fundamental rights to dignity, privacy, equality, and freedom. The judgment drew heavily on *Justice K.S.*

³ (Ancient India / Quint article) — Ray S, 'Indian Culture Does Recognise Homosexuality, Let Us Count the Ways' The Quint (2018),

⁴ Naz Foundation PIL) — Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277 (Delhi H.C. 2009).

⁵ (Delhi HC 2009 judgment) — Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277 (Delhi H.C. 2009).

⁶ (Koushal judgment) — Suresh Kumar Koushal v. Naz Foundation, AIR 2014 SC 563 (India).

Puttaswamy v. Union of India (2017)⁷, which recognised privacy as a fundamental right and affirmed that sexual orientation is an essential component of personal identity. However, critically, the 2018 ruling only decriminalised homosexuality, it did not legalise same-sex marriage or create any framework for recognising same-sex relationships under law.

CURRENT LEGAL POSITION ON SAME-SEX MARRIAGE IN INDIA

As of today, same-sex marriage is not legally recognised in India. The country's marriage laws, the Special Marriage Act, 1954⁸, the Hindu Marriage Act, 1955, the Muslim Personal Law, and other personal laws, all define marriage exclusively as a union between a man and a woman, using gendered terms such as 'husband,' 'wife,' 'man,' and 'woman.'

In October 2023, the Supreme Court delivered its most direct judgment on the issue in *Supriyo @ Supriya Chakraborty v. Union of India*⁹. A five-judge Constitution Bench unanimously held that there is no fundamental right to marry that compels the State to create a legal marriage framework for same-sex couples. The bench split 3:2 on key issues. The majority (Justices Bhat, Kohli, and Narasimha) refused to read the Special Marriage Act in a gender-neutral manner, holding that doing so would constitute judicial legislation violating the separation of powers. They also declined to direct the government to create a civil union framework, holding that this was exclusively a legislative task.

The minority (CJI Chandrachud and Justice Kaul) disagreed, holding that the SMA could be interpreted in a gender-neutral manner and that the State has a positive constitutional duty to provide legal recognition to same-sex relationships. The Court did unanimously direct the Union government to form a high-powered committee to examine the rights of queer couples in areas such as succession, insurance, ration cards, and pension benefits, but this falls far short of the marriage equality the petitioners had sought. Without legal recognition, same-sex couples in India continue to be denied inheritance rights, joint adoption, spousal medical decision-making, insurance benefits, and access to government welfare schemes.

GLOBAL PERSPECTIVES: HOW OTHER COUNTRIES LEGALISED SAME-SEX MARRIAGE

⁷ (Puttaswamy privacy) — Justice K.S. Puttaswamy v. Union of India, AIR 2017 SC 4161 (India)

⁸ (Special Marriage Act) — The Special Marriage Act, 1954, § 4(c) (India).

⁹ (Supriyo judgment) — *Supriyo @ Supriya Chakraborty v. Union of India*, AIR 2023 SC 4904 (India).

The global movement toward marriage equality has grown steadily over the past two decades. The Netherlands became the first country in the world to legalise same-sex marriage in 2001, followed by Belgium (2003), Canada (2005), and Spain (2005)¹⁰. The United Kingdom legalised it in England and Wales in 2014 through the Marriage (Same Sex Couples) Act, following decades of incremental progress including decriminalisation in 1967 and civil partnerships in 2005. In 2015, the United States Supreme Court delivered its landmark ruling in *Obergefell v. Hodges*¹¹, striking down all state-level bans and recognising same-sex marriage as a constitutional right nationwide. In Latin America, Argentina led the way in 2010, followed by Brazil, Colombia, Uruguay, and Ecuador. In Asia, Taiwan made history in 2019 as the first Asian country to legalise same-sex marriage after its Constitutional Court declared existing marriage laws unconstitutional. Germany, France, Australia, and South Africa have also recognised marriage equality¹². As of today, over 35 countries worldwide have legalised same-sex marriage and notably, none of them have experienced the social collapse that opponents predicted. India, despite being the world's largest democracy and a country that constitutionally guarantees equality to all its citizens, continues to lag behind this global movement toward recognising love and dignity without discrimination.

SOCIAL IMPACT OF LEGALISING SAME-SEX MARRIAGE

Beyond the legal dimension, the legalisation of same-sex marriage would have significant and wide-ranging social impacts in India:

MENTAL HEALTH AND WELL-BEING: Research consistently shows that LGBTQ+ individuals in countries where same-sex marriage is legal experience better mental health outcomes, lower rates of depression, anxiety, and suicide than those in countries where it is not. The social validation provided by legal recognition reduces the sense of shame and stigma that LGBTQ+ individuals in India currently face¹³.

FAMILY STABILITY AND CHILDREN'S RIGHTS: Legalising same-sex marriage would provide a stable legal framework for LGBTQ+ families, including the right to jointly adopt children. Currently, children living with same-sex couples in India have no legal security,

¹⁰ (Global — Netherlands, Canada etc.) — Pew Research Center, 'Gay Marriage Around the World' (2017),

¹¹ (*Obergefell v. Hodges* USA) — *Obergefell v. Hodges*, 576 U.S. 644 (2015) (United States Supreme Court)

¹² (Taiwan / Asia) — Pew Research Center, 'Gay Marriage Around the World' (2017),

¹³ (Mental health research) — Pew Research Center, 'Global Views on Homosexuality' (2021),

they cannot be legally adopted by both partners, leaving them vulnerable in the event of separation, illness, or death of one partner.

