RELATIVE EXPLORATION OF THE SAME-SEX MARRIAGE DISCOURSE IN CANADA, THE UK AND INDIA: DILEMMAS UNVEILED

Abstract

Following the recent ruling of the Supreme Court of India in *Supriyo* v. *Union of India*, the debate regarding same-sex marriage legalisation again popped up on the surface by considering the sufferings of same-sex couples due to human rights violations and the likelihood of recognising same-sex marriage under the Indian traditional marriage jurisprudence. The legitimisation of same-sex marriage in countries like Canada and the UK shows the steps that are required to be followed to sensitise the society before recognising same-sex unions under "marriage" institution, as this institution has social, ethical, religious and legal implications. Now the following questions remain open: whether as a multi-religious country India should follow the path of Canada and the UK in recognising same-sex marriage? Whether the existing marriage jurisprudence is sufficient to legalise same-sex marriage in India? This paper will primarily make an effort to answer these questions in detail by studying the legal intricacies of same-sex marriage in Canada and the UK and by making a relative study of the contemporary Indian legal status towards same-sex marriage.

I Introduction

MARRIAGE IS a conclusive deliberate amalgamation - of the mind, the soul, and the body. The authority of marriage stems from the identities that people bring to it and discover within it.[1] A profound and enduring commitment of the partners to one another and a soulful dedication to the relationship are the blessings of marriage.[2] When two people agree to marry, they are expected to be in a life-long settled relationship which has to be maintained by love and faithfulness.[3] Each spouse provides emotional, financial, and spiritual support to the other as a marital commitment. Hence, companionship, love, and mutual respect are the hallmarks of a successful marriage. The sole purpose of getting married is not to facilitate sexual relations between the spouse and the procreation of children, although that may be one of the key incentives for entering into a marital tie. Traditionally, Indian law recognises only heterosexual marriages as an outcome of practising Victorian Morality by the British

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1 Linda S. Eckols, "The Marriage Mirage: The Personal and Social Identity Implications of Same-Gendered Matrimony" 5(2) *Michigan Journal of Gender and Law* 353, 354 (1999).

2 Bernard M. Loomer, "On Committing Yourself to a Relationship" 16(4) *Process Studies* 255-263 (1987).

3 J. M. Vorster, "Christian Ethical Perspectives on Marriage and Family Life in Modern Western Culture" 64(1) *HTS Theological Studies* 463, 468 (2008).

rulers.Nonetheless, there have been major changes recently to the legal position pertaining to sexual orientation and gender identity. In many nations across the world, the laws that outlawed same-sex relationships and the expression of gender identity have been revised and reversed.[4] Human rights laws and practices have placed increasing weight and deliberations on gender identity, sexual orientation, and intersex status in recent decades.[5] Sexual orientation refers to a person's level of sexual attraction towards the other sex or both sexes or the same sex. On the other hand, sexual interactions between people of the other sex (heterosexual), or both sexes (bisexual) or the same sex (homosexual) are deliberated as sexual behaviour.[6] Among these, this study majorly concentrates on same-sex people (homosexuals).[7]

There has been homosexuality recorded throughout history, and some people have even come to embrace it.[8] In ancient Greece, Rome, Persia, and Islamic nations, there was some tolerance for homosexuality, and the practice grew as these civilizations deteriorated. In the later years in Greece and Rome, for example, open homosexual prostitution was practised.[9] Similar accepting approaches are also observable in the Indian ancient culture. In Mahabharata, one of the antique Hindu epics, Krishna and Arjuna, sometimes known as "the two Krishnas" represent a unique friendship bond that transcends marriage and procreation.[10] During the Mughal period, homosexual

4 Holning Lau, "Sexual Orientation and Gender Identity Discrimination" 2(2) *Comparative Discrimination Law* 1, 2 (2018).

5 For critical evaluation of the legal development, see, Paula Gerber and Claerwen O'Hara, "Teaching Law Students about Sexual Orientation, Gender Identity and Intersex Status within Human Rights Law: Seven Principles for Curriculum Design and Pedagogy" 68(2) *Journal of Legal Education* 416-446 (2019); Suzanne M. Marks, "Global Recognition of Human Rights for Lesbian, Gay, Bisexual, and Transgender People" 9(1) *Health Human Rights* 33-42 (2006).

6 J. Michael Bailey, Paul L. Vasey, Lisa M. Diamond, *et al.,* "Sexual Orientation, Controversy, and Science" 17(2) *Psychological Science in the Public Interest* 45, 48 (2016).

7 Whether or not to include other stable patterns of sexual attraction, like attraction to children [Michael C. Seto, "Is Pedophilia a Sexual Orientation?" 41 *Archives of Sexual Behavior* 231-236 (2012)] or even to non-human animals [Hani Miletski, "Is Zoophilia a Sexual Orientation? A Study," in Andrea M. Beetz and Anthony Louis Podberscek (eds.), *Bestiality and Zoophilia: Sexual Relations with Animals* 82-97 (Purdue University Press, Ashland, 2005)], under the umbrella term "sexual orientation" is a significant current debate. I employ the phrase in the more limited meaning, which is to limit the discussion to attraction to women and men who are sexually mature.

8 See generally, Jeffrey Weeks, *Sexuality and Its Discontents: Meaning, Myths and Modern Sexualities* (Kegan Paul, London, 1985); Benjamin Kleinmuntz, *Essentials of Abnormal Psychology* (Harper and Row, Manhattan, 1980); Laud Humphreys, *Tearoom Trade: Impersonal Sex in Public Places* (Aldine Transaction, New Jersey, 1975).

9 Subhash Chandra Singh, "Gay and Lesbian Sexuality: Issues and Legal Responses" in Manik Chakraborty (ed.), *Human Rights in Twenty First Century: An Anthology*, 67-100 (R. Cambray and Co. Private Ltd., Kolkata, 2014).

10 R. Vanita and S. Kidwai, *Same Sex Love in India: Readings from Literature and History* 3 (Macmillan, New Delhi, 2000).

and bisexual people used to hold high positions in the King's palace.[11] The scenario started to change with the imposition of the colonial regime and the introduction of the penal provisions concerning homosexuality. As a result, lesbians, gay men, bisexuals, and transgenders often

Experienced stigma, discrimination, and social exclusion. With the development of human rights, in recent years, there has been discussion over the rights of lesbians, gay men, bisexuals, and transgender people, the legal status relating to sexual orientation, and the legitimacy of homosexuality.[12] Nevertheless, the debates over their right to marry and the right to enjoy marital benefits are the most contemporary ones.

The early development of human rights law and its practices among scholars did not support same-sex marriage. According to article 16 of the 1948 Universal Declaration of Human Rights (UDHR) marriage between man and woman is permissible.[13] As per article 16(1) of the UDHR, only individuals who are of legal age possess the right to marry and form families, without any limitations on the basis oftheir race, nationality, or religion. They are entitled to fair treatment before, during, and following their marriage. Thus, same-sex marriage has been outlawed under the UDHR.[14] According to article 23(2) of the International Covenant on Civil and Political Rights, 1966 (ICCPR), it is acceptable for both women and men who are of legal age to get married and start families and the State is under an obligation to recognize the right of both women and men wishing to marry each other.[15] Article 16 of the ICCPR acknowledges that everyone has the right to be recognized everywhere as a person before the law. However, gay men and lesbians are not treated as equal human beings in regard to marriage and family, employment, child custody, etc. in comparison to heterosexual human beings. Moreover, article 17 of the ICCPR also states that:

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11 Walter Penrose, "Colliding Cultures: Masculinity and Homoeroticism in Mughal and Early Colonial South Asia," in Katherine O'Donnell and Michael O'Rourke (eds.), *Queer Masculinities, 1550-1800: Siting Same-Sex Desire in the Early Modern World* 144, 145 (Palgrave Macmillan, London, 2006).

12 Mahendra P. Singh, "Decriminalisation of Homosexuality and the Constitution" 2(3) *NUJS Law Review* 361-380(2009); Ajendra Srivastava, "Gay Sex and the Constitution: Naz Foundation and Lawrence Compared" 51(4) *Journal of Indian Law Institute* 513-522(2009).

13 Cultivating and Promoting adherence for fundamental freedoms and human rights for all people without regard to race, sex, religion, or language is one of the primary goals of the United Nations as stated in art. 1(3) of the Charter. See, Thomas Buergenthal, "The Evolving International Human Rights System" 100(4) *American Journal of International Law* 783, 786 (2006).

14 Ingar Brueggemann and Karen Newman, "For Better, For Worse" 3(2) *Health and Human Rights* 54, 56 (1998).

15 Kristie A. Bluett, "Marriage Equality under the ICCPR: How the Human Rights Committee Got It Wrong and Why It's Time to Get It Right" 35(4) *American University International Law Review* 605, 607 (2020).

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Hence, State actions to deny gay men and lesbians to get married and start a family are clearly a violation of article 17 of the ICCPR on the following grounds:

Please rewrite the paragraph given below. It is not stating the grounds in a lucid manner.

Conversely, the European Court of Human Rights had modified, in *Goodwin* v. *United Kingdom*,[16] its long-standing approach whereby as per Article 12 of the European Convention on Human Rights (ECHR) only people of opposite biological birth-sex have the right to get married. It allowed, within the framework of the ECHR, any post-operative transsexual to enjoy the right to be getting married to any individual of his or her opposite post-operative sex.[17] However, it does not extend to same-sex marriage. The scenario started to change with the approval of the civil union of same-sex persons among gay men and lesbians. Over the past 20 years, several nation-states have passed laws introducing same-sex marriage through intricate legal frameworks.[18]Legislation establishing registered partnerships for same-sex and different-sex couples was passed in the Netherlands on July 5, 1997. The legislation became operative on January 1, 1998. Later on, a law allowing same-sex marriages was passed in the Netherlands on December 21, 2000, and it became effective on April 1, 2001.[19] The Netherlands was the first country to legalize same-sex marriage through legislation.[20] The first national Constitution to include lesbian and homosexual rights[21] was written in South Africa.[22]Along with Belgium and Spain, Canada, a common law

16 (2002) VI ECHR 1.

17 Aleardo Zanghellini, "To What Extent Does the ICCPR Support Procreation and Parenting by Lesbians and Gay Men?" 9(1) *Melbourne Journal of International Law* 125, 130 (2008).

18 Belgium followed in 2003, Canada and Spain in 2005, South Africa in 2006, Norway and Sweden in 2009, and Argentina, Iceland, Portugal, and Mexico City in 2010. See, Joseph Chamie and Barry Mirkin, "Same-Sex Marriage: A New Social Phenomenon" 37(3) *Population and Development Review* 529, 531 (2011).

