

Policy Perspective

Uniting Queer Hearts Under the Law: Envisioning a Future of Inclusivity with the Amended Special Marriage Act for Same-Sex Couples in India

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Abstract

The paper explores the historical context, significance, current landscape, and potential amendments of the Special Marriage Act (SMA) of 1954 to include same-sex marriages. Tracing its origins from colonial-era legal reforms, the paper highlights the Act's role in facilitating interfaith and inter-community marriages while addressing the glaring absence of recognition for same-sex unions. Through an analysis of key provisions, legal precedents, constitutional harmony, and international examples, the paper argues for the amendment of the SMA to embrace marriage equality. Emphasizing the Act's inherent flexibility, the paper proposes leveraging its existing framework to accommodate same-sex marriages efficiently. Furthermore, it discusses the socio-economic benefits and legal clarity associated with recognizing same-sex marriages, advocating for the alignment of Indian law with constitutional values of equality and non-discrimination. The paper underscores the imperative of legislative reform to foster social inclusion, and progress, and strengthen India's secular fabric. Amending the SMA to recognize same-sex marriages represents a pivotal step towards a more inclusive and equitable society, promoting the fundamental rights and dignity of all individuals regardless of sexual orientation.

Keywords: Special Marriage Act, Same-Sex Marriage, Secularism, Inclusivity, Legal Reform, Constitutional Harmony, Social Acceptance, Human Rights

1. Introduction

This paper sheds light on the historical evolution and contemporary significance of the Special Marriage Act (SMA) of 1954, alongside addressing its current inadequacies

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concerning the recognition of same-sex marriages. Marriage in India underwent a notable transformation during the colonial era, transitioning from solely religiously governed customs to the introduction of civil marriages under Act III of 1872. However, early resistance revealed the challenges of reconciling legal reforms with entrenched religious practices. Following India's independence, the SMA of 1954 emerged as a progressive measure, providing a secular alternative to traditional religious ceremonies and facilitating interfaith and inter-community unions. Despite its role in promoting social harmony and individual choice in marital unions, the SMA's failure to explicitly address same-sex marriages highlights a significant gap in India's legal framework. Despite landmark judicial decisions, such as *Navtej Singh Johar v. Union of India* (2018) decriminalizing homosexuality, the absence of legal recognition for same-sex unions perpetuates marginalization and legal ambiguity for LGBTQIA+ couples.

This paper sets the stage for examining the SMA's historical context, current landscape, and the imperative for legislative reform to embrace marriage equality. By analyzing key provisions, legal precedents, constitutional harmony, and international examples, the paper advocates for amendments to the SMA that align with India's constitutional values of equality, non-discrimination, and personal liberty, thereby fostering a more inclusive and equitable society for all its citizens.

2. Historical Context: Tracing the Origins from the Colonial Era to the Enactment in 1954

The SMA finds its genesis in the fertile ground of colonial legal reforms. Prior to the 19th century, marriage in India was governed entirely by the religious customs and personal laws of various communities (Mitra & Fischer, 2002). However, the British Raj, with its emphasis on codified law, introduced Act III of 1872, which provided a framework for civil marriages for all persons irrespective of religion (Chatterjee, 2010). This early legislation, however, met with resistance due to concerns about undermining established religious practices (Chatterjee, 2010). The seeds for the SMA were sown in the aftermath of India's independence. Recognizing the limitations of Act III and the need for a more inclusive approach, the nascent Indian government embarked on drafting a new law. The SMA, enacted in 1954, aimed to provide a secular alternative to religious marriages, particularly facilitating unions between individuals of different faiths or castes. While the Act did not explicitly address same-sex marriage, its emphasis on a civil, non-religious approach to matrimony laid the groundwork for future debates on expanding its scope to encompass unions beyond those defined by gender and religion.

3. Objective and Significance: Understanding the Act's Role in Facilitating Interfaith and Inter-Community Marriages

The SMA stands as a landmark piece of legislation in its contribution to social harmony within India's diverse society. Before its enactment, marriages were solely governed by the religious codes and customs of individual communities. This often posed a significant barrier for couples from different faiths or castes who wished to marry. The SMA emerged as a progressive response, offering a secular alternative to traditional religious marriage ceremonies.

