LEGALISATION OF SAME-SEX MARRIAGES IN INDIA THROUGH SPECIFIC AMENDMENT TO SPECIAL MARRIAGE ACT 1954

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(July 2022)

DECLARATION

I, REETAM SINGH, do hereby declare that the dissertation titled "LEGALISATION OF SAME SEX MARRIAGES IN INDIA THROUGH SPECIFIC AMENDMENT TO SPECIAL MARRIAGE ACT 1954" submitted by me for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M. DEGREE PROGRAMME of National Law University and Judicial Academy, Assam is a bonafide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

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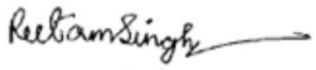

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CERTIFICATE

This is to certify that REETAM SINGH has completed his dissertation titled "LEGALISATION OF SAME SEX MARRIAGES IN INDIA THROUGH SPECIFIC AMENDMENT TO SPECIAL MARRIAGE ACT 1954" under my supervision for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M DEGREE PROGRAMME of National Law University and Judicial Academy, Assam.

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LIST OF ABBREVIATIONS

1.	AIR	All India Reporter
2.	Anr	Another
3.	Ch	Chapter
4.	Cis	Cisgender
5.	CrPC	Criminal Procedure Code
6.	Corpn.	Corporation
7.	Del	Delhi
8.	Dr.	Doctor
9.	DLT	Delhi Law Tribunal
10.	DOMA	Defence of Marriage Act
11.	Hag	Hague
12.	IPC	Indian Penal Code
13.	JJ	Juvenile Justice
14.	Ltd	Limited
15.	LGBTQIA+	Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual
16.	Mad.	Madras

		Madras
17.	NLUJAA	National Law University and Judicial Academy Assam
18.	NALSA	National Legal Services Authority
19.	NALSAR	National Academy of Legal Studies and Research
20.	NCT	National Capital Territory
21.	Ors	Others
22.	OCI	Overseas Citizen of India
23.	SCC	Supreme Court Cases
24.	Vol.	Volume
25.	UNICEF	United Nations International Children Emergency Fund
26.	UCC	Uniform Civil Code
27.	UK	United Kingdom
28.	USA	United States of America

INTRODUCTION

The legal standing on the issue of same-sex relationships has seen a positive evolution in India with respect to the recent rulings of the Supreme Court and subsequent High Courts. The Navtej Singh Johar Judgement decriminalised consensual intercourse by reading down Section 377 of the Indian Penal Code. But the same didn't mean that same-sex relationships are legal in India. The definition of "husband" and "wife" within the Hindu Marriage Act of 1955 and Special Marriage Act of 1954 is what put restrictions on the application of such statutes upon same-sex marriages from being solemnised. The Thesis Paper discusses the historical underpinnings of the Special Marriage Act of 1954 by exploring its objective and purpose to encourage inter-caste and inter-faith marriages. It undertakes a comparative analysis of the recent legislations passed in the field of recognition of same-sex marriages across the world with a special focus on the USA and the United Kingdom. A case-by-case analysis is done on how the Indian Judiciary has approached the issue of recognition of gay rights and gender-neutral marriage laws in India. Each statute of The Special Marriage Act of 1954 is explored while suggesting possible amendments to facilitate same-sex marriages as well under its scope with minimum alterations to the existing statutes. And a detailed discussion was undertaken on the issue of divorce laws and adoption laws where the issue faced by same-sex couples is highlighted. The Paper argues that the Special Marriage Act of 1954 is the best solution available to provide emancipation to the LGBTQIA+ community in India and how denial of equitable marital rights in violation of Article 14, Article 15 and Article 21 of the Indian Constitution.

STATEMENT OF PROBLEM

The thesis discusses the amendments that could be brought into the Special Marriage Act 1954 to legalise same-sex marriages in India. It further elaborates on the main issues of concern and challenges to be faced under the Special Marriage Act 1954 to legalise such marriages.

LITERATURE REVIEW

- **Ruth Vanita in her book Love's Rite: Same-Sex Marriage in India and the West** Shows How subtly and imaginatively Indian Attitudes towards same-sex unions have evolved over the centuries. The Book offers a global perspective on historical understanding of the issue of LGBTQIA+ Rights
- **Evan Gerstmann in his book Same-Sex Marriage and the Constitution** argues that there is long-standing constitutional protection of the right to marry that applies to same-sex couples. It balances strong advocacy of this position with respectful engagement with those who oppose same-sex marriage. It concludes that the Constitution protects same-sex marriage but that it is the proper role of the courts to enforce this right. The book also takes on many of the same-sex marriage myths: that it will lead down that 'slippery slope' to such things as polygamy, that same-sex marriage has been a political albatross for liberals and progressives, and that courts are 'usurping' the democratic process.
- **George Chauncey in his book Why Marriage: The History Shaping Today's Debate Over Gay Equality** argues why marriage has suddenly emerged as the most explosive issue in the gay rights struggle for equality.
- **William Eskridge in his book The case for same-sex marriage** argues for same-sex marriage that answers a range of objections. Eskridge, a law professor (Georgetown Law Center) who served as a co-counsel in a federal gay-marriage case, writes eloquently in favour of same-sex marriage. He answers some of the mainstream's reservations (marriage is only for procreation, allowing marriage goes beyond the

tolerance of homosexuality and forces society to approve of it, etc.), but he also addresses some objections from within the gay community.

- **Satchit Bhogle in his Article The Momentum of history-Realising Marriage Equality in India** argues that the next logical step post Navtej Singh Johar Judgement is marriage equality or the recognition of same-sex marriage on the same footing as traditional opposite-sex marriage and that all the jurisprudential ingredients are already present for such recognition. The article argues that the restriction of the definition of marriage to 'one man, one woman' constitutes impermissible sex discrimination under Articles 14 and 15 and is also manifestly arbitrary. It recognises that the evolving concept of constitutional morality, which trumps social or popular morality as a means to interpret public morality as a restriction on fundamental rights, may be invoked to dispel arguments that same-sex marriage intrudes on the so-called sanctity of traditional opposite-sex marriage. It further argues that 'one man, one woman' violates the right to privacy and autonomy, and life with dignity under Article 21, along with the freedom of expression, which includes the expression of sexual orientation and self-identified gender. The article also argues that though the personal law that applies to a person depends on their religion, personal laws are religious neither in origin nor in character; though in any case, marriage equality should not be held to violate religious freedom based on the application of the significantly eroded 'essential religious practices' test. Lastly, the article argues that the Hindu Marriage Act and the Special Marriage Act are capable of being interpreted as is to permit same-sex marriage.
- **Nayantara Ravichandran in her Article Legal Recognition of Same-Sex Relationships in India** follows the decision in Kumar Koushal Vs Naz Foundation and argues whether legal recognition of same-sex relationships simultaneously is possible.

And the scope of discrimination based on sexual orientation is objectionable or not within the civil and criminal law. The paper examines whether the route of recognition through 'civil partnerships' that has been taken by many other countries should be followed in India, but concludes that this is an unsatisfactory intermediate process to granting recognition to same-sex marriages. The Author acknowledges that it would be unfeasible to seek amendments to personal laws to obtain such recognition since it would encounter strong opposition invoking religious freedoms. The Paper concludes that the most viable manner of attaining legislative recognition of same-sex marriages would be an amendment of the Special Marriage Act or, by a judicial reading down of the Special Marriage Act to permit same-sex marriages, on the ground that not permitting same-sex marriages unfairly discriminates against members of the LGBT community.

AIM

To suggest amendments to The Special Marriage Act of 1954 to facilitate the legalisation and recognition of same-sex marriages in India within the scope of the Act.

RESEARCH OBJECTIVES

The objectives of the Research Thesis are: -

1) To analyse the origin and need for Special Marriages Act in India
2) Analyse the need and desire for people to get married
3) State the regulations in the field of homosexuality in India
4) Interpret the recent landmark judgements in the field of recognition of gay rights and marital rights in India
5) Analyse the function of the system of marriage and its social significance
6) Make the statutes of the Special Marriage Act 1954 gender neutral
7) Highlight the issues of concern in the divorce laws, maintenance laws, and custody law of children within divorce
8) Suggest a way forward

SCOPE AND LIMITATION

The field of gay rights has various issues encompassed under it like employment rights, historical discrimination, succession rights and body autonomy rights. The Paper focuses only on the domain of marriage laws about LGBTQIA+ rights. It explores the changing views of the countries of the world on the issue and suggests a way forward to accommodate marital rights for the LGBTQIA+ community within the present framework of Indian Laws.

The limitation of the Paper is that it does not discuss the amendments required in other laws than the Special Marriage Act 1954 in detail. While also avoiding the issue of how personal laws would conflict with the amended clauses while exploring the conservative view that why they resist any such emancipation of gay rights.

RESEARCH QUESTIONS

1) What was the need for The Special Marriage Act of 1954?
2) Do the marriage laws in India make gender discrimination within its statutes?
3) Why do people get married?
4) What protection and advantage do marriage provide to a couple?
5) How have LGBTQIA+ rights evolved in India?
6) How was same-sex marriage legalised in USA and United Kingdom?
7) How have the Courts proceeded toward gender-neutral laws in India?
8) How should the spousal rights in case of divorce be for same-sex marriages?
9) How can we incorporate same-sex couple adoption within the present framework of adoption and surrogacy laws in India?
10) Why does the LGBTQIA+ community in India require legal protection?

HYPOTHESIS

Recognition of same-sex marriages in India within the ambit of marital laws is not possible as marriage by definition is meant to be between a man and a woman only. And marriage is a tool of procreation, which has religious sanctions guiding its functioning by customs which are unquestionable.

RESEARCH METHODOLOGY

Here, while undertaking research for the Thesis Paper, we have adopted the analytical methodology along with the doctrinal or non-empirical method. This includes both primary and secondary sources of data. In primary sources, we have referred to various books, journals, articles etc. available in the library of NLUJAA and in secondary sources we have referred to the online legal database available in the library of NLUJAA along with the resources available on the internet.

RESEARCH DESIGN

The Thesis Paper has been divided into 6 Chapters:

- **Chapter-1 Historical Underpinning of Special Marriage Act 1954** is an introductory chapter that explores the historical origin of the Special Marriage Act, and the debates that were undertaken by the Parliamentarians in its opposition. It draws a contrasting similarity to the fact that the opposition to inter-caste, inter-religion marriages that the Act facilitates is the same one that the LGBTQIA+ community faces today.

- **Chapter-2 Marital Jurisprudence: What is the need for marriage** discusses the need for marriage as a social institution. It explores the reasoning forwarded by Philosophers and Political Scientists to support or criticise the institution. It discusses the role of the family as a political unit. Why there is a patriarchal division of roles within the marriage? And ends with jurisprudential reasoning as to why does the LGBTQAI+ community wants the equitable right to marry at par with heterosexual relationships.

- **Chapter 3 is the Case Law facilitation legalisation of same-sex marriage in India.** It discusses the implications of Navtej Singh Johar's judgement in detail. Also argues the recent judgements that have been forwarded to recognise same-

sex marriages in India that have been solemnised abroad. It thereafter moves into the domain of constitutional morality and why the legalisation of same-sex marriages in India falls under its domain post the Puttuswamy Privacy Judgement.

- **Chapter 4 are lessons from abroad.** Here the timeline of gay rights emancipation is highlighted in the context of the USA and United Kingdom. How the Courts legalised such marriages and what reasoning did they use to justify their implementation even after the Conservative Governments tried to overturn the rulings through the passage of arbitrary legislation.

- **Chapter 5 is Proposed amendments to the Special Marriage Act 1954.** This is the main chapter of focus of our Thesis Paper. It discusses first the research work done by other individuals on the issue and how this Paper takes their work forward. Line-by-line reading is done and subsequent amendments are suggested with valid reasoning as to why such changes are being made. And how this new addition won't alter the original interpretation or protection provided under the Act. The procreation, consummation and impotence clauses of marriage laws are criticised based on case laws forwarded by the Courts in recent times. It denounces the role of custom in marriage by application of constitutional morality. Justification is provided as to why gender-neutral laws are required within the statutes and how clauses ought to be interpreted as per the rules governing the interpretation of statutes. The relevance of divorce, maintenance and alimony for a same-sex couple is discussed in detail and case laws are highlighted governing the field at present time in India. The Chapter

ends by defining the scope of adoption, succession and custody rights for children within same-sex marriages.

- **Chapter 6 is the Conclusion** which culminates the findings of the Paper and suggests a way forward

PART-II

HISTORICAL UNDERPINNING OF SPECIAL MARRIAGE ACT 1954

When India became newly independent in 1947, there was a need for a special law to protect the secular fabric of the country. Provide safeguards to inter-faith marriages in the backdrop of the evils of the Partition and the sectarian violence that followed India's independence. The Special Marriage Act 1954 was brought in to replace the colonial era Special Marriage Act, 1872 which was a Victorian Era law and had strong elements of *macaulayism* i.e. the British way of civilising Indians according to their customs, morals and practices. The Act of 1872 was inspired by the needs of the Brahmo Samaj who then demanded a special law to differentiate their rituals and marriages from the Hindu customs.[1]

The main objective of the Act was to provide for inter-religion marriages which could be solemnized under an Act not governed by personal laws. The only restrictions provided under the Act were the fact that the Parties to the marriage should not be involved in a subsisting valid marriage. They must be of able mental

[1] Mody, P., Love and the Law: Love-Marriage in Delhi Modern Asian Studies, vol. 36, no. 1, (2002), p. 228.

capacity to give consent for marriage. And that the marriage should not fall under any degree of prohibited relationships as identified by Section 2(b) of the Act[2]. The only discrimination in terms of eligibility was made to define the valid age of marriage i.e. 21 years old for the groom and 18 years for the bride[3]. The Act facilitated the role of the Court in defining civil union in India by introducing Marriage Officers[4] who would perform the oaths in presence of a witness and solemnize the ceremony. The Government appointed a Registrar of Marriage who was empowered to issue a marriage certificate.[5]

The Government of India formed a Joint Parliamentary Committee in 1952[6] to provide for a special form of marriage and register such special form of marriages through the Act of enactment of a special law that would have facilitated inter-caste and inter-religion marriages. Though Parliamentarians like K.M. Shah of Tehri Garwal opposed the Bill stating that it was contrary to the Hindu, Islamic, Jewish and Parsi personal laws. He held that such a uniform civil code was unfeasible. Further, he stated that such a Bill would be opposed by the majority of the people as such legislation didn't have the backing of the society or consensus of the masses. He feared that such legislation would encourage youth

[2] First Schedule, "Degrees of prohibited relationship"; Special Marriage Act 1954; Government of India
[3] Section 2; Chapter 4; Special Marriage Act 1954; Government of India
[4] Section 9,10,13,15,16,17; Special Marriage Act 1954; Government of India
[5] Chapter III, Special Marriage Act 1954; Government of India
[6] Gazette of India; Extraordinary, Part II, Section 2; dated 28.07.1952

to form marital unions without emphasizing the social implications of such unions. He also feared that marriage amongst people of different faith or religion would not succeed in creating an amiable atmosphere within the domestic lives of such individuals. As the children would have suffered the most due to easy divorce laws under the Special Marriage Bill. He held that the idea of creating a casteless and classless society upon secular and democratic ideals could not be achieved by tampering with the ancient laws without giving due regard to traditions and customs which was a result of centuries of experience of the past generations. Such opposition to Special Marriage Bill 1952, resounds even today amongst various members of the society who are in opposition to the legalisation of same-sex marriages in India. Parliamentarian Sucheta Kriplani in her dissent against the Bill asked for grounds of mutual consent for divorce to be included in the Bill. She contended that sensitive people in society have certain circumstances calling for the dissolution of marriage on traditional grounds. Called for providing waiting time for the divorce to disregard couples from filing frivolous petitions and giving them time to reconsider. Member of Parliament Violet Alva, V K Dhage and K Rama Rao also presented their dissented view upon the Bill; stating that the draft Bill failed to take regard of the socio-scientific knowledge of the society. The ideas upon which it was based were outdated. They further commented on the role of "non-consummation of marriage" where the impotence of both man and woman in a relationship was discussed along with it being a

ground for nullity of marriage. Such issues of concern resonate around the issue of legalisation of same-sex marriage at present times as well. The aspect of succession, which is governed heavily by religious customs and traditions, was to be governed by the Indian Succession Act 1925. But the peculiar aspect of the Special Marriage Act 1954 was that if the parties belonged to Hindu, Sikh, Buddhist or Jain religion, then they were bound by the Hindu Succession Act to decide upon the issues of succession to property as highlighted under Chapter IV of The Special Marriage Act of 1954(Consequences of Marriage Under This Act). Thus, the Act though secular allowed the traditional religious elements of human relationships to be incorporated. Implying its objective was to create a harmonious construction of personal laws with the needs of the society.