19 Patrick Festy and Godfrey Rogers, "Legal Recognition of Same-Sex Couples in Europe," 61(4) *Population* 417, 419 (2006).

20 Joseph Chamie and Barry Mirkin, "Same-Sex Marriage: A New Social Phenomenon" 37(3) *Population and Development Review* 529, 531 (2011).

21 M. P. Byrn, "Same-Sex Marriage in South Africa: A Constitutional Possibility" 87 *Minnesota Law Review* 512 (2002).

22 South Africa is frequently not listed as a nation that allows same-sex marriage due to the Civil Unions Act of 2006, which implies that same-sex marriages are not marriages. Only the Civil Unions Act permits same-sex unions; neither the Marriage Act (Act 25 of 1961) nor the Customary Marriages Act (Act 120 of 1998) permit marriages between persons belongs to the same sex. See, Joan Callahan, "Same-Sex Marriage: Why It Matters-At Least for Now" 24(1) *Hypatia* 70, 79 (2009).

nation, was one of the leading states to legalize same-sex marriage. Meanwhile, the United Kingdom (UK) Parliament enacted the Marriage (Same Sex Couples) Act, 2013 to formally recognize same-sex unions in Wales and England. Right now, about 30 countries allow same-sex marriages. In contrast, over 70 countries still forbid consensual same-sex behaviour. This includes the six countries[23] that put people to death for having consensual same-sex relationships. In five other countries,[24] the death penalty is an option for punishment.[25] Against this background, this article tries to understand the path of legitimization of same-sex marriage in Canada and the UK and tries to demonstrate the present Indian context of the legitimization of same-sex marriage. Contextually, the author proposes to discuss the path taken in Canada and the UK in legitimizing same-sex marriage and the obstacles faced by the procedure in the first two parts and demonstrate the Indian scenario regarding the same in the third part. Conclusions hold a discussion on the reasoning behind allowing same-sex marriages and comparative approaches of Canada, UK and India.

II Legal position relating to same-sex marriage in Canada

Preliminary recognition and role of judicial precedents

A federal legislation known as the Civil Marriage Act of 2005 (S.C. 2005, c. 33) makes same-sex marriages legal in all 13 provinces and territories in Canada.[26]By passing this Act, Canada became the fourth country after the Netherlands,[27] Belgium,[28] and Spain[29] to legalize same-sex marriage. Canada adopted the Civil Marriage Act by its Supreme Court's order in *Reference Same Sex Marriage*.[30] It was a question of reference

23 These are Saudi Arabia, Nigeria, Yemen, Iran, Mauritania, and Bahrain.

24 These are Qatar, Somalia, Pakistan, Afghanistan, and UAE.

25 Sexual Orientation Laws in the World - 2019, *available at*: https: //ilga.org/ downloads/ ILGA_ Sexual_ Orientation_ Laws_ Map_ 2019. pdf, (last visited on Jan. 25, 2024).

26 On Jan. 14, 2001, two marriages of same-sex persons took place. Kevin Bourassa and Joe Varnell were married to each other and Anne Vautour and Elaine Vautour were also married to each other. These two were the first marriages between same sex persons that were legitimised in modern times. The Toronto Metropolitan Community Church took this opportunity to tie up the banns for the nuptials in accordance with Christian tradition.

27 On Sept. 12, 2000, a bill for legitimization of same-sex marriage was approved by the House of Representatives and on Dec. 19, 2000, the same bill was adopted by the Senate. On December 21, 2000, Queen Beatrix of the Netherlands granted her royal assent to the law, which went into effect on April 1, 2001. Nancy G. Maxwell, "Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison" 18(1) *Arizona Journal of International and Comparative Law* 141-207 (2001).

28 Belgium Civil Code Act, 1804, Art. 143, Book I, Title V, Ch. I, Reform of Feb. 13, 2003.

29 On June 30, 2005, the Spanish Parliament approved Law 13/2005, which amends the Civil Code to permit same-sex marriage. See, Raquel Platero, "Love and the State: Gay Marriage in Spain" 15 *Feminist Legal Studies* 329-340 (2007).

30 [2004] 3 SCR 698: 2004 SCC 79.

regarding the constitutional validity of same-sex marriage.[31] The court stated in an advisory decision released on December 9, 2004, that the Charter guarantees equality and that marriage is a basic right that should be expanded to include same-sex couples. Before this, in *Miron* v. *Trudel*,[32] the Supreme Court of Canada stated that common-law couples were subjected to discrimination by an insurance benefit that was only accessible to married pairs. Through this judgement, the court expanded the explanation of the term "spouse" to include unmarried same-sex couples, citing the Canadian Charter of Rights and Freedom's section 15's prohibition on discrimination based on marital status as a violation of the equality clause.[33] It is notable that the term "sexual orientation" does not seem to be there in section 15(1) of the Charter, in addition to colour, race, ethnic or national origin, sex, religion, age, physical or mental disability.[34] In fact, the Department of Justice of the Federal Government declared in 1986 that it was "of the view that the courts will find that sexual orientation is encompassed by the guarantees in Section 15".[35] In *Andrews* v. *Law Society of British Columbia*,[36] the Supreme Court decided to restrict the ambit of review within the four corners of section 15(1) by interpreting "discrimination" as (i) a distinction (or a neutral rule with a similar effect), (ii) that can be found on the basis of any of the grounds "enumerated" in section 15(1) or "analogous" to any of the grounds as enumerated, and (iii) which is "discriminatory" in some substantive rather than purely formal sense. Thus, the question remained open whether sexual orientation was an "analogous ground" similar to race, religion, and sex or not. Finally, in *Egan* v. *Canada*,[37] the Supreme Court upheld "sexual orientation" as an analogous ground under section 15(1) of the Charter. However, the sitting judges provided two distinct sets of justifications for this judgement. Justice Cory found that "homosexuals, whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage". Instead of discussing the origins of sexual orientation, this argument centred around the collective social,

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31 It is notable that the rights and obligations of same-sex partners were the concerning point for the first two cases on discrimination based on sexual orientation. See, *Anderson* v. *Luoma*, (1986) 50 RFL (2d) 127 (BCSC): (1985) 14 DLR (4th) 749; *Andrews* v. *Ontario (Minister of Health)*, (1988) 64 OR (2d) 258: 49 DLR (4th) 584 (HCJ).

32 [1995] 2 SCR 418: 1995 CanLII 97 (SCC).

33 Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982.

34 Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter*, 163-168 (Oxford University Press, Oxford, 1997).

35 Department of Justice Canada, *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* 13 (Communications and Public Affairs, Department of Justice, Ottawa, 1986).

36 [1989] 1 SCR 143.

37 [1995] 2 SCR 513.

political, economic, and legal standing of lesbian, gay and bisexual people. Whereas, Justice La Forest observed that "whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs ...".The notion that it is difficult or impossible for anyone to change his or her sexual orientation (inner feelings or desires) was a crucial consideration for this argument.[38] Similarly, in *Vriend* v. *Alberta*,[39] the Supreme Court upheld the opinion that the absence of the term "sexual orientation" from such a well-defined comprehensive list can be seen as a denial of equality based on grounds similar to those specified in the Charter.

Again in the ground-breaking judgement of *M* v. *H*,[40] the court reiterated the term "spouse" to include same-sex couples and emphasised that marital status-baseddiscrimination is a violation of section 15 of the Charter. In this instance, the Court ruled that same-sex couples are less deserving of protection and respect when they are excluded. This ruling expanded the definition of family to include factors other than marriage and sexual orientation. The legislative initiatives, however, did not embrace same-sex couples within the definitional clause that defines the term "spouse", but instead created a new category called "same-sex partner", which refers to either of the two persons living together for longer than three years.[41] However, the *M* v. *H* Act made sure that practically all laws that assure rights and obligations for unmarried different-sex couples also provide the same guarantee for same-sex partners. Further, in *Halpern* v. *Attorney General of Canada*,[42] the Ontario Court of Appeal upheld that the common law description of the term "marriage", which elaborates the term as a union between one woman and one man,[43] violated the very principles of Section 15 of the Canadian Charter. While defining this, the court observed that the Charter enumerated the following specific classifications: race, colour, ethnic or national origin, sex, religion, age, physical or mental disability. Further, in *Egan* v. *Canada,*[44] the court had determined that the basic facets of the term "sexual orientation" were analogous to the categories specified in section 15 of the Charter. Thus, the categorization on the basis of "sexual orientation" required equal protection and upheld the Constitutional

38 Robert Wintemute, "*Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits*" 49 *McGill Law Journal* 1143, 1147-1148, (2004).

39 [1998] 1 SCR 493: 1998 CanL II 816 (SCC).

40 [1999] 2 SCR 3.

41 Amendments due to the Canadian Supreme Court's decision in M.H. Act, S.O. 1999, Cl. 6.

42 [2003] OJ No. 2268.

43 In *Hyde* v. *Hyde and Woodmansee*, (1866) LR 1 P and D 130, English Courts of Probate and Divorce defined common law marriage as the union for life of one woman and one man voluntarily entered into, to the exclusion of all others.

44 [1995] 2 SCR 513.

values in Canada.[45] Thus, before the Civil Marriage Act was enacted, through Court decisions, the procedure of legalising same-sex marriage started to take a concrete shape in the majority of Canadian provinces.

Legislative assurance: A concrete step towards authoritative recognition

The decriminalisation of homosexual behaviour by the federal government was a part of changes brought to the Criminal Code that also legalised abortion and contraception in 1969. It was the first step towards "normalising" same-sex relationships in Canada. Except for the province of Alberta, provincial legislatures updated their human rights laws over time to forbid discrimination based on sexual orientation.[46] Later, the verdict of the Ontario Court of Appealin *Haig* v. *Canada*,[47]which stated that the exclusion of the term "sexual orientation" from these quence of labelled reasons of discrimination can be seen as a breach of the principles enshrined in section 15, led the federal government to amend the Canadian Human Rights Act. As a consequence of this verdict, the federal government as well as the provincial governments brought changes in many statutes to ensure similar private spousal benefits for same-sex couples as those available for heterosexual common-law couples.[48] Consequently, the Omnibus Modernization of Benefits and Obligations Act, 2000 was endorsed in reaction to the *M.* v. *H.* ruling. It amended 68 federal laws that discriminate against same-sex couples concerning their eligibility for tax benefits, and social welfare including security for aged people. Section 1(1) of the Act, however, stated explicitly that, "[f]or greater certainty, the amendments made by this Act do not affect the meaning of the word 'marriage,' that is, the lawful union of one man and one woman to the exclusion of all others."