The Act's significance lies in its ability to transcend the limitations of religious affiliation and social stratification (Subramanian, 2010). By providing a standardized legal framework for civil marriages, the SMA empowered individuals to marry outside their designated faith or community, based on their own volition. This not only fostered greater individual choice in marital unions but also served to weaken the hold of rigid social structures that might have otherwise discouraged interfaith and inter-community marriages. The Act's role in promoting social mobility and dismantling social barriers remains a crucial aspect of its enduring legacy (Maity, 2020).

4. Current Landscape: The Act's Relevance in Contemporary India and the Absence of Same-sex Marriage Recognition

The Special Marriage Act (SMA) of 1954 continues to hold significance in contemporary India by providing a legal framework for interfaith and inter-community marriages, fostering national unity amidst a backdrop of diverse religious and social identities. However, a glaring lacuna exists within the Act's purview - the absence of recognition for same-sex marriage. While the Supreme Court's landmark 2018 decision in *Navtej Singh Johar v. Union of India* decriminalized homosexuality, it did not extend to acknowledging same-sex unions as marriages (Chaudhary, 2020). This exclusion creates a state of legal ambiguity and marginalizes LGBTQIA+ couples, denying them the rights and protections afforded to heterosexual married couples.

Further compounding this issue, the Supreme Court's recent judgment in a series of petitions demanding marriage equality for same-sex couples (October 2023) declined to recognize same-sex marriage as a fundamental right (Yasir & Travelli, 2023). The court, while emphasizing the right to cohabit and form partnerships, refrained from mandating the legislature to legalize same-sex marriage. This decision underscores the current limitations of legal recourse for LGBTQIA+ couples seeking marital recognition (Divan, 2023).

The Act's gender-neutral language pertaining to spouses offers a glimmer of hope for potential future amendments that embrace inclusivity. However, the current landscape remains one of dissonance between evolving societal norms and the limitations of existing legislation.

5. Key Provisions: An examination of the important sections and their implications for marriage beyond gender and religion

The provisions of SMA have not evolved to recognize the changing dynamics of society, particularly concerning the rights of same-sex couples. Section 4 of the Act stipulates conditions for the solemnization of marriage, which implicitly assumes heterosexual unions by requiring neither party to have a living spouse.

This implicitly excludes same-sex couples, who cannot legally marry under the current framework. Section 5 mandates notice of intended marriage, and Section 6 allows for objections to be raised, both of which are accessible only to heterosexual couples due to the Act's interpretation. The Act's Section 11 provides for the declaration by parties and witnesses.

Here, the language used is gender-neutral, suggesting that the Act's framework could potentially accommodate same-sex marriages without substantial alterations. Section 21 deals with the legitimacy of children from such unions, which could be interpreted to extend protections to children of same-sex couples if the Act were to be amended. Section 24 outlines the consequences of marriage on property, which is a significant aspect for same-sex couples as it would grant them equal legal status in property matters. Section 25 and Section 26, concerning divorce and custody of children, respectively, are also critical as they currently do not apply to same-sex couples due to the lack of legal recognition of their unions.

The Act's silence on the recognition of same-sex marriages creates a legal void. While the Act's existing framework, with its secular orientation and gender-neutral language in certain sections, shows an inherent flexibility, it requires legislative intervention to become truly inclusive.

The judiciary has indicated that the onus lies with the legislature to amend the law to reflect contemporary societal values (Mahajan, 2020). Incorporating same-sex marriages into the Act's purview would entail redefining marriage within its provisions as a union between two persons, not predicated on gender. This amendment process would involve the introduction of a bill in Parliament, followed by the necessary debates and approvals, culminating in the President's assent.

Such a legislative change would not only extend the Act's secular promise to same-sex couples but also harmonize it with the constitutional values of equality, non-discrimination, and personal liberty. The Act's potential expansiveness could be harnessed to encompass marriage beyond gender and religion, thereby strengthening the secular fabric of the nation and providing a legal foundation for the recognition of same-sex marriages in India. This would not only align the Act with constitutional values but also with international human rights standards, which increasingly recognize marriage equality as a fundamental right (Rajagopal, 2023).