The Special Marriage Act 1954 was seen as a stepping stone toward the Uniform Civil Code(UCC). The Constitution of India under Article 44 envisions that the State shall endeavour to establish a uniform civil code for the citizens of India[7]. The need for a uniform code is still contested today though the element of same-sex marriage is avoided in this debate where it forms the core of the issue of this Paper. [8]

[7] Article 44; Constitution of India; 1950

[8] Special Marriage Act And Anti-Conversion Laws of India; Aarya Parihar; Legal Service India E-Journal; Accessed at: https://www.legalserviceindia.com/legal/article-7996-special-marriage-act-and-anti-conversion-laws-of-india.html ; accessed on 01.07.2022

MARITAL JURISPRUDENCE: WHAT IS THE NEED FOR MARRIAGE

Marriage as a social institution is seen as a safeguard for financial stability, security and companionship. Legally, marriage provides the Partner(s) social security benefits, inheritance benefits, insurance benefits etc. It gives financial equity to the spouses. Couples for years work and live together, whereas in the patriarchal division of roles, traditionally the male/individual takes the responsibility to be the working partner bringing in resources while the female/other partner stays home and raises their children creating domestic wealth out of the union. The offspring from such a union is legally recognised and could have further claim upon the paternal or maternal ancestral properties. This gives financial security to the offspring in the eyes of law. It ensures that even after one or both the Partner(s) is/are dead, the future generation from one's procreation is financially secured. Marriage thus is not simply a tool of legal procreation but is a tool for harmonious cohabitation of individuals in the society under the rules and laws of the land. The Rights of the individuals and their future generations are guaranteed and secured by an institution(marriage) which is duly recognised in the eyes of the law.

MARITAL JURISPRUDENCE

Marriage as an institution has its basis in Natural Law[9]. Under the Natural Law School, marriage is a tool to ensure the eternal and immutable transfer of a hierarchy of moral values and properties. It passes from one generation of man to another and is seen as a tool for the *'creation of nature'*. It is seen as the foundation of human relationships on which other familial relationships like maternal, paternal and sanguinary etc. are based upon. It is a legally recognised social contract between two individuals implying a permanent nature of union amongst them to maintain societal recognition and make paternity of any future generations irrefutable. Marriage imposes rules, expectations, guidelines, responsibilities and boundaries amongst the Parties involved. Though the rules vary from custom to tradition and from personal laws of one religion to another; the rights and responsibilities of individuals are well defined. Monogamy, non-adulterous relation, non-desertion of spouses, and co-habitation of spouses and children are the basic rules that all human beings in a traditional marital relationship are required to follow. But such rules were made upon by the customary practices of individuals in the practice of religious ideals/commandments[10] . Certain Societies,

[9] Dalrymple v Dalrymple; (1811) 2 Hag Con 54

[10] 20:3 to 20:16; Chapter 40; Book of Exodus; The Holy Bible; Available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://digitalcommons.andrews.edu/cgi/viewcontent.cgi?article=1018&context=church-history-pubs

by invoking the natural law theory through customary practices justify practices such as polygamy or polyandry, matrilineal succession etc. which can be seen as taboo by other societies/tribes within their degrees of marriage. Before the canonical (Christian) outlying of the rules of marriage; marriage was simply seen as a promise in the eyes of God (Abrahamic or others) where practices differed from one place to another and within the religion itself based upon geography. A variety of practices influenced by local customs were followed which were standardized to regulate the connection between state and family as a political unit[11]. The role of ceremonies got prominence in the Common Law through the 1753 Marriage Act[12] which brought in regulation by State upon the requirements of legitimate marriages in England. Thus marriage, in the eyes of law, and as per the Christian and Islamic doctrine, is a contractual agreement between a man and a woman (traditional definition) so that they can have a lawful sexual relationship. Where the rights and interests of the parties are safeguarded who enter into such a social contract.

[11] Robert David Shakespeare; Marriage and the Social Contract in British Romantic Discourse; University of Waterloo; 2014

[12] Probert, Rebecca. "The Impact of the Marrige Act of 1753: Was It Really 'A Most Cruel Law for the Fair Sex'?" Eighteenth-Century Studies, vol. 38, no. 2, 2005, pp. 247–62. JSTOR, http://www.jstor.org/stable/30053767 Accessed 1 Jul. 2022

In the contractual view, the promise of exclusivity as a moral obligation is seen as the contractual promise made between the spouses. But the fact that parties to a marriage can negotiate the terms of settlement i.e. dower, dowry, place of the marital home, Stridhan (in Hinduism), Mehar (in Islam) and could also release each other from the obligations of marriage via divorce makes marriage transactional. The institutional view of marriage sees marital obligation as a "natural law" of mankind where marriage is a protective-procreative union of two individuals which is undertaken to protect love. It disassociates the need for marriage from any sexual undertone or necessities. The voluntary acts of couples undertaken within the institution of marriage like obtaining joint property or bringing up a child are seen as an act of generating affection and intimacy between the two partners. Marriage is seen as the outcome of love between two people. Where the conditions of marriage are the protective steps undertaken to ensure the continuity of their love. Here, death or divorce is the conclusion of an individual's obligation to the institution of marriage when the love or the Party(s) ceases to exist.

Thinkers and Philosophers from ancient times have made effort to define or defile the institution of marriage. The views of Plato on family and marriage being idealistic can be summarised to be the antithesis of the institution that it represents

today. Plato in his book *Republic* compared marriage to animal breeding and supported the notion of communal family. He degrades the role of the family as a unit. Calls for a Guardian class rearing children collectively where the right of procreation follows the controversial idea of *eugenics*[13]. He called for state control of marriages, control on the number of marriages and who should be entitled to marry. In simpler terms, Plato differentiated the role of procreation from the institution of marriage. He recognises the role of marriage in procreation. But as a political institution, he de-recognised the legitimacy of a family as an outcome of marriage. He saw the family as a creche for future generations by introducing the concept of the Guardian class. For him, individuals were a unit on their own; and family bred nepotism, a trait of which he was a staunch opposer. For Plato, a marriage equates women and children as private property to the man, which reduces their productivity. The positive aspect of this idea is, equating the men and women watchdogs of the Guardian class, as equals, with no sexual discrimination.

The traditional idealistic view of marriage as an institution can be said to be inspired by Aristotle. It incorporates the humane aspect of marital relationships where marriage as a relationship intrinsically means something to both partners.

[13] Grube, G. M. A. "The Marriage Laws in Plato's Republic." The Classical Quarterly, vol. 21, no. 2, 1927, pp. 95–99. JSTOR, http://www.jstor.org/stable/636442. Accessed 1 Jul. 2022

According to Aristotle, marriage is when two individuals come together to undertake a "shared activity" which is guided by the natural instincts of the two sexes. Here mutual need and mutual love form the bedrock of the relationship which is part of the "necessities for life" i.e., having and raising children. He calls it a friendship for utility. For him, it is a sort of lifelong Project that two people undertake. Even if they might get divorced; they share the responsibilities of raising the child together for life. For Aristotle, the need for a State arises from a man's need to protect his family. Hence, he calls State a "*families of state"*. For the proper functioning of the individual units of a family; he makes marriage an essential component of his political theory[14]. This political thought has influenced other thinkers such as Hegel, Rawls and Sandel. He disagrees with the views of his mentor Plato on gender neutrality within the roles in marriages, as he believes each of the sexes brings different qualities into the relationship where the husband commands '*rules'* while the wife '*obeys'*.[15]

St. Thomas Aquinas (Christian Theologian Jurist) in defining sexual morality under natural law; defines monogamous marriage as the most suitable arrangement between spouses. According to him; Christian Philosophers focused on marriage and monogamy as it secures paternal guidance; a chief requirement

[14] Aristotle; Politics; Book 2; Section 1264b
[15] Aristotle; Nichomachean Ethics; Section 1160-62

for the rearing of the child. Polygamy and extra-marital sex were equated with mortal sin as it harms the scope of paternal guidance for a child. The purpose of sexual intercourse is for the preservation of life, for procreation of life and to preserve the existence of the human race on Earth. And on this behalf, the role of intercourse or a sexual relationship should be to create offspring via marriage only that has been duly authorised in the eyes of God.[16] It was through this interpretation; that sexual intercourse outside the institution of marriage was associated with the forbidden sin. Marital sex was equated with "marriage debt" which the spouses owed to each other. A viewpoint, that has been challenged by the recent observations of Courts against marital rape. [17]

Modern Philosophy advocates for equal rights of spouses in a marital relationship. The origin of this philosophy could be attributed to Thomas Hobbes. For him, the differentiation based on strength was non-existent as there is no element of physical warfare in marriage. He advocated for free choice amongst equals and was a proponent of the doctrine of equal rights. But he did admit though that the male counterparts dominated the marriages in terms of power dynamics and hence

[16] John M. Finnis, Good of Marriage and the Morality of Sexual Relations, 42 Am. J. Juris. 97 (1997). Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/1092

[17] RIT Foundation v. UOI; 2022 LiveLaw (Del) 433 https://www.livelaw.in/top-stories/delhi-high-court-passes-split-verdict-on-criminalizing-marital-rapejustice-rajiv-shakdher-holds-exception-2-of-section-375ipc-unconstitutional-198832 ; Accessed on 01 July 2022

man's role was seen as more significant than that of a woman.[18] Locke in his opposition to political patriarchy went ahead with this liberal interpretation of the role of women within marriage. Locke saw marriage as the union of two equals where hierarchical roles resulted in conflicts as it does in the political patriarchy while defining *paternal regal power*.[19] Immanuel Kant combined the contractual understanding of marriage with the Augustinian notion of sexual morality that marriage as a contract, was required to make sex permissible amongst individuals. Kant equated sex with moral objectification. He saw marriage as a right of the spouses for lifelong possession of each other's body as property. Where human beings were transformed into mere things of possession which could be claimed upon.[20]

Hegel emphasises smaller families and marriage as the foundation of the state. He was critical of Kant's view of marriage as a simple contract and argued the importance of "love" within a marriage. He didn't see marriage as a transactional contract where individuals lost their personalities within a union. But saw it as a union for sharing each other's mutual existence. For him, in marriage, ethical love should not be equated to sexual love or being subordinate to an individual's

[18] Thomas Hobbes; Leviathan; Chapter 20; 1651
[19] John Locke; The Second Treatise of Government; Page 77-82; 1690
[20] Immanuel Kant; Metaphysics of Morals; Chapter 6 Page 277-79

passion or sexual needs.[21] Hegel linked marriage to the State by asserting that ethical love is publicly assuming roles of companionship and spousal relationship which individuals try to project upon the next social unit i.e., the society. Hegel has equated marriage to one's social compass which defines the moral values that in turn, define the ethics of one's character and judgements. This system of values further affects one's role in civil society and the State. Marriage prepares men in sharing a common enterprise where they see the whole State as an extension of their family.

John Stuart Mill's view on marriages reciprocated that of Kant. He projected gender roles with power dynamics in a marital relationship. For Mill, marriage was the physical subordination of women. He compared marriage to slavery where the female had no legal rights or any resolution against abuse. Marriage according to Mill was a union of the unequal where men from historic times had a vested interest to keep women subjugated under their control in the name of sustenance of customary practices. There was no element of voluntary consensual assession to marriage for a woman. Her options were limited by the customary practices of the time.[22]

[21] G.W.F. Hegel; Elements of the Philosophy of Right; Page 162-63; 1821
[22] J S Mill and HT Mill; The subjection of Women; Longmans, Green, Reader and Dyer; 1869

The Marxist school too saw marriage as a tool for the exploitation of women. Friedrich Engels saw monogamy as a weapon which allowed men to exert control upon women and their right to reproduce. Marriage was a medium of transfer of private property where monogamy ensured the transfer took to an undisputed heir. Karl Marx, just like Plato argued for the abolition of the private family as he believed this would liberate women from the proprietorship of men and end their role as "instrument of human production".[23] Patriarchy was linked to capitalism where the objective of the dominant class was to ensure their perpetual authority through the laws and rules of society.

FAMILY AS A POLITICAL UNIT

Aristotle and Hegel, equally believed that the family is the smallest and the most local unit in politics. It is here that the concept of "rule of law" is applied through the political hierarchy of Polis or State.[24] Citizenship deduces its legitimacy from the bonds of the family which is expressed on a societal level. To bring harmony

[23] Friedrich Engles, Karl Marx; The Communist Manifesto; Page 173; 1848

[24] Jarvis DE. The family as the foundation of political rule in western philosophy: a comparative analysis of Aristotle's politics and Hegel's philosophy of right. J Fam Hist. 2011;36(4):440-63. doi: 10.1177/0363199011416333. PMID: 22164889.

amongst the interest of the child and their parents; indoctrination of ethical and moral values take place at the "family" level unit of society. The interests of individuals are homogenised in the interest of the state to reduce conflict. This homogenisation of interests takes place through the institution of marriage where compromise on conflicting opinions is part of marital obligations. Marriage allows the creation of new units of families that socialise in a recognised group forming the economic unit of society within the State. They form the most important unit of economic production and consumption; as their "herd mentality" identifies 'what' and 'how many' products shall be consumed. While the structure in terms of male to female ratio and skills of members define the characteristics of labour that is available to undertake production. For society to develop and prevent disappearance; a continuity in biological reproduction is required from the family to ensure the sustenance of labour in society. Families also regulate the sexual activity within their members (negative covenant) and control the reproduction within their unit class. Family Law, as a tool for regulation of this political unit of "family", was used as a tool to justify the domination of women and oppression of children by the male parent.[25]

[25] Fran Olsen, The Politics of Family Law, 2(1) LAW & INEQ. 1 (1984). Available at: https://scholarship.law.umn.edu/lawineq/vol2/iss1/1

PATRIARCHIAL DIVISION OF ROLES IN MARRIAGE

The study of the division of labour within the institution of marriage gained its prominence after married women started moving into the labour market. Historically men tend to hold traditional expectations where they prefer rigid gender roles as the "bread earners" within the family. The dominating role of the male was presumed to be natural and necessary. The domestic role of women within marriage was equated to unpaid labour[26]. Feminist Philosophers have defined that patriarchy is practised domestically within the household and the same is projected publicly to maintain the sexual division of labour. Oppression of women takes place through domestic violence, political subjugation through denial of representation and negative laws/covenants against the freedom of women to pursue their interests. The doctrine of coverture within the Common Law system was designed such that it didn't recognise the wife as a legal personality within the marriage. All her rights were subsumed to be that belonging to her husband within the marriage. Feminist Sociologist Ann Oakley has rejected the biological differentiation of males and females. She states that the "sex" of an individual is biological and permanent. But the "gender" of an individual is a

[26] Walby, Sylvia. "THEORISING PATRIARCHY." Sociology, vol. 23, no. 2, 1989, pp. 213–34. JSTOR, http://www.jstor.org/stable/42853921. Accessed 01 Jul. 2022

cultural construct where society assigns specific roles to individuals.[27] The rewards for these specific roles are different which results in gender inequalities both within the family and the workplace at large. Another Sociologist, Jessie Bernard states that the outcome of benefits from the gender roles within the marriage for the male and female counterparts are different and unequal. In the workplace, married men tend to have successful careers while wives balancing both a career and domestic life are seen as 'someone trying to do a balancing act'.[28] The division of gender roles within marriage is justified as an outcome of constraints of child care and household chores. [29] Years of indoctrination of this mindset of gender division of roles has led women to comfortably believe that husbands are to be of dominant traits while being soft & reciprocating to the demands of the husband is assumed to be part of the basic femineity of women.

The feminist movement in the 1970s-80s across the western world led to the invigoration of liberal traits such as equal treatment, opportunity, rights to property and gender neutrality within the institution of marriage. Women were seen with respect and their interest including their right to own bodily integrity

[27] Ann Oakley; Woman's Work: The Housewife, Past and Present; Vintage Books; 1974
[28] Jessie Bernard; The future of Marriage; Yale University Press; 1982
[29] Calasanti, Toni M., and Carol A. Bailey. "Gender Inequality and the Division of Household Labor in the United States and Sweden: A Socialist-Feminist Approach." Social Problems, vol. 38, no. 1, 1991, pp. 34–53. JSTOR, https://doi.org/10.2307/800637. Accessed 01 Jul. 2022

were protected with the enactment of anti-marital rape laws/sexual battery/prevention of domestic abuse laws across the world. Abortion laws and the rise in popularity of female contraceptives too formed part of this self-consciousness movement. Their involvement increased in the economic activities of the family where they took on roles that were traditionally reserved for males. Gender bifurcation of activities through the veil of sexism became a social taboo and society began to recognise the role of women, individually, as a political unit in itself. Marriage henceforward was not seen as a tool of compromise for the perpetual existence of females but was seen as an option to enter upon as equal contributors of her own free will. Inspired by women's emancipation movements; the LGBTQAI+ community across the world came under the umbrella movement of feminist liberation to press for their equal rights to marriage and its benefits as well. The call for equal treatment, equal opportunity for work, protection against abuse and arbitrary discrimination by the State found a common ground between the LGBTQAI+ and Women's Rights movements. Both social groups wanted to be recognised as equal human beings enjoying dignity at par with other groups, especially the males. And on this behalf, they share the common objective of emancipation of the subaltern class of individuals in society.

WHY DOES LGBTQAI+ COMMUNITY WANT THE RIGHT TO MARRY?