REDUCTION OF DISCRIMINATION: Legal recognition sends a powerful social signal that same-sex relationships are equal in dignity and worth to heterosexual ones. Countries that have legalised same-sex marriage have generally seen a reduction in hate crimes, workplace discrimination, and social exclusion of LGBTQ+ individuals over time.

ECONOMIC BENEFITS: Marriage brings significant economic benefits, joint tax filings, spousal insurance, pension rights, and inheritance. Denying these to same-sex couples creates financial hardship and inequality. Legalising same-sex marriage would close this economic gap and ensure LGBTQ+ couples can plan their financial futures with the same security as heterosexual married couples.

CHANGING SOCIAL ATTITUDES: A 2021 Pew Research Centre study found that a majority of younger Indians support equal rights for LGBTQ+ people. Legalisation would both reflect and accelerate this shift, helping to normalise same-sex relationships in mainstream Indian society and reduce the stigma that causes immense harm to LGBTQ+ individuals and their families.

ARGUMENTS IN FAVOUR OF LEGALISING SAME-SEX MARRIAGE

1. CONSTITUTIONAL EQUALITY: Articles 14, 15, and 21 of the Indian Constitution guarantee equality before law, protection from discrimination, and the right to life and personal liberty. Denying same-sex couples the right to marry is a clear violation of these provisions, creating an unjustified distinction based solely on sexual orientation.

2. HUMAN DIGNITY AND AUTONOMY: The Supreme Court has held that personal autonomy including the freedom to choose one's life partner is protected under Article 21. Cases like *Shafin Jahan v. K.M. Ashokan* ¹⁴ and *Shakti Vahini v. Union of India* ¹⁵ affirmed the right to choose a spouse as a fundamental freedom. This principle should logically extend to same-sex couples.

3. LEGAL AND FINANCIAL PROTECTIONS: Marriage confers crucial legal benefits, inheritance rights, joint property, insurance, medical decision-making, and pension benefits.

¹⁴ (*Shafin Jahan*) — *Shafin Jahan v. K.M. Ashokan*, AIR 2018 SC 1933 (India).

¹⁵ (*Shakti Vahini*) — *Shakti Vahini v. Union of India*, AIR 2018 SC 1601 (India).

Denying these to same-sex couples creates serious inequalities, particularly in times of illness, death, or financial hardship.

4. ALIGNMENT WITH INTERNATIONAL STANDARDS: The Universal Declaration of Human Rights¹⁶ and the International Covenant on Civil and Political Rights¹⁷ both recognise the right to marry as a fundamental human right. India's refusal to recognise same-sex marriage places it at odds with its international human rights obligations.

5. GROWING PUBLIC SUPPORT: Public opinion in India is shifting, particularly among younger generations. Legalising same-sex marriage would reflect this evolving social reality and signal that India's legal system is capable of growing with its people.

ARGUMENTS AGAINST LEGALISING SAME-SEX MARRIAGE

1. CULTURAL AND RELIGIOUS TRADITIONS: Opponents argue that marriage has always been defined in India, across Hindu, Muslim, Christian, and other personal laws, as a union between a man and a woman. Changing this definition would go against deeply held cultural and religious values central to the identity of millions of Indians.

2. LEGISLATIVE DOMAIN: The majority in *Supriyo* held that recognising same-sex marriage is a complex policy matter involving numerous personal laws and statutory frameworks. It requires extensive legislative deliberation, and judicial intervention would amount to overreach into Parliament's domain.

3. SOCIETAL READINESS: Some argue that India's society, particularly in rural and semi-urban areas, is not yet ready for same-sex marriage. They contend that imposing this change without broader social consensus could lead to backlash and social tension.

4. CONCERNS ABOUT PROCREATION AND FAMILY STRUCTURE: Traditional opponents argue that marriage is primarily designed for procreation. Critics of this view note that procreation has never been a legal requirement for marriage, and same-sex couples can parent through adoption or surrogacy.

5. LEGAL COMPLEXITY: India's marriage laws are deeply intertwined with personal laws that are constitutionally protected. Extending the Special Marriage Act to same-sex couples

¹⁶ (UDHR) — Universal Declaration of Human Rights art. 16(1), Dec. 10, 1948, G.A. Res. 217A (III).

¹⁷ (ICCPR) — International Covenant on Civil and Political Rights art. 23(2), Dec. 16, 1966, 999 U.N.T.S. 171.

would require comprehensive reforms across multiple statutes, a task of significant legal and political complexity.

CONCLUSION

The legal status of same-sex marriage in India reflects a society and legal system in transition. The decriminalisation of homosexuality in 2018 was a historic achievement but it was the beginning of the journey, not the end. The *Supriyo* verdict of 2023, while affirming the dignity and rights of LGBTQ+ persons and directing the government to address discrimination, ultimately placed the responsibility for marriage equality on Parliament, an institution that has so far shown little appetite for this reform.

The global experience is clear: countries that have legalised same-sex marriage have not suffered social collapse, they have become more equal, more inclusive, and more just. India has the constitutional tools, Articles 14, 15, 19, and 21, to achieve this change. What is needed is the political will. An amendment to the Special Marriage Act, 1954, removing its gendered language, would be the most practical and immediate step toward equality. Until this happens, millions of LGBTQ+ Indians will continue to live in a legal limbo, their relationships real, their love undeniable, but their rights incomplete.

“The Constitution does not ask who you love. It only asks that you be treated equally. To deny a person the right to love freely is to deny them the right to live freely.”