The amendment of the Act to include same-sex marriages, which can also be considered 'special' in the context of the Act, would be a step towards a more inclusive society, ensuring that all individuals have the right to marry the person of their choice.

6. The Act's Flexibility: How the Act's existing framework is conducive to encompassing same-sex marriages

The SMA offers a compelling framework for recognizing same-sex marriages in India through its inherent flexibility. Unlike personal marriage laws that govern specific religious communities, the SMA focuses on civil marriage solemnized by a Marriage Officer. This neutrality regarding gender and religion in the core definition of marriage (Section 5) presents a crucial point of entry for legal inclusion (Dideriksen, 2020). Furthermore, the Act emphasizes the concept of consent between two individuals (Section 4). This focus on mutuality transcends considerations of biological sex, potentially paving the way for the recognition of same-sex unions built on mutual commitment (Subramani, 2023).

Additionally, the Act doesn't prescribe any specific conditions for the parties entering a marriage beyond basic requirements like age and mental capacity (Section 4). This absence of gendered language creates further space for legislative interpretation to encompass same-sex couples (Singh, 2017). The flexibility extends to formalities as well. The Act mandates a 30-day public notice period (Section 6) to prevent existing marriages. While intended to safeguard existing heterosexual unions, this provision can be adapted to address potential challenges arising from same-sex marriage recognition. By fostering transparency and allowing for objections, the Act provides a mechanism to navigate potential concerns during the transition to a more inclusive legal landscape (Bag et al., 2011).

7. Legal Precedents: Discussing past judgments and interpretations that hint at the Act's potential expansiveness

The SMA has undergone several amendments to address the evolving legal and social landscape. Notably, the Marriage Laws (Amendment) Act, 2001 introduced significant changes, including the provision for the appointment of Diplomatic and Consular Officers as Marriage Officers for solemnizing and registering marriages between Indian nationals abroad. This amendment broadened the Act's applicability, reflecting India's commitment to accommodating its diaspora (Press Information Bureau, 2024).

Further, the Personal Laws (Amendment) Act, 2019 removed leprosy as a ground for divorce or separation, aligning the Act with modern medical advancements and human rights standards (Rajagopal, 2018). These amendments demonstrate the legislature's intent to refine the SMA in response to contemporary challenges and societal progress. Additionally, the proposed Marriage Laws (Amendment) Bill, 2010, sought to introduce the 'irretrievable breakdown of marriage' as a new ground for divorce, emphasizing the Act's adaptability to the changing dynamics of marital relationships. Although not yet enacted, this bill indicates a legislative inclination towards recognizing the personal autonomy of individuals within the marriage (Chakrabarti et al., 2022). These amendments,

coupled with judicial interpretations, suggest that the SMA's framework is capable of further expansion, potentially to include same-sex marriages, thereby reinforcing the Act's foundational principle of secularism and equality.

8. Legal Efficiency: The advantages of amending existing laws over crafting new ones

Amending the SMA to encompass same-sex marriage offers a strategic and efficient pathway to legal reform, as evidenced by several key advantages. Courts and legal professionals are already familiar with the Act's procedures and interpretations, streamlining the integration of provisions for same-sex couples (Bhatia, 2023). This efficient utilization of resources circumvents the extensive bureaucratic and legislative processes required for entirely new laws. Amending the SMA minimizes disruption, conserves governmental and judicial resources, and allows for a more focused allocation towards public education and societal integration (Gee & Webber, 2005). Furthermore, amending the SMA fosters public perception and acceptance. Incremental changes are often more palatable to the public, facilitating smoother societal transition. This method respects the evolutionary nature of social norms, aligning legal progress with the gradual shifts in public consciousness.