Marriage, beyond the legal dimension, has a social dimension of interpretation as well. It is the social recognition of one's love in the eyes of the public and their intimate relation towards each other. It is a public statement that two individuals have publicly decided to enter into a union for mutual coexistence in each other's company. The compromise of civil union or domestic partnership does not provide the same stature of dignity that legal marriage provides. Such denial of equal rights as to that of heterosexual couples is seen as discrimination based on gender and sexual orientation. This has been already outlined as unlawful and discriminatory by most countries across the world. Equality before the law and equal protection under the law is a principle that is sacrosanct to any Constitution of a democratic country. Marriage rights form the core of citizenship rights of a country, and denying equal rights to marry creates a distinction of citizenship amongst the LGBTQAI+ and heterosexual communities living within a country. The children adopted by same-sex couples are devoid of many benefits that the children of heterosexual marriages enjoy. Spouses of same-sex couples are denied facilities such as insurance benefits, pension, immigration rights, kinship etc.

which spouses in heterosexual marriages enjoy. [30] For members of the LGBTQAI+ community; approval of same-sex marriage by society is acceptance of their being, and their choices as individuals by the society at large.

Civil Union and Domestic Partnership facilitate the economic benefits of marriage. Through civil unions, spouses are provided employee benefits, tax benefits, lenient adoption rules etc. Such an option faces less opposition from the religious hardliners and conservative class. But the mere act of giving such a consolatory option has the element of inherent discrimination built into it. Separate classes of people and their successors are created within the society. For the LGBTQAI+ community, marriage based on equality is the only way of the emancipation of their equal rights. It is recognition by society of who they are and that their existence is not brushed off below the carpet. The kids of such couples are protected from any kind of discrimination and enjoy equal protection against discrimination or abuse. That the family as a whole is valid in the eyes of law and in lieu, in the eyes of the people.

[30] Mohr, Richard D. "The Case for Lesbian and Gay Marriage." The Long Arc of Justice: Lesbian and Gay Marriage, Equality, and Rights, Columbia University Press, 2005, pp. 55–72. JSTOR, http://www.jstor.org/stable/10.7312/mohr13520.6. Accessed 02 Jul. 2022.

CASE LAW FACILITATING LEGALISATION OF SAME-SEX MARRIAGE IN INDIA

When the five-judge Constitution bench led by CJI Dipak Misra proclaimed "*I am what I am, so take me as I am"* in their landmark judgement in reading down the colonial era Section 377 of IPC; it was not just a mere statement for the support for liberal rights to sexuality. But it was a statement that recognised the individuality of every person irrespective of their sexual preferences. Both Chief Justice Dipak Misra and Justice AM Khanwilkar held that "*Majoritarian views and popular views cannot dictate constitutional rights. The LGBT community possesses human rights like all other sections of society. Equality is the essence of the constitution…. Discrimination based on sexual orientation is a violation of freedom of speech and expression…. Sexual orientation is one of many biological phenomena. It is natural and no discrimination can exist. Any violation is against freedom of speech and expression…. Morality cannot be martyred at the altar of social morality. Only constitutional morality exists in our country…. Denial of self-expression is like death…. We have to fester tolerance and peaceful co-existence; we have to respect them who they are and not ask them to be who they*

weren't"[31] Justice Rohinton F Nariman held that homosexuality was not a disease and that homosexuals had the right to live with dignity and live without stigma. Justice DY Chandrachud in his part of the Judgement stated that "Human sexuality cannot be reduced to the binary formulation". He further questioned the definition of "natural" or "unnatural" sexual intercourse and the role of the state to decide upon it. He equated denial of the right to sexual orientation as denial of the right to privacy.[32]

Navtej Singh Johar & Ors. versus Union of India[33] only decriminalised consensual intercourse from the ambit of Section 377. It did not recognise the legality or gave validity to same-sex marriage in India.[34] The Central Government of India in its stance in a petition to the Delhi High Court[35] has held that decriminalisation of homosexuality and legalisation of same-sex marriage are two separate issues. As per the law of the land, a marriage in India is allowed only between a biological man and a biological woman. The primary contention of the

[31] News18 Network; 'I Am What I Am, So Take Me As I Am': What Judges Said in Their Landmark Verdict Against Section 377; Published on 06/09/2018; Accessed at: https://www.news18.com/news/india/i-am-what-i-am-so-take-me-as-i-am-what-the-judges-said-in-their-landmark-verdict-against-section-377-1869801.html Accessed on: 02/07/2022

[32] Navtej Singh Johar & Ors. versus Union of India thr. Secretary Ministry of Law and Justice ; AIR 2018 SC 4321; W. P. (Crl.) No. 76 of 2016; D. No. 14961/2016

[33] Supra notes 33

[35] Abhijit Iyer Mitra vs Union Of India & Ors; W.P.(C) 6371/2020 & CM APPL. 42707/2021, 43274/2021

Petitioners was that when Section 7 A(1)(d) of the Citizenship Act[36] didn't discriminate based on the sexuality of individuals and allowed a person married to an Overseas Citizen of India(OCI) whose marriage was solemnised for over two years to be eligible to apply for Spousal Overseas Citizen of India(OCI), the same facility should be forwarded to the same-sex couples. The Government of India contended that "spouse" under the Indian laws meant husband and wife term in its exclusive roles. "Marriage" as a term in Indian laws is associated with heterosexual couples only. The Petitioners also argued that the Hindu Marriage Act did not distinguish between the sexuality of the parties and the condition precedent by the statutes was that marriage can be solemnised only between two Hindus.[37] Further, the condition imposed under the Special Marriages Act 1954

[36] Section 7 A(1)(d) of the Citizenship Act :spouse of foreign origin of a citizen of India or spouse of foreign origin of an Overseas Citizen of India Cardholder registered under section 7A and whose marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the presentation of the application under this section: Provided that for the eligibility for registration as an Overseas Citizen of India Cardholder, such spouse shall be subjected to prior security clearance by a competent authority in India: Provided further that no person, who or either of whose parents or grandparents or great grandparents is or had been a citizen of Pakistan, Bangladesh or such other country as the Central Government may, by notification in the Official Gazette, specify, shall be eligible for registration as an Overseas Citizen of India Cardholder under this sub-section.

[37] Section 2, Hindu Marriage Act 1955. Application of Act.—(1) This Act applies— (a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj, (b) to any person who is a Buddhist, Jaina or Sikh by religion, and (c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed. Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:— (a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion; (b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and (c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion. (2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs. (3) The expression "Hindu" in any portion

Section 4 does not differentiate based on gender exclusively, except in defining the legal age of parties (section 4(c)). The distinction between the two sexes was made only under Definition in Section 2(b). [38] The Foreign Marriage Act, 1969 too under Section 4 (Conditions relating to solemnization of foreign marriages) has placed no restrictions upon the gender of the spouses defined under Section 2 (Definitions).[39]

The opponents of same-sex marriage legalisation in *Navtej Singh Johar vs Union of India* believe that the Section 377 judgement only decriminalised a private activity between two consenting same-sex adults. It did not discuss or either

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of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

[38] Section 4, Special Marriage Act 1954:
Conditions relating to solemnization of special marriages.—Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:— (a) neither party has a spouse living; 3[(b) neither party— (i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or (ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or (iii) has been subject to recurrent attacks of insanity 4 * * *;] (c) the male has completed the age of twenty-one years and the female the age of eighteen years; 5[(d) the parties are not within the degrees of prohibited relationship: Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship; and] 6 [(e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends].

[39] Section 4; Chapter II; Solemnisation of Foreign Marriages; The Foreign Marriage Act,1969:
Conditions relating to solemnization of foreign marriages.—A marriage between parties one of whom at least is a citizen of India may be solemnized under this Act by or before a Marriage Officer in a foreign country, if, at the time of the marriage, the following conditions are fulfilled, namely:— (a) neither party has a spouse living, (b) neither party is an idiot or a lunatic, (c) the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage, and (d) the parties are not within the degrees of prohibited relationship: Provided that where the personal law or a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship.

elaborated upon public or consensual same-sex activity in public. Hence it could be inferred that it did not provide any special rights to same-sex couples in India. This is in contradiction to the Supreme Court's judgement in the *National Legal Services Authority(NALSA) Vs Union of India*[40] where the Court held up the definition of the "Third Gender" and their right to self-identify their gender. The Court held that the fundamental rights for such "third gender" are secured under the Constitution of India. The word "dignity" interpreted under Article 21 of the Constitution entitles such gender to express their gender identity and live dignified life. The Judgement further stated that the right to equality (Article 14) and right to freedom of speech & expression (under Article 19(1)(a)) were framed as gender-neutral statutes. Hence its applicability would extend to the "third gender" and they shall be entitled to all the benefits that any male or female citizen of India enjoys. Article 15 and Article 16 of the Constitution specifically prohibits any discrimination on the ground of "sex" only and in this regard "sex" does not imply just biological attributes i.e. chromosome, genitals, bodily features but it also includes gender within its ambit, which is purely based on one's perception of their self-identity and even sexual orientation. This viewpoint of the Apex Court was further highlighted in the Judgement in *K.S. Puttaswamy Vs Union of India*[41] where while commenting upon the privacy rights of sexual minorities, Justice

[40] AIR 2014 SC 1863
[41] (2017) 10 SCC 1

Chandrachud held that sexual orientation was an essential characteristic of the right to privacy. It commented upon the *de minimis hypothesis* forwarded by the *Koushal* Judgement[42]. Stating that it was misplaced as the violation of a fundamental right is intolerable even if one individual was affected by its violation. And that the principle of the greater good for public morality would result in hostile treatment of the aggrieved. Hence privacy in its definition preserves the individual's intimacies with their loved ones and their identity of sexual orientation. Again in the case of *Arunkumar and Another. v The Inspector General of Registration and Ors.*[43], the Madras High Court recognised the Hindu marriage between a cis-gendered man and a transgender woman. Upholding that it would be recognised as a valid marriage under Section 5 of the Hindu Marriage Act 1955 and Registrar of Marriages in their duty were bound to register the marriage where the transwoman will qualify as a "bride" under Section 5 of Hindu Marriage Act 1955. It emphasized the issue of self-determination, freedom of expression and continuation of the *NALSAR* judgement which recognises a trans person's right to self-identity. The definition of the bride cannot be static or immutable. Interpretation of statutes must take place in light of the needs of the society and the prevalent legal system in function today in society. It stated that the right to marry was under Article 16 of the Universal Declaration of Human

[42] Kumar Koushal Vs Naz Foundation; (2014) 1 SCC 1
[43] WP (MD) No. 4125 of 2019 and WMP (MD) No. 3220 of 2019

Rights[44] and a person should have the choice to decide whom to marry as safeguarded under Article 21 of the Indian Constitution.

The lacuna in the *Navtej Singh Johar* judgement was that it did not elaborate and touch upon the issue of expression of sexuality in the public sphere in non-physical form. By focusing on the issue relating to the private sphere or as the judgement highlights "within the four walls of one's own house", the Court failed to distinguish the role of sexual intercourse from marriage. Thus, bifurcating the need for one to define the other. But the *Navtej Singh Johar* judgement overrode the "against the order of nature" criterion of sexual relations between two consenting adults. The ratio decidendi commented extensively on the changing social dynamics of present times. It de-hyphenated the purpose of sexual relation from procreation whereby associating the act of lovemaking with the fundamental right to life and personal liberty under Article 21. Through this, the Courts opened a new chapter in Indian Jurisprudence where the taboo of intercourse was seen beyond the glasses of social morality. Amongst the new dimensions of "constitutional morality".

[44] Shafin Jahan Vs Ashokan K.M. ; AIR 2018 SC 1933

CONSTITUTIONAL MORALITY

The doctrine of constitutional morality, as forwarded by Dr B R Ambedkar is the Indian constitutional jurisprudence which means adherence to the core ideas and principles as enshrined in the constitution. It is using the constitutional principles and dogmas as a superlative base upon which contemporary issues shall be decided against the customary principles. Grote, while describing Athenian Democracy under Kleisthenes stated that it was the supreme obedience to the constitution of the land. Dr Ambedkar in his interpretation implied it to be a harmonious interaction between the citizens and the government where issues of conflict were resolved via the spirit of the ideals enshrined in the constitution. The concept of basic structure doctrine as enshrined upon *Keshavananda Bharati Vs State of Kerela* was the first time the judicial interpretation of the term occurred. Thereafter in *S.P Gupta Vs Union of India*[45] *Naz Foundation v. Govt. of NCT of Delhi*[46] *Govt. Of National Capital Territory Of Delhi vs Union Of India*[47] *Joseph Shine vs Union of India*[48] *Indian Young Lawyers Association and Ors. vs. The State of Kerala and Ors.*[49] the Apex Court used the principle to justify landmark judgement on historical issues such as the 1st Judges Case, decriminalisation of

[45] (1982) 2 S.C.R. 365
[46] 160 Delhi Law Times 277
[47] (2018) 8 SCC 501; C. A. No. 2357 of 2017; D. No. 29357-2016
[48] 2018 SCC Online SC 1676
[49] (2019) 11 SCC 1

consensual intercourse under Section 377, adultery, entry of women to the Sabarimala Temple and other relevant issues.

The principle ensures that all the voices are heard and incorporated and the judgement is arrived upon through a democratic process of giving due deliberation to the viewpoints of all the stakeholders and measuring it against the constitutional values as stated in the Preamble of the Constitution of India. Morality being subjective has been weighed upon different yardsticks by the conservatives and liberals across the centuries. In cases of conflicting views, constitutional morality can be used as a tool to interpret the individualistic rights that are conferred upon an individual safeguarded by the Indian Constitution. Tradition and contemporary ideals of society many times appear to be at crossroads when a citizen intends to express their individualistic rights. Constitutional morality as part of "constitutionalism", acts as a limiting principle upon the powers of the State. The 'rule of law' takes primacy over an arbitrary tradition/custom. The outcome of the application of such a principle is that it would inculcate a citizen to undertake a pluralistic view and live with that pluralistic view within an inclusive society. It is the trickle-down effect of constitutional principles like equality, liberty, fraternity, and justice in the day-to-day living, existence and thought process of citizens. In *Navtej Singh Johar,* the Court held that in case of conflict between

constitutional morality and social morality, constitutional morality shall prevail. Forceful imposition of dogma upon citizens to create a homogenous society with uniform views upon morality was seen as a violation of the principle of constitutional morality. It brings agreeableness amongst people in the society through positive transformation changing the societal perception of what ought to be the correct public morality.

The critics of constitutional morality opine that there is no explicit mention of the term nor any fixed definition of what defines its contours or ambits of implications. The interpretation itself is marred by the subjectiveness of the Judges which has an open-ended interpretation. Liberalism, as philosophy should be organically inculcated amongst the ideal citizens. Constitutional morality according to many imposes a certain ethos which one believes to be supreme than the others. By invoking constitutional morality; the judiciary violates the cardinal rule of the doctrine of separation of powers. Whereafter, it pursues adventurism into the realms of legislative making laws for the country which it thinks the law should ought to be.