Subsequently, in 2005, the scenario started to take a different path with the enactment of the Civil Marriage Act. As a federal nation, the Constitution Act, 1867, namely sections 91 and 92, lay out the division of authority between the Parliament of Canada and the provincial legislatures.[49] The provinces' legislatures have jurisdiction over "the solemnization of marriage in the province" [Section 92(12)], while the Parliament of Canada has jurisdiction over "marriage and divorce" [Section 91(26)]. This division of authorities allows Parliament to adopt laws pertaining to marriage

45 Robert Wintemute, "Discrimination against Same-Sex Couples: ss. 15(1) and 1 of the Charter: *Egan* v. *Canada*" 74 *Canadian Bar Review* 682, 691-700 (1995).

46 For example, Equality Rights Statute Law Amendment Act, S.O. 1986 c. 64.

47 [1992] 16 CHRR D/226 (Ont. Ct of Appeal).

48 Claire F. L. Young and Susan B. Boyd, "Challenging Heteronormativity? Reaction and Resistance to the Legal Recognition of Same Sex Partnerships," in Dorothy E. Chunn, Susan Boyd, and Hester Lessard (eds.), *Reaction and Resistance: Feminism, Law, and Social Change* 262-290, 269 (UBC Press, Vancouver, 2007).

49 Peter W. Hogg, *Constitutional Law of Canada*, Ch. 52 (Carswell,Sacramento, 1997).

eligibility while allowing the provinces to make laws on marriage procedures. The power to define the term "marriage" falls within federal jurisdiction following this division. This forward-thinking reading of section 91(26) provides the backbone to the conclusion that same-sex marriage should be covered by future enactment. As a result, primarily the Civil Marriage Bill was presented in the House of Commons and passed with a strong majority, thanks to the support of lawmakers from other parties, despite being introduced as a bill of the Liberal Party's minority government. The legislation was subsequently approved by the Senate and granted royal assent on July 20, 2005, by the Governor General.[50]The Civil Marriage Act, 2005 acknowledges the need to uphold equal access to marriage for couples of the same sex and couples of the opposite sex to provide an umbrella guarantee to enjoyment of the right to equality without discrimination.[51]According to the Act, the other concepts of civil unions rather than "marriage" would not provide same-sex couples with the same authority to have access to marriage for civil reasons and would violate their basic human rights by discriminating against them. It also states that the Parliament of Canada has the authority to enact laws for regulating marriage and allied rights but it is not authorized to create any other institution for partners belonging to the same sex.[52]The Act also asserts that couples belonging to the same sex should have legitimate access to marriage rights for civil purposes to reflect principles of tolerance, respect, and equality that are consistent with the Canadian Charter of Rights and Freedoms. Earlier marriage had been defined as the lawful union of one female and one male to the exclusion of all others, but the Civil Marriage Act, through section 2 defined the term "marriage" as the lawful union of two persons (without specifying the gender of the persons) to the exclusion of all others. It is argued that this change brought about by the Civil Marriage Act is based on the underlying assumption that one size fits all, that is, one legislation can govern all types of marriage. Thus, the recognition of the legitimacy of same-sex spousal status under the domestic legal framework of Canada led to the overturning of the common law interpretation of the term "marriage" as it forbids both general and specific reasons for discrimination.[53]

As per section 3(1), no individual or organization shall be deprived of any assistance or benefit, or be subject to any obligation or penalty, in respect of marriage between persons belonging to the same sex, under any provisions of Canadian law merely because of exercising the freedom of religion and conscience assured within the four

50 Peter W. Hogg, "Canada: The Constitution and Same-Sex Marriage" 4(3) *International Journal of Constitutional Law* 712, 714 (2006).

51 The Civil Marriage Act of Canada, 2005, Preamble.

52 *Ibid.*

53 Donald J. Macdougall, "Marriage Resolution and Recognition in Canada" 29(3) *Family Law Quarterly* 541, 543(1995).

54 The Civil Marriage Act of Canada, 2005, s. 4.

corners of the *Canadian Charter of Rights and Freedoms or* because of expressing of their beliefs in marriage institution as the union of a woman and man to the exclusion of all others as per with that guaranteed freedom. This 2005 Act also declares that no marriage can be demonstrated as voidable or void only by the sole cause that the spouses in that marriage belong to the same sex.[54] The Catholic Church was the main group that opposed this Act because they were concerned that they may be forced to officiate gay weddings under threat of being hauled before a human rights tribunal if they refused. However, by denying these oppositions, this strategy was chosen because of Canada's substantive equality jurisprudence and functional approach to family law.[55] The requirements of people who are part of families are given great weight in family law, rather than worrying about the legitimacies of marriage licenses they possess. A broad, functional view of family is required by substantive equality law, which rejects definitional restrictions based on genetics, faith, or custom. Instead, the challenges are thrown towards the pre-existing categories by the idea of substantive equality in recognizing the possibility that they reflect and strengthen dominance relations.[56] The federal government was insistent that any modification to the description of the term "marriage" must protect the right of the persons, who have the authority to solemnise marriages, under any religion. To this, though a practical effect, the federal government inducted a religious "opt-out clause" that would permit clergy to decline to officiate marriages if they were opposed on the basis of religion.[57] The administration requested a review of that opt-out clause from the Supreme Court in *Reference Same Sex Marriage*.[58] The marriage solemnization, according to section 92(12) of the Constitution Act of 1867, is under provincial competence and the court resolved that the federal Parliament has no authority to enact laws in this area. Furthermore, the Supreme Court held that the religious freedom shieldas speculated under section 2(a) of the Charter is sufficiently extensive to provide protection to religious officials from being duty-bound to carry out same-sex marriages, whether it is civil or religious in nature, that are contrary to their religious beliefs by the State.[59] Thus the Civil Marriage Act is revised by the federal government to demonstrate in the preamble, that:

> Whereas nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of

55 Joanna Radbord, "Lesbian Love Stories: How We Won Equal Marriage in Canada" 17 *Yale Journal of Law and Feminism* 99, 100 (2005).

56 *Id.* at 101.

57 Mary C. Hurley, *Bill C-38: The Civil Marriage Act. Legislative Summary LS-502E* 13 (Library of Parliament, Ottawa, 2005).

58 [2004] 3 SCR 698: 2004 SCC 79.

59 Graham Gee and Gregoire C. N. Webber, "Same-Sex Marriage in Canada: Contributions from the Courts, the Executive and Parliament" 16(1) *King's College Law Journal* 132, 139 (2005).

> religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.

However, there is still a problem with those who are authorised by the State to perform the rituals of marriage but are not religious officials, such as marriage commissioners, judges, and mayors. In this regard, it is noteworthy that the recognition of the Supreme Court regarding the authority of the federal government to legalize marriages between same-sex couples necessitates territorial and provincial cooperation to confirm the enjoyment and access to such rights.The procedure also involves further State agents, such as marriage commissioners within the same-sex marriage.[60]

III Legal position relating to same-sex marriage in the United Kingdom

De-criminalization of homosexual relations: primary steps towards recognition of same-sex marriage

The decriminalization of homosexual practices was achieved in the UK by the Sexual Offences Act, 1967 since buggery was made a capital offence under Henry VIII.[61] It made homosexual activities legal in England and Wales under the conditions that they were consensual, took place in private, and involved two people who were at least 21 years old.[62] However, when more than two persons take part or are present, such sexual activities are not considered private ones. Further, the Criminal Justice (Scotland) Act of 1980 and the Homosexual Offences (Northern Ireland) Order of 1982 respectively legalized homosexual activities in Scotland and Northern Ireland. However, the social approaches towards the homosexual people did not change much. This included discrimination in employment, punishment for making public shows of affection,[63] and, of course, the absence of legal safeguards for women and men who are in same-sexfamily-like relationships. Even in the forefront of law, the court in *Dyson Holding* v. *Fox*,[64] though recognised the treatment of opposite-sex live-in partners as a 'family' to determine the succession of a tenancy on death, a similar right was denied to same-sex cohabitants in *Harrogate Borough Council* v. *Simpson*.[65] The resembling approach is visible in the judgment of the Court of Appeal in *Re D*,[66] where the court observed the father's homosexuality as a ground for not upholding a parental

60 Linda A. White, "Federalism and Equality Rights Implementation in Canada" 44(1) *Journal of Federalism* 157, 174 (2013).

61 Kate Gleeson, "Freudian Slips and Coteries of Vice: The Sexual Offences Act of 1967" 27(3) *Parliamentary History* 393, 395 (2008).

62 Sexual Offences Act, 1967, s. 1.

63 *Masterton* v. *Holden*, [1986] 3 All ER 39: [1986] 3 WLR 132.

64 [1975] QB 503: [1975] 3 All ER 1030.

65 [1986] 2 FLR 91: [1984] EWCA Civ 3.

66 [1977] App. Cas. 602.

relationship between a loving (divorced) father and his son. Further, the court remarked homosexuality as 'oddness' which is sufficient to show the social approaches towards lesbians, gays, and bisexuals. The legislative attitude was no different. In a discussion over a housing bill in the Standing Committee, it was suggested that homosexual partners should have the same rights to tenancy succession as opposite-sex cohabitants.[67] However, the same was finally defeated.

Further, homosexuality continued to be regulated by the offence of "male soliciting" beneaththe Sexual Offences Act, 1956, which could be applied to a wide range of activities in public, including sexually suggestive taking.[68] It is argued that this approach continued because male homosexual behaviour offended public morality.[69] Again the Local Government Act, 1988 inserted section 2A in the Local Government Act 1986. It stated that "a local authority shall not - (i) intentionally promote homosexuality or publish material with the intention of promoting homosexuality; (ii) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship."[70] Therefore, this provision prohibits the promotion of homosexuality by publishing material or by teaching such materials. This was probably done to prevent public schools from promoting any viewpoint that implied same-sex relationships could have the same qualities as heterosexual ones, and to deter local governments from providing funding to lesbian, gay, or bisexual organisations or allowing the use of their facilities. Although its symbolism was likely to have had a greater influence on attitudes and perceptions, section 2A appears to have had little practical impact.[71] In 2003, it was repealed.[72]

Well-being approaches to legalize same-sex partnership

In 2002, the Civil Partnership Bill was presented to the House of Lords by Liberal Democrat Lord Lester, with the intent to legalize civil partnerships for same-sex couples. It allowed same-sex and opposite-sex couples who had lived together for at least six months to officially declare their "partnership" and at that point, their union would be recognised legally for several purposes, such as communal property's joint ownership, succession upon death, inheritance taxation, and employment rights. However, the procedure for divorce would be simpler in comparison to married

67 Michael McManus, *Tory Pride and Prejudice: The Conservative Party and Homosexual Law Reform* 88 (Biteback, Hull, 2011).