The familiarity of the SMA as a framework for interfaith and inter-community marriages can ease the public's understanding of its potential extension to same-sex couples (Osman, 2020). Finally, amending the SMA presents a strategically opportune moment to address any shortcomings in the existing Act. By incorporating provisions for same-sex marriage, legislators can simultaneously introduce updates or clarifications to the SMA, ensuring its continued effectiveness in contemporary society. This approach leverages the legislative process to achieve multiple goals, promoting efficiency and maximizing the impact of legal reform (Solanki, 2015). Beyond domestic considerations, amending the SMA aligns with international resonance. Numerous jurisdictions have successfully expanded marriage laws to include same-sex couples. By embracing international trends, India can demonstrate its adherence to human rights standards and solidify its position as a leader in social justice (Shunmugasundaram, 2021).

9. International Examples: How other countries have successfully amended marriage laws to include same-sex couples

India can glean valuable insights from the experiences of nations that have successfully amended their marriage laws to encompass same-sex couples. Several countries serve as compelling case studies, demonstrating the feasibility and positive outcomes associated with this approach. Legislative amendments have been the most common method, with 25 countries enacting laws through their parliaments (Marks, 2006). Notably, Australia, Ireland, and Switzerland required public referenda before legislative action, underscoring the importance of societal consensus in the

process (Raveau et al., 2022). Conversely, 10 countries have relied on judicial rulings to extend marriage rights to same-sex couples, with courts often interpreting constitutional principles of equality and non-discrimination as mandates for change (Norrie, 2015). Canada, a Commonwealth nation with a legal system sharing some similarities with India, offers a particularly instructive example (Gee & Webber, 2005). In 2005, Canada amended the Civil Marriage Act, removing gender-specific language and defining marriage as "the lawful union of two persons to the exclusion of all others." This concise amendment effectively opened marriage to same-sex couples while maintaining the core principles of the existing legislation (Wright, 2006).

Similarly, numerous European nations have embraced inclusivity through legislative reform. In 2001, the Netherlands became the first country in the world to legalize same-sex marriage through a legislative amendment (Wockner, 2023). Other European nations followed suit, with countries like Spain (2005), France (2013), and Germany (2017) all amending their marriage laws to include same-sex couples. These amendments typically involved revising existing legal definitions of marriage to be gender-neutral, ensuring a smooth integration of same-sex unions into the established legal framework (Trimble, 2017). Beyond Europe and the Commonwealth, countries in Latin America have also demonstrated successful legislative reform. Argentina, in 2010, amended its Civil Code to explicitly recognize same-sex marriage. This amendment not only provided legal recognition but also ensured equal rights and obligations for same-sex couples compared to heterosexual couples (Masci et al., 2019).

Recent examples include Greece, which, in 2024, became the first Christian Orthodox majority country to legalize same-sex marriage, also permitting same-sex adoptions (Smith, 2024). Estonia followed suit as the first post-Soviet state to embrace marriage equality, with legislation effective from January 1, 2024 (Musaddique, 2024). These instances illustrate the evolving nature of marriage laws, adapting to contemporary understandings of human rights and equality. The global trajectory towards marriage equality has not only aligned with constitutional values but also reflected a broader commitment to human dignity and the universality of love (DeSilver, 2023).

10. Constitutional Harmony: Aligning the Act with the constitutional values of equality and non-discrimination

The Indian Constitution enshrines the principles of equality and non-discrimination as fundamental pillars of a just society (Articles 14, 15). These principles unequivocally posit that all individuals are equal before the law, irrespective of their caste, religion, sex, or sexual orientation (Sankaran, 2007). The exclusion of same-sex marriage from the purview of the SMA stands in stark contrast to these core tenets. The denial of marriage rights to same-sex couples creates a two-tiered system of citizenship, privileging heterosexual relationships and relegating same-sex

partnerships to a status of inferiority. This dissonance between the lived realities of LGBTQIA+ individuals and the constitutional promise of equality undermines the very notion of a just and inclusive society (Bilchitz, 2016).

Further, the current legal framework fails to recognize the inherent dignity and autonomy of same-sex couples. The right to marry is not merely a social construct; it signifies the state's recognition of a fundamental human right - the right to form a family unit and enjoy the legal and social benefits associated with marriage. Denying this right to same-sex couples constitutes a form of state-sanctioned discrimination, perpetuating social stigma and marginalization (Mishra, 2023). Amending the SMA to encompass same-sex marriage would bring Indian law into harmony with its own constitutional aspirations. By extending marriage rights to all consenting adults, irrespective of gender, the state would reaffirm its commitment to equality and non-discrimination.