In Chief Justice Deepak Misra's words in *NCT of Delhi Vs Union of India* "Constitutional morality in its strictest sense implies a strict and complete

adherence to the constitutional principles as enshrined in the various segments of the document. It is required that all constitutional functionaries "cultivate and develop a spirit of constitutionalism" where every action taken by them is governed by and is in strict conformity with the basic tenets of the Constitution."[50] In the *Naz foundation* judgement[51], the Delhi High Court while rejecting public morality held that constitutional morality was dynamic and was based on shifting and subjective notions of righteousness. When deciding upon the issues of crucial state interests, the focus should be on constitutional morality and not subjective popular morality or public morality. Constitutional morality was the enabler to creating a temporary notion of morality in the mindset of the majority which with time, becomes popular morality. Prevailing societal norms that have become the antithesis to the new age morality of the changing times need to be re-constituted. The term 'morality' occurring in Constitution (Article 25)[52] cannot be narrowed down and viewed through the glasses of religious or sectional morality. In cases of violation of fundamental rights; it is the violation of the constitutional morality

[50] State (NCT of Delhi) v. Union of India, (2018) 8 SCC 501

[51] 160 Delhi Law Times 277

[52] Article 25; the Constitution of India: Freedom of conscience and free profession, practice and propagation of religion

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly

that has taken place and the Constitutional Courts are bound to take decisions in conformity with constitutional morality and not religious morality.[53] Equality and non-discrimination are the fundamental principles of constitutional morality. Harmonisation of constitutional and religious morality needs to take place within the ambits of Article 25 and Article 26 to ensure no social groups, albeit being in majority or minority, feel undermined or repressed. [54]

[53] Indian Young Lawyers Association & Ors vs The State of Kerala & Ors., (2019) 11 SCC 1
[54] Indian Young Lawyers Association & Ors vs The State of Kerala & Ors., (2019) 11 SCC 1

LESSONS FROM ABROAD: USA AND UNITED KINGDOM

The same-sex movement in the USA can trace its origin to the Stonewall riots of 1969. It was here gays, lesbians and bisexuals came out on the street and expressed their identities publicly to profess their love in public.[55] The exclusion of same-sex couples from marital rights was seen as societal persecution of sexual orientation of the minority community. The civil rights movement for the LGBTQAI+ community had its foundation in classical liberalism theory. The State's intervention in the domestic lives of the individual was seen as a violation of liberal ideals of a laissez-faire attitude and was seen as dirigisme into the private sphere. The opposition to such relationships was not profound on any reasonable principle but was a projection of cultural attitude. A stand that liberal philosophy tends to oppose the status quo attitude. For over 20 years, the LGBTQAI+ Rights Activists fought a legal battle against the discriminatory laws which began from *Loving Vs Virginia*[56]. This was not encompassing gay rights as such but was fought through the dimension of racial equality where it denied African-American interracial couples equal protection under the law just unlike their white heterosexual counterparts. The Case established the freedom to marry a person of

[55] Eskridge, William N. "A History of Same-Sex Marriage." Virginia Law Review, vol. 79, no. 7, 1993, pp. 1419–513. JSTOR, https://doi.org/10.2307/1073379. Accessed 23 Aug. 2022.
[56] 388 US 1 (1967)

one's own choice as part of the fundamental rights within the US Constitution. The prohibition on inter-racial marriages was a violation of the federal equal protection principles and state equal rights amendments.[57] Any effort by the state to hardwire sex differences into the concept of marriage perpetuated the traditional sex-based stereotype of the man being the breadwinner and the woman being perpetually the housekeeper.[58] The Constitution of any country is genderless in its safeguards provided to remove any gender biases or to remove gender stereotypes. The United States Human Rights Act prohibits the Government from adopting policies that have a discriminatory effect upon sexual orientation minorities and those discriminations that are exclusively based on sexual orientation.[59] In *Jones Vs Hallahan*[60] , the Kentucky Court of Appeals held that Kentucky statutes do not specifically prohibit marriage between same-sex persons. The Christian definition of marriage was invoked to justify the Court's action stating that the authorisation to issue a marriage license to same-sex couples was not validated by any law. Hence, by the Church's definition, if marriage between any such people can't be solemnised, the Courts don't have the jurisdiction to intervene in the matter as the law does not regulate the marriage

[57] A. Sylvia; Homosexuality and the Social Meaning of Gender; 1988; Wis. L. Rev. 187; 218-221,230-33; Claudia A.Lewis; Note From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage; 97 Yale L.J. 1783(1988)

[58] Supra Notes 57

[59] Dickerson Vs D.C; Department of Human Servs; No. 89-465-PA(N); D.C. Communication on Human Rights, 1991

[60] 501 S.W. 2d 588 (Ky.1973)

but only regulates the registration of marriages. And this viewpoint was further elaborated in the judgements of other Courts as well who stated "same-sex unions" are not "marriage" by definition as the purpose of marriage is procreation which the same-sex couple are unable to accomplish.[61] In *Adams Vs Howerton*[62] the Federal Court of California reiterated the traditional Judeo-Christian view on morality within marriage. The Defence of Marriage statutes enacted across the US States saw a nationwide anti-gay rights movement where LGBT couples were forbidden from marrying their Partners even in private ceremonies. Specific prohibitions against same-sex marriage were initiated in Arkansas, Nevada, Missouri, Colorado and Arizona until 2008. In certain states, domestic partnerships and civil unions were banned until 2012. The Federal Defence of Marriage Act (DOMA) was the final nail in the coffin in 1996 against any nationwide recognition of same-sex marriages.

In the USA, each state has separate marriage laws but in principle, they must adhere to the rulings of the Supreme Court of the United States. The principle of validation of same-sex marriage was tried to be invoked through the challenge to racial laws, but in principle, the Courts had a negative stance to overturn

[61] Baker, 191 N.W. 2d at 186
[62] 486 F. Supp. 1119 (C.D. Cal. 1980)

previously held observations as highlighted in *Baker Vs Nelson*[63] and *Baehr Vs Miike*[64].

But the landmark judgement that altered the reasoning of US Courts was by the Massachusetts Supreme Judicial Court in the case of *Goodridge Vs Dept. of Public Health*[65] whereby it held that the Massachusetts Constitution legally requires the state to recognise same-sex marriage. In June 2013, the Supreme Court of the United States in *United States Vs Windsor*[66] held that the Defence of Marriage Act of 1996 violated the US Constitution, more specifically the due process clause of the Fifth Amendment[67]. Though it was a tax case, the broader implication of the matter was whether Section 3 of the DOMA was constitutional or not. The *Hollingsworth Vs Perry*[68] Judgement of the Supreme Court of the United States too found that banning same-sex marriages violated the equal protection under the law principle of the United States Constitution. This case was

[63] 291 Minn. 310, 191 N.W. 2d 185(1971)
[64] 74 Haw. 654, 852 P.2d 74(1993)
[65] 440 Mass 309, 798 N.E. 2d 941 (Mass 2003)
[66] 570 US 744, 81 U.S.L.W. 4633
[67] Constitution of the United States; 1776
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
[68] 570 US 693 (2013)

in regards to the State of California, which limited marriage registration to opposite-sex applicants only.

The cornerstone of the adjudication on same-sex marriage in the United States can be attributed to *Obergefell Vs Hodges*[69] where the ruling was that same-sex couples are guaranteed the fundamental right to marry under the due process clause of the 5th Amendment and the equal protection clause of the 14th Amendment of the United States Constitution. The Judgement required that all the 50 States of the United States of America adhere to the ruling of the Supreme Court and recognise same-sex marriages at par with heterosexual marriage across the United States with the same terms and conditions. The judgement overturned the earlier ruling of Baker *Vs Nelson.* The Court put the rights of the individuals above the denial of implementation of such marital rights by the democratic process of voting for ratification of proposed laws. *Obergefell Vs Hodges* was not just a single lawsuit but a consolidation of similarly situated lawsuits in the domain of recognition of same-sex relationships such as *DeBoer Vs Snyder*[70] *Obergell Vs Kasich*[71] *Henry Vs Wymyslo*[72]*Bourke Vs Beshear*[73]*Love Vs*

[69] 576 US 644(2015)
[70] 772 F.3d 388
[71] Obergefell et al v. Kasich et al, No. 1:2013cv00501 - Document 65 (S.D. Ohio 2013)
[72] Henry et al v. Wymyslo et al, No. 1:2014cv00129 - Document 28 (S.D. Ohio 2014)
[73] *Bourke v. Beshear*, CIVIL ACTION NO. 3:13-CV-00750-CRS (W.D. Ky. Jan. 13, 2016)

Beshear[74]and *Tanco Vs Haslam*[75] which laid the groundwork for recognition of same-sex marriages in the United States of America.

UNITED KINGDOM

Same-sex marriages are partly recognised around the United Kingdom. When India decriminalised any act of homosexual sex between partners in 2018; the British law struck down their equivalent of Section 377 by the Sexual Offences Act of 1967. The law struck down The Buggery Act of 1533 where until the 1830s individual could be executed in the name of "buggery". The Criminal Law Amendment Act of 1885 outlawed all acts between men in the name of preventing "gross indecency". But the Crown in 1957 appointed the Wolfenden Committee to publish a Report on the reality of the effectiveness of such penal laws and whether the countries within the commonwealth realm should pursue these codes into the future. The Report suggested that any consensual act by men over the age of 21 should not be a criminal offence or a matter of law. In this regard, the Sexual Offences Act of 1967 was passed in England and Wales. Whilst Scotland followed the suit in 1980 and Northern Ireland in 1982. The 1970s saw the rise of the gay

[74] *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014)
[75] 135 S. Ct. 1169, 190 L. Ed. 2d 910

rights movement across England. But the Government still passed the Nullity of Marriage Act of 1971 which exclusively banned any same-sex couple marriages in England and Wales. The Matrimonial Causes Act of 1973 declared same-sex marriage void if the Parties to the marriage were not respectfully a male and a female. This was extended to Scotland and Northern Ireland as well. The Common Law interpretation of the issue of marriage traces its origin to the landmark case of *Hyde Vs Hyde.*[76] Lord Penzance held that marriage as understood in Christendom is the voluntary union for the life of one man and one woman, to the exclusion of all others. In *Talbot Vs Talbot*[77], the Courts held that the prohibition on marriages was extended to cases where one of the spouses even had gender reconstruction surgery as it held that "marriage is a relationship that depends on sex, not gender."

1972 saw the first United Kingdom Gay Pride March which thereafter has become a cultural revolution across the world. Thereafter came the Judgement in *Dudgeon Vs the United Kingdom*[78] in 1981 where it found that Northern Ireland's criminalisation of homosexual acts violated the European Convention on Human Rights(ECHR). More specifically Article 8 of ECHR, specified that all the

[76] [L.R.] 1 P. & D. 130
[77] (1967) 111 Sol J 213
[78] App No 7525/76 (Official Case No) [1981] ECHR 5 (Other Reference) (1982) 4 EHRR 149 (Other Reference) IHRL 31 (ECHR 1981) (OUP reference)

citizens of the signatory States had the right to private and family life. This law recognised privacy in the private sphere which opened the pro-gay rights legislation in the United Kingdom. In the 1990s, several organisations and associations were formed across England to promote the needs and interests of the LGBTQAI+ communities. In 2001, the UK Government lifted its ban on LGBTQAI+ people from serving in the armed forces based on a "don't ask don't tell" policy. Also in 2001, the age of consent was reduced to 16 years. 2002 saw the enactment of the Adoption and Children Act that allowed single LGBTQAI+ individuals to be eligible to adopt a child in the United Kingdom. Before this, same-sex couples and unmarried cis-gendered couples in a live-in relationship were not allowed to adopt. By 2003, the Government repealed the draconian Clause 28 of the Local Government Act that denied the local authorities to support the LGBTQAI+ community.[79] The Employment Equality (Religion or Belief) Regulations of 2003 protected LGBTQAI+ employees from discriminatory action by their employers including any act of not hiring or promoting them. In 2004, the Civil Partnership Act was introduced that gave same-sex couples equal rights and responsibilities as enjoyed by heterosexual couples in England, Scotland, Northern Ireland and Wales.[80] The 2004 Gender Recognition Act allowed transgender people to acquire new birth certificates and other legal papers post

[79] British Library; LGBTQ Histories; Published at: https://www.bl.uk/lgbtq-histories/lgbtq-timeline
[80] Supra Notes 79

their operation. The Human Fertilisation and Embryology Act of 2008 recognised the same-sex couple's right to be legal parents to a child conceived through assistive reproduction techniques.

But it was in 2013, that the United Kingdom Parliament enacted the landmark Marriage (Same Sex Couples) Act across England and Wales that introduced the concept of legally recognised civil marriage across the British Isle. It allowed religious organisations to marry same-sex couples with immunity and protect such unions from any future legal actions. Through this Act, the couples could also transform their pre-existing civil partnerships into marriage whereafter the first same-sex marriage took place in March 2014. [81] It also allowed individuals to legally change their gender without having to end their marriage.

The Human Rights Campaign Foundation, which tracks the status of same-sex marriages around the world held that currently, thirty-two countries have legalised same-sex marriages. These are Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Denmark, Ecuador, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Mexico, the Netherlands, New

[81] Marriage (Same Sex Couples) Act 2013; Accessed at: https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/lawofmarriage-/

Zealand, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, the United Kingdom, the United States of America and Uruguay.[82] Of these, twenty-two countries had legalised same-sex marriage through the process of legislation and amendment to existing laws. Ten Countries had legalised same-sex marriage through judicial decisions. While two countries, i.e. South Africa and Taiwan enacted laws after a judicial intervention.

[82] HRC Foundation; Marriage Equality Around the World; Published at: https://www.hrc.org/resources/marriage-equality-around-the-world

PROPOSED AMENDMENTS TO THE SPECIAL MARRIAGE ACT, 1954

The idea for the legalisation of same-sex marriages under the Special Marriages Act was first proposed by Nayantara Ravichandran[83] . She recommended reading down the Special Marriages Act. Ravichandran states that Special Marriages Act is secular legislation whose objective was to facilitate marriages of people belonging to different religions not bound by personal laws. Hence it is the most desirable tool to achieve marriage equality in India. Same-sex marriage could be accommodated within the framework of the Special Marriage Act by learning from other countries like the Netherlands, England, Wales, some States of the USA etc. The idea of reading down of Special Marriages Act was inspired by the judgements of Supreme Courts in the United States of America for the States of Massachusetts[84] Iowa[85] and Connecticut[86] where it held that any law withholding citizen's marriage rights was unconstitutional according to the tenants of due process of law and equal protection under the law. The right to marry is incorporated under the right to individual liberty and a group could not be denied

[83] N. Ravichandran; Legal Recognition of Same-Sex Relations In India; National Law School of India University, Bangalore; Published at: www.manupatra.com
[84] Goodridge v. Deptt. of Public Health, 798 NE 2d 941 (Mass 2003)
[85] Varnum v. Brien, 763 NW 2d 862 (Iowa 2009)
[86] Kerrigan v. Commr. of Public Health, 289 Conn 135 (2008)

the right to be married as enjoyed by others without any sound justification under the tenants of law.[87]

Similarly, the Constitutional Court of South Africa in *Garden State Equality Vs Dow*[88] held laws not permitting same-sex marriages to be violative of Section 9(3) of the South African Constitution that guaranteed rights against unfair discrimination based on the grounds of race, gender, sex etc.[89] The Canadian Court of Appeal for Ontario in *Halpern Vs AG of Canada*[90] held that the existing common law definition of marriage between one man and one woman violated the equality rights under Section 5(1) of the Canadian Charter of Rights and Freedoms[91]. The High Court of England found restrictions on same-sex marriages in England violative of the European Convention on Human Rights.[92] It recognised the decision made by the Constitutional Court of South Africa by holding that though no specific Civil Partnership Act existed as such did in the

[87] Supra Notes 86
[88] Garden State Equality v. Dow, 2012 NJ Super Unpub LEXIS 360.
[89] Section 9; Chapter 2: Bill of Rights; Constitution of the Republic of South Africa; Published on 1996; Accessed at: https://www.gov.za/documents/constitution/chapter-2-bill-rights
The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
[90] Halpern v. AG of Canada, (2003) 169 OAC 172.
[91] https://www.cga.ct.gov/PS98/rpt%5Colr%5Chtm/98-R-0143.htm
[92] Wilkinson v. Kitzinger, 2006 EWHC 2022 (Fam)

United Kingdom, the Court provided equivalent status to long-term same-sex relationships.

Satchit Bhogle[93] too recommended that the definition of marriage to 'one man, one woman" should be classified as sexual discrimination under Article 14 and Article 15 while violating the privacy rights enshrined under Article 21 and freedom of expression under Article 19(1)(b). The right to choose a life Partner is also given as an interpretation of expressing one's fundamental right as highlighted under *Shakti Vahini Vs Union of India*[94]*, Shafin Jahan Vs Ashokan K.M.*[95] *and Shayara Bano Vs Union of India*[96]. For marriages to be restricted only between 'one man, one woman' violates the right of a citizen to live with dignity with the partner of their choice. If that Partner is homosexual, the discrimination provided to the citizen from enjoying a marital relationship in the eyes of other citizens violates Article 14. The *NALSA* judgement[97] has already disassociated the sexual orientation of an individual with sex and the use of a person's sexual orientation as a ground of discrimination concerning the third gender. The term "person" under Article 14 was held to be gender neutral and "sex" defined within

[93] S Bhogle; The Momentum of History – Realising Marriage Equality in India; NUJS Law Review; 12 NUJS L., Rev-3-4(2019); Accessed at : http://nujslawreview.org/wp-content/uploads/2020/02/12-3-4-Satchit-Bhogle.pdf
[94] (2018) 7 SCC 192
[95] AIR 2018 SC 1933
[96] (2017) 9 SCC 1
[97] (2014) 5 SCC 438

grounds of discrimination under Article 15 also encompasses gender fluidity instead of binary interpretation. Hence discrimination under Article 14 and Article 15 also included discrimination on the grounds of gender identity and sexual orientation. The *Puttaswamy* Judgement[98] provided the right to privacy upon the personal and intimate choices that an individual makes in their lives. An individual's choices upon their intimacy whereby the exercise of their sexual agency and right to choose a partner within the nature of the relationship that they intend to pursue forms part of the foundations of marriage equality. Individuals have the right to an union under Article 21 of the Constitution and the word "companionship" means physical, mental, sexual or emotional companionship in line with Article 12 of the Universal Declaration of Human Rights[99].

The draft Uniform Civil Code of 2017 further defines marriage as a union between heterosexuals and homosexuals. Thus, taking a broader scope in its definition. It also recognises "live-in relationships" between different sexes without the burden of marriage. [100] But sadly, the Bill could never see the light of the day and still is under the process of consideration due to opposition from the conservative classes.