68 Sexual Offences Act, 1956, s. 32.

69 Paul Johnson, "'Offences against Morality': Law and Male Homosexual Public Sex in Australia" 33(3) *Alternative Law Journal* 155, 155 (2008).

70 Local Government Act, 1988, s. 28.

71 Robert Wintermute, "Sexual Orientation Discrimination," in Christopher McCrudden and Gerald Chambers (eds.) *Individual Rights and the Law in Britain* 509 (Oxford University Press, Oxford, 1994).

72 Local Government Act, 2003, s.122.

couples, and the court's authority would be more constrained. However, given how different this concept of "partnership" was from marriage, many people questioned why it did not apply to family members. It was countered by the argument that this would "undermine" marriage by inducing relationships that required less commitment than marriage. However, this Bill could not be passed in the Parliament. Nonetheless, a development has taken place from the corner of adoption law. The Adoption and Children Act, 2002 permits adoption by a couple,[73] and defines a couple to include "two people (whether of different sexes or the same sex) living as partners in an enduring family relationship."[74] The only limitation was that one of the pair is acting as the adoptive father and is of minimum 21 years of age, and the other individual is of minimum 18 years of age and acts as the adoptive mother. This concept of "couple" was revolutionary but difficult to apply as same-sex relationships were not yet legally recognised.[75] Nevertheless, through the Adoption and Children Act, the UK has made a proactive effort to treat same-sex couples equally even before same-sex unions were officially recognised by law.

In a 2003 consultation document, the Women and Equality Unit of the Department of Trade and Industry of the UK suggested that same-sex partners should be given the chance to register their relationships to be recognised legally.[76] The Civil Partnership Bill, which would have permitted the registration of same-sex relationships, was consequently presented in July 2004 in the House of Lords after the government stated its intention to do so late in 2003. "Broad political support" was given to the legislation, which led to its passage.[77] The bill was approved by the Queen in November 2004 and came into effect thereafter. Most of the privileges enjoyed by married couples are also granted to same-sex couples under the 2004 Civil Partnership Act. When Baroness Scotland introduced the bill in the House of Lords, she focused heavily on well-being defences. She stated that:[78]

> We have considered the specific problems faced by same-sex couples as a result of the failure to give legal recognition to their relationships.

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73 Adoption and Children Act, 2002, s. 50.

74 *Id.,* s. 144(4)(b).

75 Angela Marshall, "Comedy of Adoption - When Is a Parent Not a Parent?" 33 *Family Law Journal* 840 (2003).

76 Barry Crown, "Civil Partnership in the U.K. - Some International Problems" 48 *New York Law School Law Review* 697, 697 (2004).

77 Grace Ganz Blumberg, "Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective" 51 *UCLA Law Review* 1555, 1572 (2004).

78 660 House of Lords Debate, April 22, 2004, Columns 387-388. In introducing the second reading of the Bill in the House of Commons, Jacqui Smith, the Deputy Minister for Women and Equality, made similar points: 425 House of Commons Debate, Oct. 12, 2004, Column 174.

> We found that problems can arise in a wider range of areas than might immediately first spring to mind. For example, where an accident causes the death of a person in a same-sex relationship, the other person in that relationship may find that he or she faces specific difficulties in obtaining access to the body, information about circumstances leading to or surrounding the death, or, indeed, compensation. Following a partner's death, they may find themselves unable to stay in the home they have shared with that partner for many years. Sometimes there have even been difficulties about attending events as intimate as funerals.

The Civil Partnership Act, 2004, offers a thorough procedure for the formation of civil partnership,[79] a method for dissolution,[80] provisions for custody of children,[81] and arrangement of finances and property.[82] Thus, in the UK, same-sex couples who have joined these partnerships are instantly accepted as civil partners. However, the existing public record shows that the then administration of the UK has no strategies or policies to enact any bill to legitimise same-sex marriage.[83] As an alternative, the Civil Partnership Act aims to discipline same-sex civil partners into a marriage-like institution with divorce-like dissolution processes by extending the alleged social policy benefits of marriage to that group. Similar to how the government abandoned no-fault divorce reform, ending a partnership formally highlights the value of commitment and gives the courts the same flexibility in modifying pre-existing agreements between the parties as they do in divorce.[84] However, it is undeniable, that a fragment of the administration's plan was to prevent any potential reaction against the legitimization of same-sex marriage in the UK. In addition, through this enactment, the government can deliver on its promise of equality by allowing same-sex couples who are committed to legal status. While avoiding the charge that same-sex unions undermine the institution of marriage, civil partnerships can secure the societal benefits that marriage provides.[85] Therefore, even though the Civil Partnership Act does not refer to same-sex unions as "marriages", it nonetheless constitutes a significant step towards equitable recognition

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79 Civil Partnership Act, 2004, ss. 2-36 (England and Wales); ss. 85-100 (Scotland); ss. 137-60 (Northern Ireland).

80 *Id.,* ss. 37-64 (England and Wales); ss. 117-25 (Scotland); ss. 161-90 (Northern Ireland).

81 *Id.,* ss. 75-79 (England and Wales); ss. 199-203 (Northern Ireland).

82 *Id.,* ss. 65-72 (England and Wales); ss. 191-196 (Northern Ireland).

83 Department of Trade and Industry, *Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples* 13 (Department of Trade and Industry, London, 2003).

84 Rosemary Auchmuty, "Same-Sex Marriage Revived: Feminist Critique and Legal Strategy" 14 *Feminism and Psychology* 101, 115 (2004).

85 Carl Stychin, "Couplings: Civil Partnership in the United Kingdom" 8(2) *New York City Law Review* 543, 548 (2005).

for same-sex couples.[86] Furthermore, the acceptance of gays, lesbians, and bisexual people within the social mindset was necessary for same-sex marriage to be properly recognised in society. Differences had to be minimised, and similarity had to be emphasised. The legal system "would not recognise a same-sex relationship that was not analogized to a heterosexual relationship", as Nicola Barker correctly asserts.[87] This method replicates the essentialist, functionalist marital accounts that the House of Lords favoured in the cases *Ghaidan* v. *Mendoza*,[88] and *Fitzpatrick* v. *Sterling Housing Association*.[89] The court was also able to dramatically expand some legal rights for surviving tenants from homosexual unions by focusing on the function of a relationship rather than its outward appearance.[90] Thus, the well-being aspirations of the 2004 Civil Partnership Act were achieved by a very close approximation between "marriage" and "civil partnership."

Authorisation of same-sex marriage through legislative approach

Finally, the Parliament passed the Marriage (Same Sex Couples) Act, 2013 to legitimize same-sex marriages in Wales and England,[91] and also in Scotland,[92] and Northern Ireland[93] with some limitations. It marks the impact of recent legal changes that have progressively and gradually removed inequalities and discriminatory actions against gay, lesbian and bisexual people.[94] The Act provides a legitimate framework for the marriage of same-sex couples, gender transition by married persons and civil partners, consular functions concerning marriage, marriages as per the credence of organisations to be formalised on the basis of the superintendent registrar's certificates, the marriage of armed forces personnel abroad, the review of civil partnership, the evaluation of survivor benefits under pension schemes, and supplementary linked purposes.[95] Part 1, section 1(1) of the Marriage (Same-Sex Couples) Act, 2013 (hereinafter 2013 Marriage Act) validates same-sex marriage in the UK by simply affirming that same-

86 Andrew Flagg, "Civil Partnership in the United Kingdom and A Moderate Proposal for Change in the United States" 22(3) *Arizona Journal of International and Comparative Law* 613, 624 (2005).

87 Nicola Barker, *Not the Marrying Kind* 168 (Palgrave Macmillan, London, 2012).

88 [2004] 3 All ER 411: [2004] UKHL 30.

89 [1999] 4 All ER 705: (1999) 3 WLR 1113.

90 Lisa Glennon, "Fitzpatrick v. Sterling Housing Association Ltd - An Endorsement of the Functional Family?" 14 *International Journal of Law, Policy and the Family* 226 (2000); Alison Diduck, "A Family by Any Other Name…or Starbucks Comes to England" 28 *Journal of Law and Society* 290 (2001).

91 Marriage (Same Sex Couples) Act, 2013, s. 20(1).

92 *Id.,* s. 20(2).

93 *Id.,* s. 20(3).

94 Ben Clements and Clive D. Field, "Trends: Public Opinion toward Homosexuality and Gay Rights in Great Britain" 78(2) *Public Opinion Quarterly* 523-547 (2014).

95 Marriage (Same Sex Couples) Act, 2013, Preamble.

sex marriage is legal. The same-sex marriage supporters argued that since 2004, "civil partnerships' were legalized for same-sex couples. This was not a "real" or "full" marriage, and it disenfranchises same-sex couples from the benefits of marriage. In contrast, the affirmation of same-sex marriage through the 2013 Act was a reaction to what some people viewed as an unfairness in the legislation.[96] However, there are several restrictions on the religious front. There are significant differences between direct and indirect discrimination, and it is evident how it exempts people from legal obligations based on their religious beliefs and faith.[97] The government steadfastly reaffirmed its commitment to the marriage institution throughout the legislative process and insisted that the amendments would represent an endorsement and expansion of that institution, additionally, it also emphasised numerous times how important religious freedom is to it and how the same-sex marriage reforms will not in any way distress the rights of believers.[98] Moreover, the UK's policy and law have been encouraged by provisional schemes of the European Convention on Human Rights and verdicts of the European Court of Human Rights. In cases where the State decides to permit same-sex marriage, religious organisations are not required to accept it, as per the European Court of Human Rights.[99]

As a result, the Act bequests "religious protection" to members of the traditional Churches of Wales and England. Part 1, section 2(2) of the (please specify the Act here) Act states, "A person may not be compelled by any means including by the enforcement of a contract or a statutory or other legal requirement to conduct a relevant marriage; be present at, carry out, or otherwise participate in, a relevant marriage or consent to a relevant marriage being conducted, where the reason for the person not doing that thing is that the relevant marriage concerns same-sex couples". Thus, it is now possible to regard "religious freedom strategy" as a genuine exception to the statute limiting the legality of same-sex marriage. Similarly, conducting or officiating same-sex marriages is forbidden by the Churches of Wales and England.[100] The real implementation of this clause is still debatable because the traditional Churches of Wales and England continue to forbid same-sex marriages while Section 2 of the

96 Adam Jowett, "One Can Hardly Call Them Homophobic" 28(3) *Discourse and Society* 281, 285 (2017).

97 Claire Fenton-Glynn, "Replacing one Type of Oppression with Another? Same-Sex Couples and Religious Freedom" 73(1) *Cambridge Law Journal* 31 32 (2014).