This alignment would not only promote social justice but also strengthen India's image as a progressive and inclusive democracy (Spandana, 2023). Opponents of same-sex marriage may argue that the concept of marriage is inherently linked to heteronormative procreation. However, this argument fails to acknowledge the evolving nature of family structures and the diverse forms of love and commitment (Gerstmann, 2008). The focus of marriage under the SMA lies in the formation of a civil union, devoid of religious connotations (Bag, 2011). Amending the Act to include same-sex couples would simply extend this existing framework to a historically marginalized segment of society.

11. Marriage as a Civil Right: Interpreting the Act's Provisions to Support the Civil Nature of Marriage for All, Including Same-Sex Couples

The SMA transcends religious considerations, focusing instead on the formation of a civil union between consenting adults. This inherent focus on the civil character of marriage presents a compelling opportunity to interpret the Act's provisions in a way that embraces same-sex couples, thereby securing their right to marry (Mitra & Fischer, 2014). A crucial argument in this regard lies in the concept of "pro forma" - a legal term signifying a prescribed form or procedure. The SMA outlines specific requirements for a valid marriage, such as minimum age, mutual consent, and the absence of prohibited relationships. These requirements are demonstrably gender-neutral, focusing on the capacity and consent of the individuals involved, not their biological sex (Dalal, 2020).

Furthermore, the Act conspicuously avoids any mention of procreation or gender roles within a marriage. This reinforces the notion that marriage under the SMA signifies a formal recognition of a committed partnership, devoid of religious or procreative imperatives (Kirpal, 2020). Objections may arise concerning the historical context of the Act and its initial focus on facilitating interfaith and inter-community marriages. However, the evolving nature of legal interpretation allows for a progressive reading of the Act (KT & Bhat, 2020). Landmark judgments like

Navtej Singh Johar v. Union of India (2018) have demonstrated the judiciary's willingness to interpret existing legal frameworks in a manner that upholds fundamental rights and expands social inclusion. By interpreting the SMA's provisions through this lens of inclusivity, the Act's focus on civil unions and the absence of gendered requirements can be seen as encompassing same-sex couples.

This interpretation aligns with the growing international consensus recognizing marriage as a fundamental right extending to same-sex partnerships. Such an interpretation would not only ensure equal treatment under the law but also resonate with the core principles enshrined in the Indian Constitution (PTI, 2020). Articles 14, 15, and 21 guarantee equality before the law, non-discrimination, and the right to personal liberty, respectively. Denying marriage rights to same-sex couples creates an arbitrary classification based on sexual orientation, violating these fundamental rights (Bhatia, 2017).

12. Succession and Rights: How amendments can extend legal protections and rights to same-sex couples

Amending the SMA to encompass same-sex marriage would not merely be a symbolic gesture; it would significantly impact the legal and financial security of same-sex couples. Currently, these couples navigate a complex web of legal ambiguities, lacking access to crucial protections and rights enjoyed by heterosexual married couples. One of the most pressing concerns pertains to inheritance and succession rights. Without marriage recognition, a same-sex partner may be excluded from inheriting property or assets accumulated by their deceased partner. This can lead to financial hardship and emotional distress, particularly for long-term committed couples (Agarwal, 2020). Amending the SMA would ensure that same-sex spouses inherit automatically, similar to heterosexual couples, fostering financial security and stability.

Furthermore, amendments can address issues related to hospital visitation rights, medical decision-making authority, and social security benefits. Often, same-sex partners are denied the right to make medical decisions on behalf of their ailing partner or even face restricted visitation rights in hospitals. Amending the SMA would grant same-sex spouses these crucial rights, ensuring their role in their partner's healthcare is recognized and respected (Marsack & Stephenson, 2018). Tax benefits currently enjoyed by married couples, such as joint tax filing and exemptions, would also become accessible to same-sex couples upon the inclusion of same-sex marriage in the SMA. This would not only bring about greater financial parity but also acknowledge the economic unit formed by a same-sex marriage (Tymkiw, 2023).