[98] (2017) 10 SCC 1
[99] (2018) 10 SCC 1
[100] Sri Chandrakant Khaire,M.P.; The Uniform Civil Code in India Bill; 2018; Parliament of India; Bill No. 250 of 2018

AMENDMENTS TO SPECIAL MARRIAGE ACT 1954

A systematic word-by-word reading of the Special Marriage Act would explain to the reader that the original object of the Act as envisioned by the Framers; was to provide a special form of marriage, registration and divorce for certain cases of relationships not possible under religious personal laws. This was especially in the context of inter-religious marriages and inter-caste marriages. The Object of the Act does not put any restriction upon the application of the Act on any class of citizens except the citizens of the state of Jammu and Kashmir[101]. It is in the definition of "degree of prohibited relationship"[102] that for the first time, a gender distinction is made between a male and a female. No terms of the definition of "prohibited relationship" put estoppel upon man-man or woman-woman or transgender-man or transgender-woman relationships as such. It could be stated that the same statutes could be used in a gender-neutral way to define the prohibition on any form of a heterosexual or homosexual marital relationship. Incestuous relationships have been scientifically proven to be deformative as it results in homozygosity. And as such a prohibition should not be looked upon

[101] Section 1; Chapter I; The Special Marriage Act; 1954; Government of India; Act No. 43 of 1965
[102] Section 2; Chapter I; The Special Marriage Act; 1954; Government of India; Act No. 43 of 1965

within the scope of morality but within the scope of scientific well-being of offspring arising from the marriage.[103]

SECTION 4, CHAPTER II

The first major amendment required would be in Section 4, Chapter II "Solemnization of special marriages" whereby this amendment would form the core upon which further amendments within the Act shall be made. Under 4(c), where the marriageable age of male and female are decided upon[104]; it could be held that the mutually acceptable age for both the partners should be 21 years under the Special Marriage Act,1954. Before 1823, the legal age to get married

[103] Henderson J. Is incest harmful? Can J Psychiatry. 1983 Feb;28(1):34-40. doi: 10.1177/070674378302800108. PMID: 6839266.

[104] Section 4, Chapter II, The Special Marriage Act 1954:
Conditions relating to solemnization of special marriages.—Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:— (a) neither party has a spouse living; 3[(b) neither party— (i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or (ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and ~~the procreation of children~~; or (iii) has been subject to recurrent attacks of insanity 4 * * *;] (c) the ~~male~~ has completed the age of twenty-one years and the ~~female~~ the age of ~~eighteen years~~; 5[(d) the parties are not within the degrees of prohibited relationship: Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship; and] 6 [(e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends]. 7 [Explanation.—In this section, "custom", in relation to a person belonging to any tribe, community, group or family, means any rule which the State Government may, by notification in the Official Gazette, specify in this behalf as applicable to members of that tribe, community, group or family: Provided that no such notification shall be issued in relation to the members of any tribe, community, group or family, unless the State Government is satisfied— (i) that such rule has been continuously and uniformly observed for a long time among those members; (ii) ~~that such rule is certain and not unreasonable or opposed to public policy;~~ and (iii) that such rule, if applicable only to a family, has not been discontinued by the family.]

was 21 years. But after 1823, it was reduced to 14 years for boys and 12 years for girls. This was done to bring some legitimacy to the custom of child marriage in India. After Independence, in the year 1978, the legal age of marriage was increased to 18 for girls and 21 for boys to bring women empowerment and reduce gender inequalities.[105] The difference between the legal eligible age of women and men was found to have no reasonable rationale as held by the Supreme Court in *Independent Thought vs Union of India*[106]. The 2021, Prohibition of Child Marriage (Amendment) Bill, 2021 in Lok Sabha proposes to increase the legal age of marriage of a girl child from 18 years to 21 years under the 2006 Prohibition of Child Marriage Act. In this regard, no wrong should be seen if the same is done uniformly for all genders within the Special Marriage Act 1954 as it would make it easier to follow uniform norms for all genders within the Act.

[105] Tejaswini Kaushal, Vidushi Maheshwari; 18 or 21?: The Debate Over The Legal Age For Marriage Analysed; Human Rights Pulse; Published on : 19.02.2022; Published at: https://www.humanrightspulse.com/mastercontentblog/18-or-21-the-debate-over-the-legal-age-for-marriage-analysed#:~:text=Section%204(c)%20of%20the,to%20have%20no%20reasonable%20rationale.

[106] (2017) 10 SCC 800

OBJECTING TO THE REQUIREMENT OF PROCREATION UNDER MARRIAGE

Under 4(ii)[107], the statute mentions that if any Party is suffering from a mental disorder of such kind that results in the inability to "procreate children", then such a form of marriage cannot be solemnised by the Marriage Officers whose powers are enshrined under Section 3. It is pertinent to state that though the Apex Court has come down against the notion of "inability to procreate" as grounds for divorce; such a viewpoint narrows down the purpose of the marriage to an act of procreation only.

Though intercourse forms the foundation of marriage and its harmonious existence within the marriage is required for its continuity. It is not the only objectivity of the marriage. Conjugal intercourse can be non-childbearing where two consenting adults can be involved in a relationship beyond the dimension of procreation. Inability to perform one of the objectives of marriage should not be a valid ground for refusal of the whole marriage process. As seen under Section 12(1)(a) of the Hindu Marriage Act, Section 2(v) read with 2(ix)(c) of the Muslim Marriage Act, Section 24(i)(ii) of the Special Marriage Act, Section 18 read with

[107] Supra Notes 76

Section 19(1) of the Indian Divorce Act or Section 30 of the Parsi Marriage and Divorce Act where impotence can be a valid ground for divorce.[108]

It is important to see marriage and its consummation beyond the scope of sexual activity to the cohabitation of partners within a common marital home of bliss enjoying their privacy. Sexual intercourse between two partners is not the only instance upon which the act of consummation of marriage can take place. Cohabitation in a common residence can too be seen as an act of consummation as held under the scope of *live-in relationships* as highlighted by the Court in *S Khushboo Vs Kanniammal & Anr*[109]*, Indra Sarma Vs VKV Sarma*[110].

A person can have a psychological or moral revulsion to sexual activity post-marriage due to psychological, accidental or behavioural factors. This should not be seen as a ground for one Partner to surrender their marital responsibilities to care for the other. Taking the shield of impotence clause to leave such a person in further distress is wrong when society has to protect such vulnerable individuals at times of distress. Barrenness and Sterility can be dependent on multiple factors

[108] Richard Shane Hammish; A Handbook On Impotency As A Ground For Dissolving Marriage In India; Academike; Published on 19/07/2020; Published at: https://www.lawctopus.com/academike/impotency-as-a-ground-for-dissolving-marriage-in-india/
[109] (2010) 5 SCC 600
[110] AIR 2014 SC 309

beyond the control of both Partners. There is no set standard of proof and any court-induced medical examination during the process of litigation is humiliating to the dignity of the Partner against whom it is being undertaken. As the reports are thereafter made public just to make a point of the physical incapacity of the individual.

Case law from judgements in *Yuvraj Digvijay Singh Vs Yuvrani Pratap Kumar*[111] and *Urmila Devi Vs Narinder Singh*[112] is standing in law but bad in principle as it equates to refusal to undertake the sexual activity with impotency. It relates sexual intercourse to the consummation of marriage and hence makes it a valid ground for divorce. It makes one question whether the stand taken by the judiciary is incorporating the needs of a present society within the scope of constitutional morality. Or whether they see marriage beyond the scope of sexual activity between two consenting adults?

The importance of consummation and impotence within marriage is a Victorian hangover upon the Indian Judicial System where no such laws find customary relevance before the codification of personal laws. The definition of the

[111] (1969) 2 SCC 279
[112] AIR 2007 HP19

consummation of marriage has its origin in the English Law as established under *W vs W*[113]. But the literal definition of "consummation" differentiates it from the capacity to conceive. "Consummation" is defined as the capacity to undertake sexual intercourse with successful coitus, not as sexual intercourse that would result in the fertilisation of an embryo. It is Vera copula i.e. sort of coitus without conception. The definition and its interpretation within the ambit of marriage acts (both personal laws and the Special Marriage Act) imply that procreation was a conditional precedent of possible outcome not the resultant conclusion of the consummation of marriage. In this regard, the law should see it with two different aspects and not equate one as the reason for the other.

Sterility of a Partner has already been held as no ground for nullity of marriage in *Shakuntala Devi Vs Amar Nath*[114]. In an era where the focus is on encouraging the usage of contraceptives, birth controls such a myopic definition of marriage as a tool of procreation defeats the sustainable development goals that the State and its organs want to pursue within India. In cases such as *Renuka Vs Rajendra*[115]*Mary Kurian Vs T T Joseph*[116] *Jayaraj Vs Mary*[117] the courts in India have already come down upon the issue of impotence within the marriage and in

[113] [1967] 3 All ER 178
[114] AIR 1982 P&H 221
[115] AIR 2007 Raj 112
[116] AIR 1980 Ker 131
[117] AIR 1967 Mad 242

this regard, a sensitive approach needs to be taken considering the mental and social wellbeing of both the parties while invoking this as a ground for dissolution of marriage.

It is hence suggested that clause (ii) under Section 24(void marriages) of Chapter VI (Nullity of marriage and divorce)[118] along with clause (i) under Section 25(voidable marriages) of Chapter VI[119] be removed/retracted/rescinded to incorporate the new understanding on the issue of impotence and consummation as forwarded by the Indian Judiciary through their judgements.

[118] Section 24, Chapter VI, The Special Marriage Act 1954:
Void marriages.—(1) Any marriage solemnized under this Act shall be null and void 5 [and may, on a petition presented by either party thereto against the other party, be so declared] by a decree of nullity if— (i) any of the conditions specified in clauses (a), (b), (c) and (d) of section 4 has not been fulfilled; or (ii) ~~the respondent was impotent at the time of the marriage and at the time of the institution of the suit.~~ (2) Nothing contained in this section shall apply to any marriage deemed to be solemnized under this Act within the meaning of section 18, but the registration of any such marriage under Chapter III may be declared to be of no effect if the registration was in contravention of any of the conditions specified in clauses (a) to (e) of section 15: Provided that no such declaration shall be made in any case where an appeal has been preferred under section 17 and the decision of the district court has become final.

[119] Section 25, Chapter VI, The Special Marriage Act 1954:
Voidable marriages.—Any marriage solemnized under this Act shall be voidable and may be annulled by a decree of nullity if,— ~~(i) the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage~~; or (ii) the respondent was at the time of the marriage pregnant by some person other than the petitioner; or (iii) the consent of either party to the marriage was obtained by coercion or fraud, as defined in the Indian Contract Act, 1872 (9 of 1872): Provided that, in the case specified in clause (ii), the court shall not grant a decree unless it is satisfied,— (a) that the petitioner was at the time of the marriage ignorant of the facts alleged; (b) that proceedings were instituted within a year from the date of the marriage; and (c) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree: Provided further that in the case specified in clause (iii), the court shall not grant a decree if,— (a) proceedings have not been instituted within one year after the coercion had ceased or, as the case may be, the fraud had been discovered; or (b) the petitioner has with his or her free consent lived with the other party to the marriage as ~~husband and wife~~ (spouse) after the coercion had ceased or, as the case may be, the fraud had been discovered.

IMPORTANCE OF CUSTOMS WITHIN THE LAW

Section 4 of The Special Marriage Act,1954 incorporates the concept of customary practices within the reasons for the solemnisation of marriage. Customs are the regulations upon human behaviour within the framework of society. With the progress in the society and incorporation of liberal ideals; customs become less important in the daily lives of individuals. The code imposed by customs becomes less relevant with time. Society by its creation develops new codes which conduct the affairs of an individual. For a practice to be a valid legal custom, it has to pass the test of "Antiquity" i.e., its existence must be proven time immemorial, "Continuity" i.e., it must be practised continuously, "Reasonableness" i.e.it must be rational and practically beneficial to the needs of the society, "conformity" i.e., it must not be overruled by a statute of any legislation and "consistency" i.e., there must be no conflict with other customs.[120]

The importance of customary rights taking primacy as statutory law is a creation of the Indian Judiciary through expansion of the interpretation of Article 13. These

[120] Mangalam Srivastava; Essentials Of Customary Law In Light Of Modern Practice And Judicial Interpretations In India; Legal Service India; E-Journal; Published at: https://www.legalserviceindia.com/legal/article-7102-essentials-of-customary-law-in-light-of-modern-practice-and-judicial-interpretations-in-india.html ; Accessed on 09/08/2022

customary practices were codified within the ambits of personal laws but their application too finds relevance in secular acts. In cases of conflict, the customary law takes precedence provided there is no legislation on the issue as stated in *Smt. Ass Kaur (Deceased) by Legal Representatives Vs Kartar Singh(Dead) by Legal Representatives & Ors*[121]. The marriage and divorce laws admit its relevance as a reason for practices and arrangements that are seen to be in violation under a pure application of one set of personal laws. But in the Sabarimala verdict[122] , the judiciary did project its changing mindset on the role of customs and tradition as precedence when it causes grave injustice to a particular group. The Court held it should be the 'rule of law' that should take the utmost primacy. The morality that law should hold is constitutional morality, not public morality. This view was also highlighted in the *Jalikattu Animal Sports* Judgement[123] where an age-old custom of harming bulls during racing along with bystanders was found to be a violation of constitutional rights guaranteed under Article 51-A. In conclusion, obedience to custom should be encouraged as that allows the homogeneous existence of society within the rule of law. But with time, only the positive aspects of such customary practices should be incorporated within the ambit of codified law. Archaic customary practices should be discarded by educating citizens on why it is wrong. Customs that have a colonial undertone and that have no relevance to

[121] Appeal (civil) 12395 of 1996
[122] Indian Young Lawyers Association Vs State of Kerela; 2018 SCC Online SC 1690
[123] Animal Welfare Board of India Vs A. Nagaraja; (2014) 7 SCC 547

the present needs and demands of the society should be allowed to diminish. Any such evaluation of the relevance of customary practices should be undertaken through the yardstick of constitutional morality.

GENDER NEUTRALITY WITHIN SPECIAL MARRIAGE ACT 1954

Separating sex from gender has been the call of various women's rights movements since the 1960s. From rape laws under Section 375 and Section 376 of the Indian Penal Code to the Domestic Violence Act of 2005; there have been repeated calls by various stakeholders including the Apex Court in its judgements that it is about time that the country needs gender-neutral laws to uphold the concept of equality as enshrined within the Constitution. Defining gender in binary terms rejects the gender-sex divide. It is anti-thesis to the idea of the third gender and their rights as highlighted by the *NALSAR*[124] *judgement.* It rejects the existence of the LGBTQAI+ communities where gender identities are fluid[125]. Though the traditional debate on the issue of gender-neutral law revolves around the point that a woman can be a perpetrator as well. This debate somehow suppresses the need of other genders and LGBTQAI+ communities whose

[124] AIR 2014 SC 1863

[125] Vidushi Joshi; Critical Analysis on the need for Gender Neutral Laws in India; Lexpeeps; Published on 24/01/2022; Published at: https://lexpeeps.in/critical-analysis-on-the-need-for-gender-neutral-laws-in-india/

objective of having gender-neutral laws is different from the 'woman perpetrator' debate.

Article 14 and Article 15 of the Indian Constitution require that any such law defined within the codified laws need to be gender neutral in all regards, unless and until they are being made to protect an endangered community as highlighted under Article 15(3) of the Indian Constitution. Giving equal rights to men and protections to men similarly to women under gender-neutral laws won't diminish the protection provided by law to women. But would encourage to reduce gender stereotyping in law. Thus, reducing the exploitation of all individuals in all vulnerable circumstances. Feminist Philosophers too have recognised the need for gender neutrality.[126] It abolishes the discrimination between different sexes in legislation along with its implementation by Courts. The concept of equality is provided to all irrespective of the individual's sex. Gender-neutral laws are instruments to obtain that utopian equality for all. During the debate upon reading down Section 377 in *Navtej Singh Johar Judgement*[127], the issue of male-on-male rape was discussed as well. Reading down Section 377 provided no alternate remedy for such male individuals who were sexually exploited and couldn't obtain protection under Section 375 and Section 376 of the Indian Penal Code.

[126] Rumney, P. (2007). In Defence of Gender Neutrality Within Rape. Seattle Journal of Social Justice, 6, 481
[127] AIR 2018 SC 4321

Issues such as female-on-male rape and transgender rape were discussed too. The Bench did observe that there was a growing need for gender-neutral rape laws in India. The Committee on Amendments to Criminal Law and Justice Verma Committee too has proposed the case of gender-neutral criminal laws in India[128].

A survey in the USA under the name of National Intimate Partner and Sexual Violence Survey 2010 found that 5% of lesbians, 61% of bisexual women, 26% of gay men, and 37% of bisexual men had experienced rape, physical violence, and/or stalking by an intimate partner. Forty-eight per cent of bisexual women experienced rape earlier in life compared to 28% of heterosexual women.[129] The 172nd Law Commission Report too recommended ungendered rape laws including adding a new section to provide safeguard to male victims as envisioned by Section 377 earlier. The Report suggested amendments to the Code of Criminal Procedure,1973 and the Evidence Act,1872.[130] The Transgender Persons (Protection of Rights) Act 2019 also creates new statutory provisions for the protection of the transgender community from sexual assault crimes giving them

[128] Priya M. Menon; Lacking support, male rape victims remain silent; THE TIMES OF INDIA; Published on February 6, 2013; Published at : https://timesofindia.indiatimes.com/city/chennai/lacking-support-male-rape-victims-stay-silent/articleshow/18524668.cms

[129] NISVS; An Overview of 2010 Findings on Victimization by Sexual Orientation; National Center for Injury Prevention and Control; Centers for Disease Control and Prevention; USA; Accessed at: https://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_victimization_final-a.pdf

[130] Avantika Mehta; Why It Is Time For India To Consider Gender-Neutral Rape laws; Article 14; Published on 07/09/2021; Published at: https://article-14.com/post/why-it-is-time-for-india-to-consider-gender-neutral-rape-laws-6136d766effef

protection at par with women. India being a signatory of the Universal Declaration of Human Rights in 1948, The International Covenant on Civil and Political Rights in 1966 and The International Covenant on Economic, Social and Cultural Rights in 1966 put a statutory obligation upon India to provide equal rights to every person with dignity.[131] But to date, no concrete steps have been taken toward this gender-neutrality of codified laws in India.