98 Javier Garcia Oliva and Helen Hall, "Same-Sex Marriage: An Inevitable Challenge to Religious Liberty and Establishment?" 3(1) *Oxford Journal of Law and Religion* 25, 26 (2014).

99 Sara MacBride-Stewart, Nicholas Johns, and Alison Green, "Understanding Same-Sex Marriage as Equality, but with Exceptions" 5(2) *Families, Relationships and Societies* 229, 234 (2016).

100 Wendy Kennett, "The Place of Worship in Solemnization of a Marriage" 30(2) *Journal of Law and Religion* 260, 272 (2015).

2013 Marriage Act consolidates this "religious protection".[101] The law establishes an opt-in procedure so that religious institutions who want to perform marriages for same-sex couples must first take appropriate action. Religious organisations are not permitted to officiate same-sex marriage until the necessary opt-in conditions have been met. In section 2(3), a comprehensive table provides further definitions of "opt-in" activities. None of a religious organization's ministers will be able to perform a same-sex marriage if it has chosen not to participate. Even if such a group has decided to perform same-sex unions, its individual members are not required to do so unless they choose to.[102] In this way, the 2013 Marriage Act is intended to have no influence on the canon law of the traditional churches in Wales and England.[103] According to the age-old canon law, a marriage must be solemnized between a man and a woman in order to be recognised by the traditional churches of Wales and England. Although canon law cannot be in conflict with State law, it is a component of that law; this is emphasised through the explanatory notes in the 2013 Marriage Act. Religious leaders expressed worry during the passage of the same-sex marriage legislation about possible repercussions for canon law and the separation of State and church. To address this concern, by assuring religious protection the legislatures tried to establish a harmonious construction regarding the authority and status of the State and Church. Additionally, the Civil Partnerships, Marriages and Deaths (Registration etc.) Act, 2019, which was passed on November 5, 2019, and took effect on December 2, 2019, amended the Civil Partnership Act 2004's eligibility requirements to permit opposite-sex couples to register civil partnerships under English and Welsh law. Additionally, it modifies the 2013 Marriage (Same Sex Couples) Act to maintain the status quo on conversion rights, meaning that for the time being, only same-sex couples are eligible to convert their civil partnerships to marriage.

Thus, in principle, now same-sex couples have similar opportunities previously available to different-sex couples to ensure the solemnization of marriage through a civil ceremony thanks to the 2013 Marriage (Same Sex Couples) Act. The law also allowed same-sex partners the option of being married in a religious ceremony, but only if a religious group has "opted in" to perform such marriages. As a result, most of the traditional Churches of Wales and England refused to solemnize same-sex marriage through a religious ceremony. The denial approaches towards same-sex couples create

101 Aloy Ojilere, "The Diplomacy of Homocapitalism against Africa" 22(1) *Journal of International Issues* 152, 157 (2018).

102 Rex Ahdar, "Solemnisation of Same-sex Marriage and Religious Freedom" 16(3) *Ecclesiastical Law Journal* 283, 299 (2014).

103 Rik Torfs, "The Religion-State Relationship in Europe" 8(2) *Review of Faith and International Affairs* 15-20 (2010).

a significant difference in opportunity between same-sex and different-sex couples.[104] Thus, though not legally but socially there's still a long way to go before the same-sex married couples enjoy the same rights as the heterosexual married couples in the UK.

IV Legal position relating to same-sex marriage in India

Decriminalization of homosexual relationship: primary step towards equality

The situation is very different in India in comparison to Canada and the UK. In India, the legal assurance of same-sex marriage is still missing. In this regard, there are no legislative or judicial precedents in India. However, recently many individuals had filed cases before the apex court for recognizing the legitimacy of same-sex marriage in India. Primarily, the Indian Penal Code, 1860, (IPC) a colonial legislation that continued to exist in the contemporary Indian legal structure denoted homosexual relations as a crime. Section 377 which described "unnatural offences" provided that "whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine." (Please say in the footnote that section 377 of the IPC was partially dropped by the Supreme Court…..give the name of the judgment…and also say how it has been dropped by the BNS, 2023). This section was clearly intended to penalize certain forms of private sexual relations that were deemed sinful within the framework of the IPC. The essential ingredient of section 377 was about a person having carnal intercourse voluntarily against the order of nature.[105] The Supreme Court in *Childline India Foundation* v. *Allan John Waters*,[106] stated that the following ingredients were essential to attract the "unnatural offence" clause, namely; (i) carnal intercourse, and (ii) against the order of nature. Further, as per section 377, penetration alone constituted carnal intercourse as required for alleging the commission of the offence under this section. The terms "sexual intercourse" and "carnal intercourse", when combined with the word "penetration", was to be understood to mean that if a man penetrated a woman's body with her consent into any area other than her vagina, he committed an offence penalized by Section 377 of the IPC; however, if he did so without her consent into any area of her body, including her vagina, he committed an offence penalized by section 376.

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104 This difference in opportunity is reflected in the fact that in 2014, 28% of marriages of different-sex partners in Wales and England were solemnized by way of a religious ceremony in contrast to 0.5% of marriages of same-sex couples. Nevertheless, in 2019, a total of 6,728, same-sex marriage was conducted in the UK and 578 Conversions from partnerships took place. See, Paul Johnson, Robert M. Vanderbeck, and Silvia Falcetta, *Religious Marriage of Same-Sex Couples: A Report on Places of Worship in England and Wales Registered for the Solemnization of Same-Sex Marriage* 4 (White Rose University Consortium, Washington D.C., 2017).

105 *Shaik Imran* v. *State of Telangana*, Criminal Appeal No. 134 of 2021, Decided on: April 22, 2022.

106 (2011) 6 SCC 261: [2011] 3 SCR 989.

Thus, both homosexuals and heterosexuals came within the purview of the offence designated under section 377. Although the term "carnal intercourse against the order of nature" was not explicitly defined, it undoubtedly included anal sex and most likely included oral sex as well, both of which are more prevalent among homosexuals than heterosexuals. It is quite improbable that heterosexual couples who frequently had anal and oral sexual activities would also be detained and charged for it. Accordingly, in *Lohana Vasantlal Devchand* v. *The State*,[107] the High Court of Gujarat stated that oral intercourse is an offence under section 377. Thus, primarily, the judiciary was in consent with the legislative approach under Section 377 of IPC. In *Sakshi* v. *Union of India*,[108] the Supreme Court agreed that "the types of several offences as mentioned by the petitioner *i.e.* penile/anus penetration, penile/oral penetration, finger/anile penetration, finger/vaginal penetration or object/vaginal penetration are serious sexual offences of unnatural nature and are to be covered under Section 377 which provides stringent punishment."

Further, police personnel have often been accused of using the specific provision of section 377 to intimidate, extort, and physically and sexually assault homosexual, bisexual, and transgender individuals. This provision maked it more difficult to pursue justice when there was an infringement of human rights of the sexual minorities. On the other hand, particular kinds of sexual behaviour, such as "oral sex" and "anal sex", between consenting heterosexual adults were also prohibited by this rule. It is suggested that homosexuality should not have been decriminalised despite the abovementioned negative aspects for the following reasons: (i) homosexuality is not accepted by Indian culture and society; (ii) the criminalization of homosexuality is necessary to establish a healthy environment; and (iii) criminal law should represent the wishes of the majority of the population and homosexuality does not meet this standard. In order to strengthen the aforementioned arguments, it may be worthwhile to cite the 1971 Law Commission of India's 42nd report where it says that : "Indian society, by and large, disapproves of homosexuality and the disapproval isstrong enough to justify it being treated as a criminal offence even if adults indulge in it in private. The purpose of Section 377 is to provide a healthy environment in society by criminalising unnatural sexual activities against the order of nature."[109]

However, in 2000, the Law Commission of India in its 172nd report[110] recommended the removal and deletion of the textual provision of Section 377 of the IPC and

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107 AIR 1968 Guj 252.

108 AIR 2004 SC 3566: (2004) 5 SCC 518.

109 Law Commission of India, *Seventy First Report on the Hindu Marriage Act, 1955 - Irretrievable Breakdown of Marriage as a Ground of Divorce* (Law Commission of India, New Delhi, 1978). This Report was submitted on April 7, 1978.

110 Rukmini Sen, "Law Commission Reports on Rape," 45(44-45) *Economic and Political Weekly*, 81-87 (2010).

appealed that (i) apart from the contemporary practice of using Section 377 by the prosecutors, the provision is disadvantageous to people's lives in general and it also creates an impediment in the way of upholding public health because of its vicious effect on the health and hygiene issues of the homosexuals; (ii) the provision is used as a weapon by the police to abuse homosexuals through detention, extortion, questioning, harassment, payment of hush money and even compel them to have forced sex; (iii) the provision through its wording spreads undesirable and unfair views towards sexual minorities in general and same-sex relations in particular; and as a consequence it pushes same-sex partners and sexual minorities generally underground which creates barrier in addressing, diagnosing and preventing the spread of HIV/ AIDS; and (iv) Section 377 is used to abuse, extort, and torture the lesbians, gay, bisexual and transgender community.[111] The Commission upheld that "it cannot have been the intent of the legislature to club together offenses of consensual intercourse and moral turpitude with those of non-consensual sexual violence such as child sexual abuse, more so when the latter has been specifically provided for in 1983 when it included a special provision for sexual abuse of girls under the age of twelve under section 376(2)(f)".[112]

In 2009, the High Court of Delhi examined the issues regarding the recognition of rights and protection of the rights of lesbians, gay men, and transgender people in *Naz Foundation* v. *Government of NCT*.[113] The Naz Foundation specified that the provision under Section 377 of the IPC breached the basic rights protected and guaranteed under Articles 14, 15, 19, and 21 of the Constitution of India. By pushing the lesbian, gay, bisexual, and transgender (LGBT) community into the shadows and making them subject to fundamental rights violations, this discriminatory provision led to the refutation of the enjoyment of fundamental human rights as well as promoted abuse, assault, and harassment by the public officials. The High Court of Delhi ruled thatas the provision of Section 377 of the IPC criminalises adults engaging in consensual sexual activity in secret, it violates the basic proponent of articles 21, 14 and 15. The High Court of Delhi struck down the portion of Section 377 of the IPC that previously defined "carnal intercourse against the order of nature" as an offence. Relying on the 172nd report of the Law Commission of India, the High Court observed:

111 This report also suggested that the word "sexual intercourse" as mentioned in Section 375 should be interpreted in such a broad manner so that it can cover other forms of penetration besides penile vaginal penetration, such as digital, oral, anal, and penetration with objects. The report did, however, also suggest that gendered violence be outlawed in all manifestations and intensity levels by making the offence gender-neutral. See, Kalika Mehta and Avantika Tiwari, "Between Sexual Violence and Autonomy: Rethinking the Engagement of the Indian Women's Movement with Criminal Law," 22 *German Law Journal* 860, 865 (2021).