13. Economic, Social and Legal Benefits: The positive ripple effects of recognizing same-sex marriages on society and the legal system

Marriage equality can attract skilled same-sex couples to India, potentially boosting the economy through increased investment and talent acquisition (Hamermesh &

Delhommer, 2020). This could also potentially boost the "Pink Economy" in India (Marlow & Trivedi, 2018). Extending marriage recognition to same-sex couples would generate positive externalities impacting both the social and legal spheres. Socially, it fosters a more inclusive environment, dismantling discriminatory stigmas attached to same-sex relationships (Drabble et al., 2021). Research suggests a correlation between marriage equality and a decrease in mental health disparities within the LGBTQIA+ community (Perone, 2015).

Legal recognition affords same-sex couples access to a robust framework of protections and entitlements currently unavailable. This includes hospital visitation rights, inheritance rights, and the ability to jointly adopt children (Herek, 2006). Furthermore, the legal clarity provided by marriage equality reduces uncertainty and litigation surrounding issues like property division and power of attorney in committed same-sex partnerships (Delhommer & Hamermesh, 2021). From a systemic perspective, recognizing same-sex marriage strengthens the legal infrastructure by promoting principles of equality and non-discrimination enshrined in the Indian Constitution. This fosters a more just and equitable society for all citizens.

14. Strengthening Secularism: Reinforcing India's secular fabric by embracing marriage equality

India's commitment to secularism, enshrined in its Constitution, necessitates the fostering of a legal environment that transcends religious affiliations. Denying marriage recognition to same-sex couples creates an incongruence between this core principle and the lived realities of LGBTQIA+ citizens. Amending the SMA to encompass same-sex marriages would be a powerful affirmation of secularism. Currently, the Act facilitates interfaith and inter-community marriages, demonstrating the state's neutrality towards religious doctrines in the realm of matrimony (Singh, 2018). Excluding same-sex couples based on sexual orientation undermines this very neutrality.

It reinforces the notion that marriage is contingent upon religious sanction, potentially privileging certain religious viewpoints over others (Markard, 2016). Recognition of same-sex marriage separates the act of marriage from religious dogma, solidifying its position as a civil contract with legal and social implications. This reinforces the state's role in regulating marriage as a societal institution, ensuring equal access for all citizens irrespective of their faith or sexual orientation (Singh, 2017).

15. Social Inclusion and Progress: The role of legal recognition in fostering social acceptance and progress

Legal recognition of same-sex marriage transcends the realm of legal rights, acting as a powerful catalyst for social inclusion and progress. Marriage equality sends a

clear message that same-sex relationships are deserving of societal respect and validation. This, in turn, can dismantle discriminatory attitudes and foster a more inclusive environment for LGBTQIA+ individuals (Kennedy & Dalla, 2019). Studies have shown a positive correlation between marriage recognition and a decrease in social stigma surrounding same-sex relationships (Badgett, 2011). Furthermore, legal recognition paves the way for broader societal acceptance. When same-sex couples can publicly celebrate their unions and enjoy the legal protections afforded to married couples, it normalizes these relationships and fosters greater understanding within the community. This societal shift can have a profound impact on younger generations, creating a more accepting environment where LGBTQIA+ youth feel empowered to live authentically (Carpenter et al., 2021). Ultimately, marriage equality serves as a crucial marker of progress towards a more inclusive and equitable society, where all individuals have the right to love and be loved.

16. Conclusion

The Special Marriage Act (SMA) of 1954 stands as a testament to India's commitment to secularism and personal liberty. While the Act has been instrumental in facilitating interfaith and inter-community marriages, its failure to recognize same-sex unions underscores the urgent need for reform. As demonstrated, the SMA's inherent flexibility and alignment with constitutional values provide a fertile ground for inclusivity. Recognizing same-sex marriages within the SMA is not just a matter of legal reform; it is a call to uphold the principles of equality, non-discrimination, and personal liberty enshrined in the Indian Constitution.

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