Gender neutrality in Marriage laws has special significance with context to the maintenance, adoption and custody. The law of maintenance puts the duty upon the male to take care of the female spouse and it is seen as his duty to upkeep the family. This viewpoint is patriarchal, misogynistic and refuses to recognise women as economic contributors to the family. For society to embrace equality in all aspects, it is important to regard women with the same economic role as that of a man in the working sphere in her family unit as well. Judgements delivered in such instances should be based on the circumstances of the case. Presently, the law is such if it is biased towards one gender, and it shall continue as so until the legislature makes an amendment. A private member's Bill in the name of "Gender Neutrality Bill, 2019" was introduced in Rajya Sabha. The objective of the Bill was the prevention of men from false acquisition, prevention of male child abuse,

[131] Priya Nandan; Gender-Neutral Laws in India; International Journal of Law Management & Humanities; ISSN 2581-5369; Volume 5 issue 1; 2022

custodial rape and abuse of male youth. But the Bill failed to recognise the needs of the LGBTQAI+ communities within its scope as well. The assumption of Criminal law that male is always the perpetrator and male cannot be raped is the same stigma that the LGBTQAI+ community faces where they are regarded as morally pervasive and unable to be exploited by other binary genders in everyday society. Protection is required for all sections equally.

The Special Marriage Act 1954 by definition applies to all persons irrespective of their sex. The Act defines marriage as "a marriage between any two persons". And in this regard, it could be assumed that the legislative intent behind its inception was to create a gender-neutral act. In several statutes, the article "the" is used before the male/husband and female/wife, not the article "a".[132] The interpretation of this usage of the article "the" instead of "a'' can be equated to the fact that the Oxford English Dictionary calls its usage to notify a general usage of the term succeeding the word "the" instead of specific usage of the succeeding term. Thus, the "husband" or "wife" must be interpreted in gender neutral way going as per the dictionary interpretation. Under Section 5[133] for notice of

[132] Dormaan Dalal; Scope of same-sex marriages and gender neutrality of the Special Marriage Act; The Leaflet; Published on 10/10/2020; Published at: https://theleaflet.in/scope-of-same-sex-marriages-and-gender-neutrality-of-the-special-marriage-act-part-i/

[133] Section 5, Chapter II, The Special Marriage Act 1954:
Notice of intended marriage. —When a marriage is intended to be solemnized under this Act, the parties to the marriage shall give notice thereof in writing in the form specified in the Second Schedule to the Marriage Officer

marriage, the word "the parties" is used not "man/male" or "woman/female" sense. It implies that the interpretation of this word "Parties" throughout the Act means a gender-neutral interpretation. Also, the words "either of the parties", "such party", "the party", "the parties", "any person", "a person" are used in Sections 8[134],11[135] and 12[136] of the Act[137] instead of binary terms male or female as used in certain other statutes. It shows the legislative intent that the framers didn't want to compartmentalise the statutes for any one gender. And as such, the Act could be interpreted in gender-neutral terms in future. Similarly, the words "any person" or "a person" was used to denote genders not "he or she" under

of the district in which at least one of the parties to the marriage has resided for a period of not less than thirty days immediately preceding the date on which such notice is given.

[134] Section 8, Chapter II, The Special Marriage Act 1954:

Procedure on receipt of objection.—(1) If an objection is made under section 7 to an intended marriage, the Marriage Officer shall not solemnize the marriage until he has inquired into the matter of the objection and is satisfied that it ought not to prevent the solemnization of the marriage or the objection is withdrawn by the person making it; but the Marriage Officer shall not take more than thirty days from the date of the objection for the purpose of inquiring into the matter of the objection and arriving at a decision.

[135] Section 11, Chapter II, The Special Marriage Act 1954:

Declaration by parties and witnesses. —Before the marriage is solemnized the parties and three witnesses shall, in the presence of the Marriage Officer, sign a declaration in the form specified in the Third Schedule to this Act, and the declaration shall be countersigned by the Marriage Officer.

[136] Section 12, Chapter II, The Special Marriage Act 1954:

Place and form of solemnization. —(1) The marriage may be solemnized at the office of the Marriage Officer, or at such other place within a reasonable distance therefrom as the parties may desire, and upon such conditions and the payment of such additional fees as may be prescribed. (2) The marriage may be solemnized in any form which the parties may choose to adopt: Provided that it shall not be complete and binding on the parties unless each party says to the other in the presence of the Marriage Officer and the three witnesses and in any language understood by the parties, — "I, (A), take the (B), to be my lawful wife (or husband)".

[137] Supra notes 136

Section 20[138],21[139] and 21-A[140] of The Special Marriage Act 1954. It was used simply to refer to one of the two spouses in gender-neutral terms. Its objective was to remove any ambiguity in its application to any of the sexes of the two Partners.

The usage of the terms "wife" and "husband" in the Proviso of Section 12(2) of the Special Marriage Act,1954[141] is as an Oath and not as a restriction. The usage of the word "husband" or "wife" by one of the spouses during oath-taking would not classify as gender casting but as a roleplay to define one of the Partners in the marital union. In same-sex marriage, the term husband can be used in oaths of both partners. Or the term "wife" can be used for both the partners or the term with which one identifies their gender subject to their interpretation. This can also be replaced by the usage of the gender-neutral term **"spouse"** such as : "*I, (A),*

[138] Section 20, Chapter IV, The Special Marriage Act 1954:
Rights and disabilities not affected by Act. —Subject to the provisions of section 19, any person whose marriage is solemnized under this Act shall have the same rights and shall be subject to the same disabilities in regard to the right of succession to any property as a person to whom the Caste Disabilities Removal Act, 1850 (21 of 1850), applies.
[139] Section 21, Chapter IV, The Special Marriage Act 1954:
Succession to property of parties married under Act.—Notwithstanding any restrictions contained in the Indian Succession Act, 1925 (39 of 1925), with respect to its application to members of certain communities, succession to the property or any person whose marriage is solemnized under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the said Act and for the purposes of this Act shall have effect as if Chapter III of Part V (Special Rules for Parsi Intestates) had been omitted therefrom.
[140] Section 21-A, Chapter IV, The Special Marriage Act 1954:
Special provision in certain cases. —Where the marriage is solemnized under this Act of any person who professes the Hindu, Buddhist, Sikh or Jaina religion with a person who professes the Hindu, Buddhist, Sikh or Jaina religion, section 19 and section 21 shall not apply and so much of section 20 as creates a disability shall also not apply.]
[141] Supra Notes 136

take the (B), to be my lawful spouse" The Special Marriage Act 1954 itself in Section 4 of Chapter II[142], Section 15 of Chapter III[143] and Section 27 of Chapter VI uses the gender-neutral term "spouse" to define any of the party to the marriage. It shows that any such amendment/replacement of the words "husband" or "wife" with the word "spouse" throughout The Special Marriage Act 1954 won't be an outside interpretation. But something which finds its origin of usage within the Act.

The replacement of the word "husband" or "wife" with the word "spouse" does not give a new interpretation to the statutes except in the Sections with regards to divorce and maintenance. By the application of the golden rule of interpretation, the words "husband" and "wife" can be given a wider interpretation which comes to the closest intention of the legislature i.e., to portray the sex-based role of the common term "spouse". Hence, by applying the rule of harmonious construction,

[142] Supra Notes 104

[143] Section 15, Chapter III, The Special Marriage Act 1954:
Registration of marriages celebrated in other forms.—Any marriage celebrated, whether before or after the commencement of this Act, other than a marriage solemnized under the Special Marriage Act, 1872 (3 of 1872), or under this Act, may be registered under this Chapter by a Marriage Officer in the territories to which this Act extends if the following conditions are fulfilled, namely:— (a) a ceremony of marriage has been performed between the parties and they have .been living together as ~~husband and wife~~ (spouse)ever since; (b) neither party has at the time of registration more than one spouse living; (c) neither party is an idiot or a lunatic at the time of registration; (d) the parties have completed the age of twenty-one years at the time of registration; (e) the parties are not within the degrees of prohibited relationship: Provided that in the case of a marriage celebrated before the commencement of this Act, this condition shall be subject to any law, custom or usage having the force of law governing each of them which permits of a marriage between the two; and (f) the parties have been residing within the district of the Marriage Officer for a period of not less than thirty days immediately preceding the date on which the application is made to him for registration of the marriage.

it could be replaced with the word "spouse" to remove any contradictions in the case of same-sex marriages.

By replacing the words "husband" or "the wife" in Section 22 (restitution of conjugal rights)[144] and Section 23 (judicial separation)[145] (Restitution of Conjugal Rights and Judicial Separation) and in Proviso (iii)(b) under Section 25(voidable marriages) under Chapter V of The Special Marriage Act 1954 with the word "spouse"; the same interpretation would be given to the statute for any heterosexual, homosexual or inter-sexual relationship. Section 22 already contains the words "the aggrieved party"; which shows that any one of the Partners can approach the court with a petition for restitution. There is no gender-based restriction on approaching the Court and hence replacing the words

[144] Section 22, Chapter V, The Special Marriage Act 1954:
Restitution of conjugal rights.—When either ~~the husband or the wife~~(spouse) has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply by petition to the district court for restitution of conjugal rights, and the court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. 2 [Explanation.—Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of providing reasonable excuse shall be on the person who has withdrawn from the society.]

[145] Section 23, Chapter V, The Special Marriage Act 1954:
Judicial separation.—(1) A petition for judicial separation may be presented to the district court either ~~by the husband or the wife~~(of the spouse),— (a) on any of the grounds specified 3 [in sub-section (1) 4 [and sub-section (1A)] of section 27] on which a petition for divorce might have been presented; or (b) on the ground of failure to comply with a decree for restitution of conjugal rights; and the court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly. (2) Where the court grants a decree for judicial separation, it shall be no longer obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

"husband" and "wife" with the single term "spouse" would still give the same meaning to the statute. Even if it is interpreted for same-sex marriages.

Certain statutes such as Section 26(the legitimacy of children of void and voidable marriages) of Chapter VI[146] along with Explanation 1(A) under Section 27(divorce)[147] have used gender-neutral terms. But its presence within the proposed amended Act does not interfere with the rights of same-sex couples. Its existence within the statutes could be expressed explicitly for cis-gendered heterosexual couples only. And the protection under those clauses for the female wife means that it ensures that the interests of the vulnerable Party within the

[146] Section 26, Chapter VI, The Special Marriage Act 1954:
Legitimacy of children of void and voidable marriages.—(1) Notwithstanding that a marriage is null and void under section 24, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act. (2) Where a decree of nullity is granted in respect of a voidable marriage under section 25, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it has been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity. (3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 25, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of not his being the legitimate child of his parents.]

[147] Provisio (1A), Section 27, Chapter VI, The Special Marriage Act 1954:
Explanation.—In this sub-section, the expression "desertion" means desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly;[(1A) A wife may also present a petition for divorce to the district court on the ground,— * * (i) that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; (ii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) (or under the corresponding section 488 of the Code of Criminal Procedure, 1898) (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards.]

marriage are safeguarded by the law. The issue of divorce, maintenance and adoption in the context of same-sex marriage is discussed further in upcoming sections.

Under Chapter VII, Jurisdiction and Procedure, in Section 31[148] clause (iii)(a) could apply exclusively to cis-gendered heterosexual relationships only. The clause (iii) of whose it is a further amendment by Act 50 of 2003 was made so that there is more clarity to the gender-neutral terms of clause (iii) of Section 31 of the Act. The legislative intent and the separation of implication on cis-gendered relationships only can be inferred from the object of the 2003 Amendment. Its presence within the Act doesn't harm the interests of same-sex couples except under clause 2 of Section 31, where it is recommended to substitute the term "wife" with "spouse" and the term "husband" with "other spouse" to give clarity in interpretation for same-sex relationships and extends its applicability to all. Such a gender-neutral term would enlarge the benefit of filing a petition to the

[148] Section 31, Chapter VII, The Special Marriage Act 1954:
Court to which petition should be made.2[(1) Every petition under Chapter V or Chapter VI shall be presented to the district court within the local limits of whose original civil jurisdiction-- (i) the marriage was solemnized; or (ii) the respondent, at the time of the presentation of the petition resides; or (iii) the parties to the marriage last resided together; or 3[(iiia) in case the wife is the petitioner, where she is residing on the date of presentation of the petition; or] (iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is at that time residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years by those who would naturally have heard of him if he were alive.] (2) Without prejudice to any jurisdiction exercisable by the court under sub-section (1), the district court may, by virtue of this sub-section, entertain a petition by a ~~wife~~ (spouse) domiciled in the territories to which this Act extends for nullity of marriage or for divorce if ~~she~~(he or she) is resident in the said territories and has been ordinarily resident therein for a period of three years immediately preceding the presentation of the petition and the ~~husband~~(other spouse) is not resident in the said territories.

husbands as well in cis-gendered relationships for whom there is only a negative covenant in the present form of the Act.

RELEVANCE OF DIVORCE, MAINTENANCE AND ALIMONY FOR SAME-SEX COUPLES

Marriage is not simply a social contract but it is a bonhomie of human and emotional relationship between two individuals. It is built upon trust, respect, and love between the spouses. The role of law in marriage is to regulate the relationship between people within the civilised society. Though the relationship is sacred, with all forms of safeguards in place, it is impossible to prevent marital falling-off between the partners. Maintenance of wife, children and parents forms a continuous obligation upon the traditionally male members of the family. In *Badshah Vs Urmila Badshah Godse*[149] the Court held that wives, children and parents are part of the marginalised section of society. Under "social justice" as enshrined in the Preamble of the Constitution; it is the goal of the state for bridging the gap between the law and society.

[149] (2014) 1 SCC 188

Under the principle of "social justice adjudication" or "social context adjudication"[150], the judges are to be emphatic toward the inequalities of the parties. They are required to be inclined in their judgements towards the weaker party if the imbalance was not to result in a miscarriage of justice. The principle was evolved by the Parliament and the Supreme Court through various Acts and case laws when unequal parties were pitted against one another in adverse proceedings. It was the duty of the Courts to balance the scale of justice towards the disadvantaged group. Socio-economic inequalities form the core of decision-making in such instances.

The Party deserving protection of maintenance too falls under such category of "social context adjudication". Where '*one formula for all'* principal can't be applicable in all cases. Historically, the Courts in India during divorce proceedings favoured the maintenance of the female spouse. But with the advent of time and financial empowerment of females, the Courts have taken a softer approach towards the male spouse depending on the facts and circumstances of the case. It shows the changing attitude of the Courts from "adversarial litigation"

[150] Singh, Aishwarya Pratap, Social Context Adjudication: 'Relevance for Trial Courts' (November 8, 2017). Available at SSRN: https://ssrn.com/abstract=3068744 or http://dx.doi.org/10.2139/ssrn.3068744

to “social context litigation”. It follows the principle that the societal law changes as per the social reality. Law has a living nature that has an element of constant change. With changing society, the law changes as well in a response to the new reality.

In both constitutional and statutory interpretation, the Court is supposed to exercise discretion in determining the proper relationship between the subjective and objective purposes of the law.[151] The Court as the interpreter of the law is supposed to correct uncertainties and harmonise results with justice through a method of a free decision based on the Latin principle of *libre recherche scientifique* i.e. on the principles of free scientific research.[152]

The idea behind Section 125 of CrPC[153] was to fulfil the constitutional duty of giving relief to wife and parents in circumstances where their subsistence is endangered on the guidelines of gender justice.