112 Law Commission of India, *One Hundred and Seventy Second Report on Review of Rape Laws*, 8 (Law Commission of India, New Delhi, 2000).

113 2010 Cri LJ 94: (2009) 111 DRJ 1.

> We declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors"… "This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report which we believe removes a great deal of confusion. Secondly, we clarify that our judgment will not result in the re-opening of criminal cases involving Section 377 IPC that have already attained finality.

On appeal in the Supreme Court in *Suresh Kumar Koushal* v. *Naz Foundation*,[114] the constitutionality of Section 377 of the IPC was contested. In this case, the Supreme Court noted that the high court had heavily relied on decisions from other countries in its quest to defend the alleged rights of LGBT people and declared that the provisions under Section 377 of the IPC invade the basic right to privacy, autonomy, and dignity. The Supreme Court ruled that these judgements cannot be relied on arbitrarily in determining whether the statute passed by the Indian legislature is constitutional, even if they shed light on many areas of LGBT people's rights and provide useful information about the condition of sexual minorities. Thus, the High Court of Delhi's 2009 decision to decriminalise adult consenting same-sex conduct was overturned by the Supreme Court, which restored the legitimacy of Section 377 of the IPC.

Consequently, in 2014, in *National Legal Services Authority* v. *Union of India*,[115] the Supreme Court was concerned about the complaints of transgender people (TG people), who prayed to declare that lack of acknowledgement of their gender identity is a violation of their rights guaranteed by the Constitution in the background of Articles 14 and 21. TG people pursued the affirmation and recognition of their gender spectrum in the eye of the law, which is in conflict with the gender determined at the time of their birth. The situation of India's TG community, which was denied even the most basic human rights, was brought to the Supreme Court's attention.[116] Thus, citing articles

114 AIR 2014 SC 563: (2014) 1 SCC 1.

115 AIR 2014 SC 1863: (2014) 5 SCC 438. See also, *Ram Singh* v. *Union of India*,(2015) 4 SCC 697: 2015 (3) SCALE 570.

116 In this regard, art. 6 of the 1948 Universal Declaration of Human Rights and art. 16 of the 1966 International Covenant on Civil and Political Rights (ICCPR) were cited by the Court. Both of these provisions state that everyone has the inherent right to life, that right is protected and guaranteed by law, and that arbitrarily no one shall be deprived of that right. Everywhere, everyone has the right to be acknowledge by the law as a person. Art. 17 of the ICCPR, further, states that every individual has a right to receive legal protection against unlawful or arbitrary intrusions into their homes, families, privacy, or correspondence as well as against illegal attacks on their honour and character.

14, 15, 16, 19, and 21 as well as the guiding principles of public policy, the Supreme Court ruled that TG people are entitled to affirmative actions and hiring preferences in order to ensure fair representation in public services under the existing international human rights law. The court further observed that :

> Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection. Article 14 does not restrict the word 'person' and its application only to male or female. *Hijras*/ transgender persons who are neither male/female fall within the expression 'person' and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country."…"The expression 'sex' used in Articles 15 and 16 is not just limited to the biological sex of male or female but intended to include people who consider themselves to be neither male nor female.

Later on, in 2018, the Supreme Court's five-judge bench[117] in *Navtej Singh Johar* v. *Union of India*,[118] overruled the judgment of *Suresh K. Koushal* v. *Naz Foundation*.[119] The question in this case was whether Articles 14, 15, 19, and 21 of the Constitution are violated by the provision contained in Section 377 of the IPC, which makes it illegal for adults to engage in consensual sexual activity. The Supreme Court ruled that an individual's sexual orientation is a vital part of his or her identity, especially for the LGBT people. It is fundamental to their dignity, integral to their autonomy and essential to their right to privacy. The moral principles upon which the connotation of section 377 is based are inconsistent with the constitutional ideals that demand that liberty must triumph over stereotypes and the mainstreaming of culture. The court determined that section 377 recognised adult consenting sexual actions in private as a criminal offence which contravened articles 14, 15, 19, and 21 of the Constitution. Nonetheless, the court emphasized that such permission must be given freely, voluntarily, and without fear of retribution or other forms of pressure. The court also held that the restrictions imposed by section 377 would still apply to any non-consensual sexual activity with an adult, any carnal activity with a juvenile, and any act of bestiality. The court while giving its reasoning observed that:

> The sexual orientation of a person is an essential attribute of privacy. Its protection lies at the core of fundamental rights guaranteed by

117 Dipak Misra, C.J., A.M. Khanwilkar, Rohinton Fali Nariman, D.Y. Chandrachud and Indu Malhotra, JJ.

118 AIR 2018 SC 4321: (2018) 10 SCC 1.

119 AIR 2014 SC 563: (2014) 1 SCC 1.

> Articles 14, 15, and 21. The right to privacy is broad-based and pervasive under our Constitutional scheme, and encompasses decisional autonomy, to cover intimate/personal decisions and preserves the sanctity of the private sphere of an individual"… "It extends to the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference. Section 377 affects the private sphere of the lives of LGBT persons.

Consequently, through all these judicial precedents, it is commonly recognised that the basic facets of the right to privacy are closely tied to the dimensions of rights to life and personal freedom.[120] For LGBT people, sexual orientation and its acceptance are indispensable components of who they are.[121] Thus, these are crucial components of the right to privacy, which is safeguarded by articles 14, 15, 16, and 21. It comprises the liberty to participate in intimate sexual conduct without the government interfering unjustifiably, in addition to the freedom to make important decisions for oneself.

Verifying the accommodation of same-sex marriage in the existing marriage laws in India

The legal recognition of same-sex marriage within the existing marriage laws in India can be demonstrated as the vanishing point of traditional marriage jurisprudence. Under the Indian Christian Marriage Act of 1872, the Parsi Marriage and Divorce Act of 1936, the Special Marriage Act of 1954, the Hindu Marriage Act of 1955, and the Foreign Marriages Act of 1969, each religious community has its own distinct set of personal laws governing marriage and divorce. The Hindu Marriage Act applies to Hindus. Anyone who practices Hinduism,[122] Sikhism, Jainism, or Buddhism in any of its manifestations is defined as a Hindu.[123] Further, the Act is applicable also to Hindus outside the territory of India only if such a Hindu is domiciled in India.[124] Traditionally, Hindu marriage is considered as a sacred union; a devout relationship that lasts till eternity.[125] Section 5 outlines the requirements for Hindu couples to get

120 In *R. Rajagopal* v. *State of Tamil Nadu*, [AIR 1995 SC 264: (1994) 6 SCC 632] the Supreme Court uphold that the right to privacy is inalienably linked to the facets of right to life and liberty that art. 21 ensures for all the citizens of this country. This view was also reiterated in *Justice K.S. Puttaswamy* v. *Union of India*, [AIR 2017 SC 4161: (2017) 10 SCC 1].

121 Jatindra Kumar Das, *Human Rights Law and Practice*, 333 (PHI Learning Private Ltd., Delhi, 2022).

122 Hindu includes a Lingayat, a Virashaiva, or a follower of the Prarthana, Brahmo or Arya Samaj. See, *Revanasiddappa* v. *Mallikarjun*, 2023/INSC/783.

123 Hindu Marriage Act, 1955, s. 2.

124 *Sondur Gopal* v. *Sondur Rajini*, AIR 2013 SC 2678: (2013) 7 SCC 426.

125 *Shilpa Sailesh* v. *Varun Sreenivasan*, Transfer Petition (Civil) No. 1118 of 2014, Transfer Petition (Criminal) Nos. 96 of 2014, 339 of 2014, 382 of 2014, 468 of 2014 and Transfer Petition (Civil) Nos. 1481-1482 of 2014, Decided on: May 1, 2023.

married legitimately. These requirements are as follows: (i) when the Hindu couple gets married, neither party has a spouse who is living; (ii) no lack of consent is there because of a mental disorder or unsoundness of mind, which renders an individual flabby for reproduction; (iii) for a bride, the minimum age should be 18 years and for a bridegroom, the minimum age should be 21 years; (iv) the intended parties are not linked with each other within the degrees of prohibited relationship; and (v) the intended parties are not sapindas of each other. Only in Hindu law, the term "sapinda" is used Please rewrite the conditions necessary for a valid marriage as grammatically its not coming out correctly) When two people share a common ancestor, they are said to be "sapinda" to each other. Under the terms of this provision, it is evident that the requirements outlined were to regulate only a marriage between two Hindus and that a Hindu marriage could be solemnized only when the requirements set out in the said provisions had been fulfilled by two Hindus.[126] Sub-section (iii) made it expressly clear that marriage should be measured as a tie between the bride and bridegroom. Here the term "bridegroom" signifies a male person who just got married or is about to be married, and the term "bride" designates a female person who has just been married or is about to be married.[127] Similarly, Saptapadi is one of the key Hindu marriage rituals which is demonstrated as the taking of seven steps in front of the holy fire by the bridegroom and the bride together, and the ritual of marriage is considered as complete and obligatory with the taking of the last and final step.[128] In *Bhaurao Shankar Lokhande* v. *State of Maharashtra*,[129] the Supreme Court further held that solemnising marriage means celebrating the marriage with proper ceremonies and in due form. Mere observing certain ceremonies and rituals with the intention to get married will not make the ceremonies and rituals approved by law or custom.[130] Further, in terms of section 18, one of the reasons why a Hindu marriage might be cancelled or declared null is if the responder is incapable of having children. Thus, traditionally, Hindu marriage is solemnized when the bride (woman) and bridegroom (man) are tied by following the pre-requisites and ceremonies provided by the Hindu Marriage Act. All these provisions and interpretations make it clear that the Hindu Marriage Act recognizes only heterosexual marriages.