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[151] Dongar Ram Vs Meera Bai @Kachra Bai; Criminal Revision No.180 of 2005 ; High Court of Chattisgarh, Bilaspur; Accessed at: https://indiankanoon.org/doc/45584088/

[152] Sanjeev Kapoor Vs Chandana Kapoor; J Ashok Bhusham, J KM Joseph ; CRIMINAL APPEAL NOS.286 OF 2020 (ARISING OUT OF SLP(CRL.)NO.1041 OF 2020) ; Supreme Court of India

[153] Section 125 in The Code Of Criminal Procedure, 1973
Order for maintenance of wives, children and parents: (1) If any person having sufficient means neglects or refuses to maintain- (a) his wife, unable to maintain herself, or (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or 1. Subs. by Act 45 of 1978, s. 12, for" Chief Judicial Magistrate" (w. e. f, 18- 12- 1978). (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or (d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class

The case law on the issue of maintenance is well settled. In *Kamala Vs MR Mohan Kumar*[154] the Court held that strict proof of marriage is not essential in the claim of maintenance under Section 125 of CrPC and that when the parties live together as husband and wife, there is a presumption that they are a legally married couple for a claim of maintenance under Section 125 CrPC[155]. Thus, it could be stated that Indian law recognised live-in relationships or civil unions between heterosexual couples. The Court decided that marriage is not a sin qua non for maintenance plea and that such a plea can be dependent upon the nature of the

may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means. Explanation.- For the purposes of this Chapter,- (a) " minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority; (b) " wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. (2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance. (3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made: Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due: Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing. Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him. (4) No Wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent. (5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

[154] AIR 2018 SC 5128

[155] Supra Note 153

relationship existing between the two parties. The Court in the Case of *Dwarika Prasad Satpathy Vs. Bidyut Prava Dixit*[156] remarked that a broad interpretation should be given to the term "wife" to include even those cases where a man and woman have been living together as husband and wife for a reasonably long period. Strict proof of marriage should not be a precondition for maintenance under Section 125 CrPC to fulfil the true spirit and essence of the beneficial provision of maintenance under Section 125.[157]

It is pertinent to mention that the woman in the case of Section 125 is also duty bound to take care of her ailing parents as held in *Dr. (Mrs.) Vijaya Manohar Arbat Vs Kashi Rao Rajaram Sawai & Ors*[158]. The Supreme Court held that a father can claim maintenance from his married daughter under Section 125(1)(d). The statutes use the word "his father or mother", but the use of the word "his" does not exclude the female from the responsibility to maintain her parents if she has sufficient means. Section 8 of the Indian Penal Code states that the pronoun "he" and its derivatives are to be used for any person, whether male or female. Hence the word "his" in Section 125 should be interpreted in a gender-neutral

[156] (1999) 7 SCC 675
[157] Supra Note 62
[158] 1987 AIR 1100

context. Section 13(1) of the General Clauses Act[159] lays down that in all Central Acts and Regulations unless there is anything repugnant in the subject or context, words importing the masculine gender shall be taken to include females.[160] Thus through this interpretation, the protection under Section 125 and Maintenance laws under the Special Marriage Act 1954 can be extended to all forms of marital relationships as any term used in context to gender here can have dual interpretation as per the need of the Case.

In terms of defining the quantum of maintenance that is legally justifiable; the Supreme Court in *Kalyan Dey Chowdhury v. Rita Dey Chowdhury Nee Nandy*[161] held that 25% of the husband's net salary would be just and proper as maintenance to the wife. The Court further held that permanent alimony awarded to the wife must befit the status of the Parties and the capacity of the spouse to pay maintenance. And that maintenance is always dependent on the factual situation of the case. The Court would be justified in moulding the claim for maintenance passed on various factors.[162] Sustenance in such cases means the

[159] Gender and number.—In all 2[Central Acts] and Regulations, unless there is anything repugnant in the subject or context,— (1) words importing the masculine gender shall be taken to include females; and (2) words in the singular shall include the plural, and vice versa.
[160] Supra Notes 160
[161] AIR 2017 SC 2383
[162] Supra Note 161

wife is entitled to live her life in the same manner as she was living in the house of her husband with respect and dignity. In *Alphonsa Joseph Vs. Anand Joseph*[163] it reiterated its view that maintenance to a wife cannot be rejected on the ground that she is earning. Further, a judicially separated wife is also entitled to maintenance and under Section 125, the wife is entitled to further maintenance beyond the scope of the Marriage Acts.

The Courts have incorporated a gender-neutral view on the issue of maintenance whereby it has recognised even the husband's claim to maintenance. In *Nivya V.M. v. Shivaprasad N.K*[164] , the Kerela High Court held that even a husband can claim maintenance provided that he is incapable or is handicapped. The Delhi High Court in the case of *Bharat Hedge Vs Smt Saroj Hegde*[165] laid down the guidelines to be followed while determining the quantum of maintenance. The factors to be considered were status of the parties, reasonable wants of the claimant, independent income and property of the claimant, number of persons the non-applicant has to maintain, and the amount needed by the applicant to live a lifestyle he/she enjoyed in the matrimonial home, defendant's liabilities and

[163] CIVIL APPEAL Nos.1657-1658 OF 2021 (ARISING OUT OF SLP (C) D. No.10566/2021)
[164] IA.No.329/2014 in OP.No.200/2014; High Court of Kerela
[165] 140 (2007) DLT 16,

paying capacity of the defendant. Duration of marriage is an important factor to consider as well.

The objective of maintenance is to prevent the destitution of the less well-off Partner. Section 36(alimony pendente lite) of The Special Marriage Act under Explanation (ii) extends the '*maintenance pendente lite'* to women under The Special Marriage Act[166]. But the idea behind pendente lite is that the spouse can support themselves with the basic essentials till the proceedings in Court have culminated. The objective here is not for outright payment to one gender only but as a payment to a Petitioner who is incapable of financially sustaining themselves. The law and the reading of statutes as stated above clearly stipulate that the maintenance can be individual-centric depending on the facts and circumstances of the case and not based on the "*one formula fits all*" principle as seen in statutes other than that of family law.

[166] Section 36, Chapter VII, The Special Marriage Act 1954:
Alimony pendente lite.—Where in any proceeding under Chapter V or Chapter VI it appears to the district court that the ~~wife~~(spouse) has no independent income sufficient for ~~her~~(their) support and the necessary expenses of the proceeding, it may, on the application of the ~~wife~~(spouse), order the ~~husband~~(the earning spouse) to pay to ~~her~~(their) the expenses of the proceeding, and weekly or monthly during the proceeding such sum as having regard to the ~~husband's~~ (earning spouse) income, it may seem to the court to be reasonable. 4 [Provided that the application for the payment of the expenses of the proceeding and such weekly or monthly sum during the proceeding under Chapter V or Chapter VI, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the ~~husband~~(earning spouse).]

The terms “wife”, “husband”, “him”, and” her” across Section 36 and 37 of The Special Marriage Act should be read in gender-neutral terms as laid down by Section 13 of the General Clauses Act. This interpretation of Section 36[167] and Section 37[168] of The Special Marriage Act 1954 allows harmonious construction of the terms in context to same-sex couples as well who on the same principles are entitled to alimony and maintenance based on their economic circumstances.

In the USA, spousal maintenance in same-sex civil unions is dependent on State laws whereby in the State of New York, a spouse can receive maintenance up to a certain number of years based upon the duration of the marriage[169]. In the State of New Jersey, for a same-sex couple to be entitled to spousal alimony; the factors that are considered in deciding upon the case are- the need and ability of Parties to pay, the duration of the marriage, the age and health of the Parties, the standard

[167] Supra Notes 166

[168] Section 37, Chapter VII, The Special Marriage Act 1954:
Permanent alimony and maintenance.—(1) Any court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree or at any time subsequent to the decree, on application made to it for the purpose, order that the ~~husband~~ (earning spouse) shall secure to the ~~wife~~ (dependent spouse) for ~~her~~ (their) maintenance and support, if necessary, by a charge on the ~~husband's~~ (earning spouse's) property such gross sum or such monthly or periodical payment of money for a term not exceeding ~~her~~ (their) life, as, having regard to ~~her~~ (their) own property, if any, ~~her husband's~~ (earning spouse) property and ability 5 [the conduct of the parties and other circumstances of the case], it may seem to the court to be just. (2) If the district court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the court to be just. (3) If the district court is satisfied that the ~~wife~~ (dependent spouse) in whose favour an order has been made under this section has remarried or is not leading a chaste life, 1 [it may, at the instance of the ~~husband~~ (earning spouse) vary, modify or rescind any such order and in such manner as the court may deem just.]

[169] Friedman &Friedman PLLC; Spousal Maintenance in a Same-Sex Divorce; Published on 28/02/2022; Published at: https://www.sarifriedman.com/blog/2022/february/spousal-maintenance-in-a-same-sex-divorce/

of living of the same-sex couple during the marriage, the earning capacity of the Parties, the education level of the Parties, the vocational skills and employability skills of the Parties, the length of absence from the job market of the spouse, the parental responsibilities for the children adopted during the civil union, the time required for reskilling for the job market for the dependent spouse, history of the financial contribution of each Party for the care and upkeep of the family, property attained during the time of civil union by the Parties, the income through investments made during the time of the civil union etc.[170]

In the United Kingdom, the same-sex couple enjoys the same grounds for divorce similar to heterosexual couples except for the adultery clause under the Marriage (Same Sex Couples) Act of 2013. The UK Court deals with the financial aspect of divorce separately from the divorce proceedings whereby the process followed is the same as that of heterosexual couples. Financial terms can be mutually agreed upon outside the Court by the Parties or the Court can intervene in complex matters. The award by the Court is dependent on a case-by-case basis considering the circumstances surrounding the divorce. But the factors upon which the decision is made are based on: the length of the marriage, the couple's standard

[170] Erin D. DeGeorge ;Detorres & Degeorge; Spousal Support, Maintenance & Alimony in a Same Sex Divorce; Published on 20/10/2020; Published at: https://www.danddfamilylaw.com/spousal-support-maintenance-alimony-in-a-same-sex-divorce/

of living during the marriage, the earnings of couples during marriage and their income, the personal property of each Partner, the contributions made by the Parties to the marriage and the responsibilities upon the Parties.[171] The principle of Fairness is what governs the proceedings and Courts believe in the principle of sharing when deciding upon complex issues such as custody of children and jointly obtained properties.

The law of divorce for same-sex couples under the Special Marriage Act 1954 can be the same as that for heterosexual couples. All the clauses in gender-neutral interpretation give the same effect to the provisions as it does at present except for the protections made especially for women under Clause 27 of the Special Marriage Act 1954 under Explanation 1A. It could be held that Explanation 1A under Clause 27 shall apply only to the case of heterosexual relationships only. Thus, a harmonious construction can be given to the statute without any substantial alterations. The principles to determine maintenance can also be the same as that is undertaken at present for heterosexual relationships. The only issue of concern is how will the Court decide which one of the same-sex Partners deserves the protection of maintenance and alimony. And in this regard, the ratio

[171] Expatriate law; International Divorce for Same-Sex Couples; Published at: https://expatriatelaw.com/international-divorce-for-same-sex-couples/

led down by the Courts in the United Kingdom could be followed where the award is decided on a case-to-case basis.

ADOPTION, SUCCESSION AND CUSTODY RIGHTS OF CHILDREN IN SAME-SEX MARRIAGE

To desire a family with heirs is part of the trait of every human being. No matter what their sexual orientation might be. It is human instinct that we desire for children to take over our private property and ensure the continuation of the legacy of our name. As such, the law has been framed as per the classical school of law to ensure this continuity of transfer of rights, titles and interests from one generation to another. The law recognises that every child has the right to a family.[172] The Constitution of India puts a statutory duty upon the State through Article 39(F) under the Directive Principle of State Policy to enact policies for the betterment of children and provide them with the opportunity to a dignified life.

[172] Lakshmi Kant Pandey vs Union Of India; 1984 AIR 469

Same-sex couples too have an equal desire and right to adopt children as any heterosexual couple. But the situation becomes unique for same-sex couples as it is difficult to assume who presumes what role in the family. Another question that arises is whether such a division of roles is what society should achieve within the family unit. Globally, special rules are made specifically for the cases of gay or lesbian couple adoption to reduce the complexity of the adoption process. It is different from heterosexual adoption throughout the countries of the world.

Even when such parents use a surrogate or artificial insemination to produce a natural child, the law is required to be specifically moulded to meet these new challenges concerning custody and guardianship of the child. It needs to weigh the interest of the Couples and the interests of the biological parents on equal footing for the best interest of the child. The law in India is more complicated on the issue as there is no statutory restriction as per the marital status of the applicant to be considered eligible to adopt a child. But when being adopted by a couple, the law makes it statutorily compulsory to obtain consent from both spouses and it is here the complication starts.

In the USA, the Supreme Court in 2015 recognised the rights of same-sex parents regarding adoption rights. The Couple is statutorily required to declare a “legal

parent" who gets the right to live with the child and is generally the decision maker about the child's education, health and future until they attain majority. This is opposite to the requirement in the case of a heterosexual cis-gender married couple adopting a child where both parents are assumed to be the legal parents automatically. But the law allows the Partner to legally adopt the previous biological child of the other Partner.

In a heterosexual divorce, both parents have the right to child custody if parents cannot reach an agreement. But in the case of same-sex divorce, the other Partner who is not the declared legal parent has limited rights and is seen as a stranger to the child without guaranteed visitation rights. Same-sex couples are required to enter into a parenting agreement as per the laws of the corresponding state. This Agreement reflects how the guardianship shall be shared, the financial responsibilities of each parent towards the adopted child, and the future rights secured for the adopted child. In case of divorce, there shall be a pre-agreed arrangement of how things would proceed if they divorce, similar to a pre-nuptial agreement.[173]

[173] Hal Armstrong; FindLaw; Gay and Lesbian Adoption Laws; Published on 19/11/2021; Published at: https://www.findlaw.com/family/adoption/legal-issues-for-gay-and-lesbian-adoption.html

In India, adoption legally means "the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of the adopted parents with all the rights, privileges and responsibilities that are attached to a biological child."[174] The laws governing the adoption process are regulated by the Hindu Adoptions and Maintenance Act of 1956 and the Juvenile Justice Act of 2015.

A "Guardian" is defined as a person having the care of the person of a minor or of his property or of both which includes a natural Guardian, a Guardian appointed by the will of biological parents or a Guardian declared by the Court.[175] The "Natural Guardian" is defined as the father, and after him, the mother provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother for an ordinary case of a boy or an unmarried girl.[176] While considering who governs custody of children, the paramount emphasis is on the welfare of the child and not the rights of the parents.[177] Section 7[178] and

[174] Section 2(2); Juvenile Justice (Care and Protection of Children) Act, 2015
[175] Section 4; Hindu Minority and Guardianship Act; 1956
[176] Section 6; Hindu Minority and Guardianship Act; 1956
[177] Rosy Jacob Vs Jacob Chakramakkal; 1973 AIR 2090
[178] Section 7; Hindu Minority and Guardianship Act; 1956
Capacity of a male Hindu to take in adoption.—Any male Hindu who is of sound mind and is not a minor has the capacity to takes on or a daughter in adoption: Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the word or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. Explanation.—If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso

Section 8[179] of the Hindu Adoptions and Maintenance Act define which Parties hold the capacity to adopt. These clauses are restrictive as it makes prior consent from their wife and husband compulsory. Section 57 of the Juvenile Justice Act imposes restrictions upon couples as they need to have a minimum of two years of a stable marital relationship to qualify for adoption.[180] The process governing the procedure of adoption is highlighted by Section 56[181], Section 58[182], Section

[179] Section 8 ; Hindu Minority and Guardianship Act; 1956
Capacity of a female Hindu to take in adoption.—Any female Hindu who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption: Provided that, if she has a husband living, she shall not adopt a son or daughter except with the consent of her husband unless the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.]

[180] Section 57 ; The Juvenile Justice (Care and Protection of Children) Act; 2015
(1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him. (2) In case of a couple, the consent of both the spouses for the adoption shall be required. (3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority. (4) A single male is not eligible to adopt a girl child. (5) Any other criteria that may be specified in the adoption regulations framed by the

[181]Section 56 ; The Juvenile Justice (Care and Protection of Children) Act; 2015
(1) Adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children, as per the provisions of this Act, the rules made thereunder and the adoption regulations framed by the Authority. (2) Adoption of a child from a relative by another relative, irrespective of their religion, can be made as per the provisions of this Act and the adoption regulations framed by the Authority. (3) Nothing in this Act shall apply to the adoption of children made under the provisions of the Hindu Adoption and Maintenance Act, 1956. (4) All inter-country adoptions shall be done only as per the provisions of this Act and the adoption regulations framed by the Authority. (5) Any person, who takes or sends a child to a foreign country or takes part in any arrangement for transferring the care and custody of a child to another person in a foreign country without a valid order from the Court, shall be punishable as per the provisions of section 80.

[182] Section 58 ; The Juvenile Justice (Care and Protection of Children) Act; 2015
(1) Indian prospective adoptive parents living in India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child, may apply for the same to a Specialised Adoption Agency, in the manner as provided in the adoption regulations framed by the Authority. (2) The Specialised Adoption Agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible, will refer a child declared legally free for adoption to them along with the child study report and medical report of the child, in the manner as provided in the adoption regulations framed by the Authority. (3) On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medical report of the child signed by such parents, the Specialised Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority. (4) On the receipt of a certified copy of the court order, the Specialised Adoption Agency shall send immediately the same to the prospective adoptive parents. (5) The progress and wellbeing of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoption regulations framed by the Authority

59[183] and Section 60[184] of the Juvenile Justice (Care and Protection of Children) Act 2015. The Act allows single individuals/parents to adopt children as per Section 57 of the Juvenile Justice Act but is silent on the issue of same-sex parents.

[183] Section 59 ; The Juvenile Justice (Care and Protection of Children) Act; 2015
(1) If an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian prospective adoptive parent despite the joint effort of the Specialised Adoption Agency and State Agency within sixty days from the date the child has been declared legally free for adoption, such child shall be free for inter-country adoption: Provided that children with physical and mental disability, siblings and children above five years of age may be given preference over other children for such inter-country adoption, in accordance with the adoption regulations, as may be framed by the Authority. (2) An eligible non-resident Indian or overseas citizen of India or persons of Indian origin shall be given priority in inter-country adoption of Indian children. (3) A non-resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoptive parents living abroad, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorised foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, as the case may be, in the manner as provided in the adoption regulations framed by the Authority. (4) The authorised foreign adoption agency, or Central Authority, or a concerned Government department, as the case may be, shall prepare the home study report of such prospective adoptive parents and upon finding them eligible, will sponsor their application to Authority for adoption of a child from India, in the manner as provided in the adoption regulations framed by the Authority. (5) On the receipt of the application of such prospective adoptive parents, the Authority shall examine and if it finds the applicants suitable, then, it will refer the application to one of the Specialised Adoption Agencies, where children legally free for adoption are available. (6) The Specialised Adoption Agency will match a child with such prospective adoptive parents and send the child study report and medical report of the child to such parents, who in turn may accept the child and return the child study and medical report duly signed by them to the said agency. (7) On receipt of the acceptance of the child from the prospective adoptive parents, the Specialised Adoption Agency shall file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority. (8) On the receipt of a certified copy of the court order, the specialised adoption agency shall send immediately the same to Authority, State Agency and to the prospective adoptive parents, and obtain a passport for the child. (9) The Authority shall intimate about the adoption to the immigration authorities of India and the receiving country of the child. (10) The prospective adoptive parents shall receive the child in person from the specialised adoption agency as soon as the passport and visa are issued to the child. (11) The authorised foreign adoption agency, or Central Authority, or the concerned Government department, as the case may be, shall ensure the submission of progress reports about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any disruption, in consultation with Authority and concerned Indian diplomatic mission, in the manner as provided in the adoption regulations framed by the Authority. (12) A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to Authority for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions as provided in the adoption regulations framed by the Authority

[184] Section 60 ; The Juvenile Justice (Care and Protection of Children) Act; 2015
(1) A relative living abroad, who intends to adopt a child from his relative in India shall obtain an order from the court and apply for no objection certificate from Authority, in the manner as provided in the adoption regulations framed by the Authority. (2) The Authority shall on receipt of the order under sub-section (1) and the application from either the biological parents or from the adoptive parents, issue no objection certificate under intimation to the immigration authority of India and of the receiving country of the child. (3) The adoptive parents shall, after receiving no objection certificate under sub-section (2), receive the child from the biological parents and shall facilitate the contact of the adopted child with his siblings and biological parents from time to time.

The Act here is not discriminatory against same-sex parents but the legislative intent here throughout the Act denotes a heterosexual interpretation of the word "family'' or "parents". Section 7 and Section 8 of the Hindu Adoption and Maintenance Act define the word "spouse" and "wife" and hence the Act cannot recognise adoption by same-sex couples by definition.

India by further enacting the Surrogacy (Regulation) Act of 2021 has denied same-sex couples the right to assisted reproduction by calling "couple" as legally married Indian man and woman above the age of 21 years and 18 years as per Section 2 of the Act. This Act had faced opposition from several sections of the society who believed that it restricted the surrogates to close relatives only which is a projection of the patriarchal mindset of Indian Society onto our science-based legislations.[185] It further entitles only couples married for 5 years to take the assistance of surrogacy. This is an archaic projection of the family system and values which do not meet the demand of present reality. It is a sort of moral policing taken by the State to control a citizen's right to procreate as well as rob women of their agency to decide how they want to rear a child. The surrogate mother was defined as a woman genetically related to the intending couple who

[185] Anudev Shah; The New Surrogacy Bill Wont Let Live-in and LGBTQ Couples Become Parents; News18; Published on 20/12/2018; Published at: https://www.news18.com/news/india/the-new-surrogacy-bill-wont-let-live-in-and-lgbtq-couples-become-parents-1979055.html

is married with a child of her own and is aged between the age of 25 years to 35 years. To control commercial surrogacy or rent-a-womb tendencies, each woman shall be allowed to become a surrogate for only once in her life.

These Acts are violative of Article 14, Article 15, and Article 21 of the Indian Constitution. Same-sex couples just like heterosexual couples have the right to adoption and qualify as a parent. Every underprivileged child should have the right to a stable life and the protection of the family. The above-stated arbitrary discriminatory laws don't pass the classification test and the test of arbitrariness as no concrete reasoning was provided within the Act as to why the same-sex couples were alienated from the process of adoption and surrogacy just based on their sexual orientation, which is a violation of the principles of Article 15 if same-sex couples/heterosexual singles are legalised in India. It presumes heterosexual couples to be inferior to same-sex couples and the arguments forwarded in cases such as *Puttaswamy Judgement, Navtej Singh Johar and NALSA Judgement* can be forwarded here again to make a case for same-sex adoption and surrogacy laws within India.

In India, the procedure of the Court upon the issue of adoption is regulated by Section 61 of the Juvenile Justice Act 2015.[186] The Courts follow the doctrine that the "welfare of minor is to be the paramount consideration". To circumvent the tougher provisions of the Juvenile Justice Act and Hindu Adoption & Maintenance Act; the Courts can use the provisions of The Guardians and Wards Act,1890 to appoint same-sex couples as "Guardians" of the Child while the couple by their testimonial Will could devolve their private property to such adopted children while making the application in Court.

In *Munnodiyil Peravakutty Vs. Kuniyedath Chalil Velayudhan*[187], the Court held that the welfare of the child is to be determined neither by economic affluence nor a deep mental or emotional concern for the well-being of the child. The answer is a balancing of all these factors and determining the best interest of the child which will ensure their complete wellbeing. In *Amit Beri Vs Sheetal Beri*[188] the court held that money alone is not sufficient to record findings regarding the welfare of

[186] Section 61 ; The Juvenile Justice (Care and Protection of Children) Act; 2015
(1) Before issuing an adoption order, the court shall satisfy itself that-- (a) the adoption is for the welfare of the child; (b) due consideration is given to the wishes of the child having regard to the age and understanding of the child; and (c) that neither the prospective adoptive parents has given or agreed to give nor the specialised adoption agency or the parent or guardian of the child in case of relative adoption has received or agreed to receive any payment or reward in consideration of the adoption, except as permitted under the adoption regulations framed by the Authority towards the adoption fees or service charge or child care corpus. (2) The adoption proceedings shall be held in camera and the case shall be disposed of by the court within a period of two months from the date of filing.
[187] AIR 1992 Ker 290
[188] AIR 2003 All 18

the child. In *Mohini Vs Virendra*[189] , the Court held that the "natural Guardian" paramount consideration in Section 6 of the Hindu Adoption and Maintenance Act is not an absolute right and the Court can give paramount consideration to the welfare of the minor. As such, it is not required that a natural Guardian declared by statute shall hold absolute guardianship and that the decision of the Court could be based on facts and circumstances in opposition to the general definition of the clause as the law lays down the primacy of welfare of the child above any statutory implication.

Further, under Section 7 of the Guardians and Wards Act of 1890, the Courts are statutorily empowered to appoint a third person Ward beyond the natural father or mother of a child depending on the facts and circumstances to protect the paramount interest of the child.[190] The factors governing any such appointment of a Guardian are highlighted in Section 17 of the Guardians and Wards Act of 1890.[191] As far as restrictions upon who could apply for guardianship, there is no

[189] AIR 1977 SC 1359

[190] Section 7 ; The Guardian and Wards Act; 1890
Power of the Court to make order as to guardianship. —(1) where the Court is satisfied that it is for the welfare of a minor that an order should be made— (a) appointing a guardian of his person or property, or both, or (b) declaring a person to be such a guardian, the Court may make an order accordingly. (2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court. (3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

[191] Section 17 ; The Guardian and Wards Act; 1890
Matters to be considered by the Court in appointing guardian.—(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to

particular restriction upon any gender, sex or type of individual as highlighted under Section 8 of the Guardians and Wards Act of 1890.[192] In case of death of any Court appointed guardians (in case of same-sex couples), the Courts can enforce Section 38 of the Guardians and Wards Act of 1890 and appoint the family members of the couple as the Guardian until the child attains majority.[193] The Court is also empowered to remove the Guardian under Section 39 of the Guardians and Wards Act of 1890.[194] The Adoption Regulations, 2017[195] allow

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which the minor is subject, appears in the circumstances to be for the welfare of the minor. (2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. (3) If the minor is old enough to form an intelligent preference, the Court may consider that preference. (5) The Court shall not appoint or declare any person to be a guardian against his will.

[192] Section 8 ; The Guardian and Wards Act; 1890

Persons entitled to apply for order.—An order shall not be made under the last foregoing section except on the application of— (a) the person desirous of being, or claiming to be, the guardian of the minor, or (b) any relative or friend of the minor, or (c) the Collector of the district or other local area within which the minor ordinarily resides or in which he has property, or (d) the Collector having authority with respect to the class to which the minor belongs.

[193] Section 38 ; The Guardian and Wards Act; 1890

Right of survivorship among joint guardians.—On the death of one of two or more joint guardians, the guardianship continues to the survivor or survivors until a further appointment is made by the Court.

[194] Section 39 ; The Guardian and Wards Act; 1890

Removal of guardian. —The Court may, on the application of any person interested, or of its own motion, remove a guardian appointed or declared by the Court, or a guardian appointed by will or other instrument, for any of the following causes, namely:— (a) for abuse of his trust; (b) for continued failure to perform the duties of his trust; (c) for incapacity to perform the duties of his trust; (d) for ill-treatment, or neglect to take proper care, of his ward; (e) for contumacious disregard of any provision of this Act or of any order of the Court; (f) for conviction of an offence implying, in the opinion of the Court, a defect of character which unfits him to be the guardian of his ward; (g) for having an interest adverse to the faithful performance of his duties; (h) for ceasing to reside within the local limits of the jurisdiction of the Court; (i) in the case of a guardian of the property, for bankruptcy or insolvency; (j) by reason of the guardianship of the guardian ceasing, or being liable to cease, under the law to which the minor is subject: Provided that a guardian appointed by will or other instrument, whether he has been declared under this Act or not, shall not be removed— (a) for the cause mentioned in clause (g) unless the adverse interest accrued after the death of the person who appointed him, or it is shown that that person made and maintained the appointment in ignorance of the existence of the adverse interest, or (b) for the cause mentioned in clause (h) unless such guardian has taken up such a residence as, in the opinion of the Court, renders it impracticable for him to discharge the functions of guardian.

[195] Gazette of India; Ministry of Women and Child Development Notification; Published on 04/01/2017; Published at: http://cara.nic.in/PDF/Regulation_english.pdf

unmarried men and women eligible for adoption. Hence same guidelines can be used to determine the eligibility of one of the Partners in case of a same-sex couple if they are looking to adopt or become a Guardian of a child.

There is a strong case for allowing same-sex couples to adopt children in India. According to UNICEF, India has around 5% of the population or 30 million kids orphaned.[196] The majority of the orphanages are in depilated condition and there is no social security available to these vulnerable kids. Only 470,000 children are in institutional care and the rest are living a destitute life on the streets of India.[197] Infertility as a whole is on a rise in society due to the life choices of people. But adoption rate has seen a decrease from 5693 in 2010 to 3276 in 2018, for the entire country.[198]

The Indian Society of Assisted Reproduction states that approximately 20,000 heterosexual couples are on the waiting list for adoption whereas around 27.5 million people take some sort of assisted fertility procedure across India showing the gravity of the issue in concern.[199] In this regard, it is suggested that it should

[196] Shreya Kalra; Why India's adoption rate is abysmal despite is 30 million abandoned kids; The Wire; Published on 30/10/2018; Published at: https://www.business-standard.com/article/current-affairs/why-india-s-adoption-rate-is-abysmal-despite-its-30-million-abandoned-kids-118103000218_1.html
[197] Supra Notes 196
[198] Supra Notes 196
[199] Supra Notes 196

be made a Government Policy to encourage and support adoption laws within personal laws in India. In the context of the Special Marriage Act 1954, it is suggested that Section 26 (Legitimacy of children of void and voidable marriage) be amended to incorporate adopted children as well under the ambit of protection[200] while Section 38 (Custody of children)[201] needs no major alterations.

[200] Section 26, Chapter VI, The Special Marriage Act 1954:
Legitimacy of children of void and voidable marriages.—(1) Notwithstanding that a marriage is null and void under section 24, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or adopted after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act. (2) Where a decree of nullity is granted in respect of a voidable marriage under section 25, any child begotten or conceived or adopted before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it has been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity. (3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 25, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of not his being the legitimate child of his parents.]

[201] Section 38, Chapter VII, The Special Marriage Act 1954:
Custody of children.—In any proceeding under Chapter V or Chapter VI the district court may, from time to time, pass such interim orders and make such provisions in the decree as it may seem to it to be just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes wherever possible, and may, after the decree, upon application by petition for the purpose, make, revoke, suspend or vary, from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending. 2 [Provided that the application with respect to the maintenance and education of the minor children, during the proceeding, under Chapter V or Chapter VI, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.]

CONCLUSION

The road ahead for India is long and meandering to emancipate equal recognition for the LGBTQAI+ community in society. Persecution of the LGBTQAI+ community today is the subjugation of the Dalit community in the past. From recognising the third gender in 2014 to *Navtej Singh Johar* Judgement in 2019, we as a country have come halfway to the meeting point. The Spring 2019 Global Attitudes Survey states that 37% of Indians support homosexuality.[202] The Courts in India have on multiple instances opined that the time had come for the Government to introduce Uniform Civil Code (UCC) for all Indians. It is observed that the Indian society has become homogenous where traditional barriers of religion, community and caste have been dissipated by the changing times. Hence UCC is the need of the hour. Religious personal laws regularly conflict with the needs of new age couples who struggled with its rigid application. [203] The Supreme Court in the Shah Bano Case[204] held that there was a need to implement UCC. In another case[205] it observed that there was a need for religion-neutral

[202] Jacob Poushter, Nicholas Kent; The Global Divide on Homosexuality Persists; Pew Research Centre; Published on 25/06/2020; Published at : https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-persists/

[203] "Delhi HC backs Uniform Civil Code, asks Centre to take necessary steps"; Richa Banka, Joydeep Bose, Avik Roy; Hindustan Times; https://www.hindustantimes.com/india-news/delhi-hc-backs-uniform-civil-code-asks-centre-to-take-necessary-steps-101625812927126.html ; Published on July 09 2021

[204] Mohammed Ahmad Khan v. Shah Bano Begum; 1985 (1) SCALE 767; 1985 (3) SCR 844; 1985 (2) SCC 556; AIR 1985 SC 945

[205] Ashwini Kumar Upadhyay Vs Union of India; WP (C) No. 699 of 2016

inheritance and succession laws in India. Thus there is a strong case for the legalisation of same-sex marriages in India post the *Navtej Singh Johar* Judgement.

India ranks lowly on the index regarding the acceptance of homosexual people within society. It ranks 82 out of 150 on the LGBTQAI+ travel safety index[206], ranked 81 out of 127 countries on the Gay Happiness Index[207], ranked 23 out of 27 countries for views on same-sex marriage and providing legal recognition[208] and ranked 51 out of 175 countries for acceptance of LGBTI People in between 2017 and 2020.[209] This shows that the 2nd most populated nation in the world and the largest democracy in the world still do not see all its citizens with equal rights and dignity.

Hence it is suggested that the time has come to de-hyphenate marriage from procreation. See marriage as a medium of personal association and not as a

[206] Lyric Fergusson; India Ranks 82nd Among 150 Countries In LGBTQ Travel Safety Index, Finds Study; Feminism In India; Published on 30/03/2021; Published at: https://feminisminindia.com/2021/03/30/lgbtq-travel-safe-countries/

[207] Mayank Jain; Gay Happiness Index ranks India below China, Nepal and Qatar; Scroll.in; Published on 19/05/2015; Published at : https://scroll.in/article/728053/gay-happiness-index-ranks-india-below-china-nepal-and-qatar

[208] LGBT Rights In India; EQUALDEX; Published at: https://www.equaldex.com/region/india

[209] Andrew R. Flores; Social Acceptance of LGBTI People In 175 Countries And Locations; November 2021; School of Law, Williams Institute; Accessed at: https://williamsinstitute.law.ucla.edu/publications/global-acceptance-index-lgbt/

religious sanctioning of human relationships. The law has evolved today to accept same-sex marriage within the constitutional framework of India and tools to legitimise such justification have been formulated by the Indian Judiciary over the years. By applying the principle of constitutional morality and simply reading the statutes of the Special Marriage Act 1954 in gender-neutral terms, as envisioned by The General Clauses Act, we can legally recognise same-sex marriages in India. Regarding the complexity and incomparability to issues that might originate in future if such marriages are legalised; the case laws in marital proceedings have already established how the law should proceed if a situation of conflict arises in future. Harmonious construction of the statutes is possible for both heterosexual couples and same-sex couples within the ambit of The Special Marriage Act 1954 as highlighted in this paper. Denial of choice to marry is a denial of the fundamental right to choose one's living Partner. A large conservative element of the society will indeed oppose these amendments, as the Conservatives did against the eradication of child marriage or giving equal rights to inheritance to the female or reservation of women in the past. But a just society must rise above hatred and move towards an egalitarian society guided by principles of rationality and not based on old dogmas of religion and custom.