Within the four corners of Muslim law, marriage is perceived as a two-party transaction with an offer, an acceptance, and the dower as the consideration.[131]In *Jafar Abbas*

126 *GullipilliSowria Raj* v. *Bandaru Pavani*, AIR 2009 SC 1085: (2009) 1 SCC 714.

127 *S. Gopal Reddy* v. *State of Andhra Pradesh*, AIR 1996 SC 2184: (1996) 4 SCC 596. Though this interpretation is in respect of Dowry Prohibition Act, 1961, but it is applicable to the marriage laws too.

128 Hindu Marriage Act, 1955, Section 7(2).

129 AIR 1965 SC 1564: [1965] 2 SCR 837.

130 *Mini* v. *Suseela*, ILR 2018 (3) Kerala 201.

131 A. Ahmed, *Mohammedan Law* 14 (Central Law Agency, Allahabad, 2012).

Rasool Mohammad Merchant v. *State of Gujarat*,[132] it was pleaded that marriage within the domain of Muslim Law (Nikah) is a civil contract made between two individuals of opposite sex having the intention of common pleasure and legitimization of the children. Further, the Muslim Women (Protection of Rights on Divorce) Act, 1986 aims to provide protection for various rights and entitlements of women who have acquired divorce from their husbands, or are divorced by their husbands, and belong to Islam religion.[133] Similarly, the Muslim Women (Protection of Rights on Marriage) Act, 2019 intends to provide protection for various rights of married women belonging to Islam by religion and to declare the husband's authority or right to divorce by pronouncing talaq.[134]Further, Mulla stated that a Mahomedan male has the legitimate right to engage in a valid marriage through a civil contract with a Kitabia that is, a Christian or a Jewess, in addition to the Mahomedan female, but a Mahomedan male cannot marry a fire-worshipper or an idolatress.[135] A marriage with a fire-worshipper or an idol a tress is merely irregular and is not void in the eye of the law.[136] Thus, from the harmonious construction of all these legislations and interpretations, it is evident that traditional Muslim laws permit contract marriage between the opposite sexes only. Similarly, Christian weddings are governed under the Indian Christian Marriage Act of 1872. It was enacted to consolidate and amend the legal requirements relating to the solemnization of marriages of Christian-professed individuals in India.[137] Section 60 provides conditions for marriages of Indian Christians. It stated that all marriages between Christians of India are required to fulfil the following requirements namely; (i) the intending man shall not be under 21 years of age, and the intending woman shall not be under 18 years of age;[138] and (ii) neither of the intended man and woman shall have a spouse who is still alive. Unless these requirements are fulfilled, no certificate of marriage will be issued to them. Hence, the essentials of marriage

132 Misc. Criminal Application No. 14361 of 2010 and Spl. Criminal Application No. 106 of 2010, Decided on: 05.11.2015.

133 Muslim Women (Protection of Rights on Divorce) Act, 1986, Preamble.

134 Muslim Women (Protection of Rights on Marriage) Act, 2019, Preamble.

135 Mulla, *Mulla's Principles of Mahommedan Law* 345 (LexisNexis, New Delhi, 2017).

136 *Mohammed Salim (D) through L.Rs.* v. *Shamsudeen (D) through L.Rs.*, (2019) 4 SCC 130: [2019] 1 SCR 941.

137 Indian Christian Marriage Act, 1872, Preamble.

138 Primarily the minimum ages was of 13 for female and 16 for male, the requirement of parental consent was re-added for the children until they attained 21 years of age. It was substituted by Child Marriage Restraint (Amendment) Act, 1978. See, Nandini Chatterjee, "Religious Change, Social Conflict and Legal Competition: The Emergence of Christian Personal Law in Colonial India," 44(6) *Modern Asian Studies* 1147, 1186 (2010). Further, by highlighting the earlier age limit, in *Lakshmi Sanyal* v. *Sachit Kumar Dhar*, [AIR 1972 SC 2667: (1972) 2 SCC 647] the Supreme Court ruled that the first condition is that the male person intending to be married should not be younger than 18 years and the female intending to be married should not be younger than 15 years.

specifically mentioned man and woman and thus, recognised hetero-sexual marriage only. Further, section 60 also provides for penalties as per the provisions of the Indian Penal Code to be imposed for false oaths or declarations in procuring marriage certificates. In *Rose Simpson* v. *Binimoy Biswas*,[139] the High Court of Calcutta alleged that the aforesaid section designates that when parties stand within the forbidden ranges of consanguinity or affinity such a marriage would be considered as invalid. Section 60 thereof merely enacts that without satisfying with the existence of the pre-requisites no certificate shall be issued, whereas the penal provisions thereafter provide for consequences of false declarations.The Parsi Marriage and Divorce Act, 1936 regulates Parsi unions and specifies the conditions for marriage, including the age requirements for both the bridegroom and the bride. Section 3 provides detailed provisions for the validation of Parsi marriage.[140] It stipulates that no marriage is valid between the contracting parties unless a male is twenty-one years of age and above and a female is eighteen years of age and above. By explaining this provision in *William Rebello* v. *Jose Agnelo Vaz*,[141] the High Court of Bombay observed that by deferring the freedom to marry till the attainment of 21 years of age, Section 3 limits the freedom of intending parties to marry who are otherwise competent to marry. But this provision does not prevent any individual from enforcing a contract of marriage that her mother or legal guardian entered into on behalf of her by continuing that the suit commenced after she attained 18 years of age. The age to get married is 21 years in general, but, after an individual attains the age of 18 years, his or her marriage could be performed with the consent of his or her legal guardian. The usage of the terms "husband" and "wife" and their collaboration with gender through the usage of "his" and "her" demonstrates that the Parsi Marriage and Divorce Act, 1936 applies to heterosexual marriages only.

For ensuring Indian citizens' freedom to marry outside of their religion or caste, the Special Marriage Act, 1954, (SMA) was passed. Section 4 prescribes conditions relating to the solemnization of special marriages. It stipulates that "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; (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 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." Thus, instead of gender-specific terms, the gender-neutral term "party" is used by the provisional framework under section 4(a) and (b). However, the requirement of attaining 21 years of age for males and eighteen years of age for

139 AIR 1980 Cal 214.

140 *Freny Barjorji Engnieer* v. *Shapurji Kekobad Modi*, AIR 1937 Bom 392.

141 *William Rebello* v. *Jose Agnelo Vaz*, AIR 1996 Bom 204.

females is upheld under section 4(c).Similarly, the requirement of not being connected through degrees of prohibited relationship is specified under section 4(d).[142] The reading of conditions stipulated in section 4 with the definition of prohibited relationshipsprovided in section 2(b) has always limited the application of the SMA to heterosexual unions only. Further, marriages involving at least one Indian citizen are governed by the Foreign Marriage Act, 1969 (FMA). The FMA is applicable to two sets of individuals - to individuals who want to solemnize their marriage on foreign soil within the provisional ambit of the FMA[143] and to individuals who look to register their marriage within the provisional ambit of the FMA even after where, by following the law of a foreign country, their marriage has been solemnized in that country.[144] In both these situations, the marriage must include a citizen of India as at least one party to the marriage.[145] Likewise, Section 4 of the FMA stipulates pre-conditions relating to the validation of foreign marriages. This provision states that "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 21 years and the bride the age of 18 years at the time of the marriage, and (d) the parties are not within the degrees of prohibited relationship". The requirements for the solemnization of marriages under the FMA are very parallel to the requirements under the SMA. Thus, the limiting application of the SMA towards heterosexual marriage is also valid in interpreting the provisions for the solemnization of marriage under the FMA.

This tradition of recognizing marriage as a heterosexual union is also evident from various judicial pronouncements. In *X* v. *Hospital Z*,[146] the Supreme Court while interpreting marriage as a fragment of the "right to privacy" considered the right founded on confidentiality in the perspective of marriage. The Supreme Court further observed thus:

> Marriage is the sacred union, legally permissible, of two healthy bodies of opposite sexes. It has to be mental, psychological and physical union.

142 S. 2(b) defines "degrees of prohibited" relationship as follows: a man and any of the individuals noted in Part I and a woman and any of the individuals noted in Part II of the First Schedule are within the degrees of prohibited relationship. Part I consists only of women's relationships with men, such as mother and daughter. Part II consists only of men's relationships with women, such as father and son.

143 Foreign Marriage Act, 1969, Chapter II.

144 *Id.*, Ch. III.

145 *Id.*, ss. 4 and 17(2).

146 AIR 1999 SC 495: (1998) 8 SCC 296.

> When two souls thus unite, a new soul comes into existence. That is how, life goes on and on this planet. (Please put the source here too).

In *Guntamukkala Naga Venkata Kanaka Durga* v. *Guntamukkala Eswar Sudhakar*,[147] the High Court of Andhra Pradesh held that unquestionably the legislative objective in framing several provisional schemes for upholding the right to receive maintenance by a wife or a husband or any of their family members was to endorse the notion of marriage. Since the family is accepted as a social unit, the marriage system affects not only the spouses but also their family members and consequently the whole society. Hence, the right to marry is one of the basic civil rights of all men and women.[148] According to the decision given above, marriage traditionally represents a heterosexual partnership. However, as a result of the developments in the fields of human rights law, gender identity, sexual orientation, and same-sex marriage, the entire legal structure relating to marriage is in a questionable position. If we have to recognize same-sex marriage then the traditional marriage laws have to be written in new ways to accommodate them. Thus, it is currently a serious question whether same-sex marriages are to be permitted in India or not.

Recent developments in Supreme Court: A failed attempt

Recently through Writ Petitions[149] and Transferred Cases (Civil)[150] in *Supriyo* v. *Union of India*,[151] the Supreme Court of India has considered various issues associated with the right to get married of LGBTQ persons including the legitimacy of same-sex marriage within the purview of Indian marriage jurisprudence.[152] In this group of petitions, along with prayers unique to their individual cases, the petitioners also prayed for certain general orders. The petitioners demanded before the court to assert that: LGBTQ individuals have the freedom to marry anyone of their choice irrespective of gender, religion, and sexual orientation; the SMA contravened Articles 14, 15, 19, 21, and 25 of the Constitution insofar as it did not validate the solemnization

147 AIR 2013 AP 58.

148 *Indra Sarma* v. *V.K.V. Sarma*, AIR 2014 SC 309: (2013) 15 SCC 755.

149 Writ Petition (Civil) No. 1011 of 2022, Writ Petition (Civil) No. 93 of 2023, Writ Petition (Civil) No. 1020 of 2022, Writ Petition (Civil) No. 1105 of 2022, Writ Petition (Civil) No. 1141 of 2022, Writ Petition (Civil) No. 1142 of 2022, Writ Petition (Civil) No. 1150 of 2022, Writ Petition (Civil) No. 159 of 2023, Writ Petition (Civil) No. 129 of 2023, Writ Petition (Civil) No. 260 of 2023, Writ Petition (Civil) No. 319 of 2023, and Writ Petition (Civil) No. 478 of 2023.

150 T. C. (Civil) No. 5 of 2023, T. C. (Civil) No. 8 of 2023, T. C. (Civil) No. 9 of 2023, T. C. (Civil) No. 11 of 2023, T. C. (Civil) No. 12 of 2023, T. C. (Civil) No. 6 of 2023, T. C. (Civil) No. 7 of 2023, T. C. (Civil) No. 10 of 2023, and T. C. (Civil) No. 13 of 2023.

151 2023 INSC 920.

152 Twenty related cases filed by 52 petitioners were heard by a five-judge Constitution Bench that included Dr. D. Y. Chandrachud, Justice Sanjay Kishan Kaul, Justice S. Ravindra Bhat, Justice Hima Kohli, and Justice Pamidighantam Sri Narasimha.

of marriage between gender non-conforming, LGBTQ and same-sex couples. It was yielded that the SMA covers any two persons who want to get married, irrespective of their sexual orientation and gender identity, and thus, LGBTQ persons should have access to all rights, entitlements and benefits linked with the solemnization and registration of marriage under the purview of SMA.

The argument was that withholding the fundamental right to marriage from LGBTQ couples does not promote or safeguard any legitimate State interest. Moreover, it was raised that upholding constitutional morality requires the acknowledgement of the right of LGBTQ couples to marry from a legal and ethical point of view. The basic testament of constitutional morality impels the organs of the State, including the judiciary, to preserve the heterogeneous nature of the society, to promote its inclusive and pluralistic essence, and to uphold the entitlement of every person to marry someone of their choice.. The Supreme Court noted in this regard that there is no universal and commonly accepted definition of marriage. The connotation of marriage is assumed differently in law, religion, and cultural contexts. Some religions contemplate marriage as a sacrament while others perceive it as a contract. The existing legal framework determines the pre-conditions for a valid marriage, such as the minimum ages of the parties to the marriage, the presence of mutual consent of the parties involved, or whether the individuals are within the degrees of prohibited relationship. A marriage is deemed legally valid in the eyes of the law as long as it matches with the preconditions outlined in the concerned law(s). It is the prerogative of married couples to make their relationship meaningful and purposeful after marriage. These facets and intricacies of marriage vary with each relationship, and it is impossible and beyond the purview of this court to authoritatively assert that a particular conception of marriage is the only valid understanding and interpretation of legitimate marriage. In this perspective, the Supreme Court scrutinised the extent of the State's capacity to regulate the "intimate zone." The Solicitor General advanced the following two arguments: firstly, since intimate relationships fall within the "intimate zone of privacy", neither homosexual nor heterosexual couples' intimate relationships can be subject to State regulations; and secondly, the public interest of maintaining the human population through procreation is the sole reason due to which the State regulates heterosexual marriages. The court held that "the intimate zone is shielded from State regulation because relationships operate in a 'private space' and decisions taken in a private space in the exercise of an individual's autonomy (such as the choice of partner, or procreation) are 'private activities.' However, this court also acknowledges the significance of the State regulation in a "private space" in subsequent considerations. The State interest in regulating marriage relationships is to democratize the private space by ensuring that activities in the intimate space are aligned with constitutional ideals. The contention put forth by the Solicitor General that the State regulates marriage relationships solely because they lead to procreation is erroneous.

The State interest in democratizing personal relationships extends beyond the marriage institution and embraces broader objectives. The State regulation of all relationships is basically driven by the goal of promoting public interest, because persons involved in relationships may not be equal by their very nature. Scholars have underscored that the democratisation of personal relationships serves two key purposes. First, it helps to eliminate the inequality of the power structure in a relationship, which prevents exploitation and subjugation; and second, it contributes to the creation of a more independent and self-sufficient citizenry which would have the ability to consider alternative perspectives. The withdrawal of the State interference from the domestic private space leaves the disadvantaged party defenceless since categorizing certain actions as being private has different implications for those with and without power. Hence, it is imperative that all activities in the "private space" involving personal choices must not readily and uncritically be classified to be outside the purview of the State regulation. By considering each case, the State has the responsibility to assess if its goal of democratizing private space overrides the interests of privacy. Hence, on the basis of these arguments, by a 3-2 majority, the Supreme Court declined the claim for the legalization of same-sex marriage. The Court also rejected the demand of providing constitutional protection for civil unions and adoption rights for queer couples.[153]

The petitioners though this case also advocated for constitutional protection of the right to marry.[154] Nevertheless, while considering the plea of the petitioners in this case, the court observed that in *Justice K.S. Puttaswamy* v. *Union of India*,[155] Justice Nariman made a passing reference to the right to marry only. It neither deliberated the linkage of the right to marry with any of the entrenched fundamental rights nor discussed the scope and ambit of such right. The petitioners leaned on the verdict of the US Supreme Court in *Obergefell* v. *Hodges*,[156] in which the right to marriage was acknowledged as a fundamental right. The question before the US Supreme Court was not whether the US Constitution provides a guarantee to the right to marry but whether a State has a duty to issue the license to recognise a marriage between two individuals of the same sex in terms of the Fourteenth Amendment to the US Constitution. To understand the background of this US case, it is noteworthy that

153 The court observed that directing the State to grant legal status or acknowledgement to some specific unions will be against the doctrine of separation of powers and could lead to unforeseeable repercussions.

154 The Petitioners contented that this court uphold the Constitution guarantees to the right to marry in *Shafin Jahan* v. *Asokan K.M.*, [(2018) 16 SCC 368: 2018 (4) SCR 955], and *Shakti Vahini* v. *Union of India*, [AIR 2018 SC 1601:(2018) 7 SCC 192]. However, this Court had to consider in both these cases whether State or non-State actors could interfere with the decision of a person regarding whom to marry.

155 AIR 2017 SC 4161: (2017) 10 SCC 1.

156 576 US 644 (2015):No. 14-556, 2015 WL 2473451 (US June 26, 2015).

through prior rulings, the US Courts had established that marriage is a civic right attributing its significance to the existence and survival of human beings,[157] is within the purview of the fundamental right to privacy,[158] and is indispensable to the orderly pursuit of happiness.[159] Conversely, within the Indian legal background, both the State legislature and Parliament have the power to enact legislation concerning marriage under Entry 5 of the Concurrent List of the Seventh Schedule of the Constitution. Hence, in an enumerated way, the power is specifically given to the legislature and the judiciary has no authority in making the law on this issue. By upholding this ground, the Supreme Court denied the petitioner's plea to acknowledge the right to marry as a fundamental right. If it is permitted this would imply that even if Parliament and the State legislatures have not established an institution of marriage in the exercise of their authority under Entry 5 of the Concurrent list, they would be compelled to create an institution because of the positive postulate encompassed by the Supreme Court in regard to the right to marry. Furthermore, it cannot be contradicted that many of our constitutional values, counting the right to life and personal liberty may comprehend the ideals inherent in a marital relationship. They may at the very least entail the right to select a marital partner and the respect for an individual's choice regarding whether and when to marry.

The petitioners contend that Section 4 of the SMA is not at par with the constitutional ideals not because it implicitly forbids marriage between same-sex couples but because it only regulates a heterosexual union by excluding the solemnization of marriage between non-heterosexual persons. If the court finds that a legislative provision is inconsistent with Part III of the Constitution, it shall declare that it is void and unconstitutional, read it down (by eliminating phrases) or read words in (by adding or replacing phrases) to protect it from being stated as void. The court noted that the intended purpose of progressive legislation such as the SMA would be defeated if it adopted the first approach. The SMA was enacted to facilitate marriages and allied issues between individuals coming from different religions and castes. If the SMA is declared void and unconstitutional for not including same-sex couples within its purview, it would take India back to the situations that existed in the pre-independence era where people of different religions and castes faced obstacles and societal barriers in celebrating love through marriage. Such a judicial ruling would not only force the nation back to the era when it was enmeshed in religious intolerance and social inequality but would also drive the courts to choose between eradicating one form of prejudice and discrimination at the expense of allowing another. The court in supplementary perceived that if it took the second approach and read words into the provisions of

157 *Skinner* v. *Oklahoma*, 316 US 535 (1942): 62 S.Ct. 1110 (1942).

158 *Zablocki* v. *Redhail*, 434 US 374 (1978): 98 S.Ct. 673 (1978).

159 *Loving* v. *Virginia*, 388 US 1 (1967): 87 S.Ct. 1817 (1967).

the SMA and allied laws such as the Indian Succession Act, 1925 and Hindu Succession Act, 1956, it would be seen as encroaching into the realm of the legislature. This view is not correct if we recognize judge made law as law !! Please revisit this point. It is a well-established principle of law that judicial legislation is not permissible. In most of the cases, the court primarily determines whether a specific law is unconstitutional, and then proceeds to ascertain the relief. However, in this alleged case, an exercise to determine the claim regarding the unconstitutionality of the SMA because of under-inclusivity would be utterly futile because of the constraints in this court's power to assure relief. Further, any amendment required in any legislative scheme including the SMA should be brought by the Parliament and it is solely the prerogative of the Parliament to determine its necessity. Similarly, it is the duty of the Parliament to interpret the provisions of FMA and its relevance to same-sex marriage.[160]

While taking all of these developments into account, the Supreme Court also deliberated on the legal standing of families formed from queer relationships. The prevailing legal and societal understanding of the concept of a "family" denotes that "family" is a singular static unit with a mother and a father (over time whose role remains constant) and their children. However, the Supreme Court ruled in *Deepika Singh* v. *Central Administrative Tribunal*,[161] that this prevailing understanding of the term "family" ignores both, the myriad circumstances which may lead to a change in one's familial structure, and the fact that many families do not initially conform to this expectation. The court expressed that familial relationships can manifest in countless forms including domestic, unmarried partnerships or queer relationships. These forms of love and families may not be conventional in acceptance but they are as real and practical as their conventional counterparts. Such liberal and progressive expressions of the "family" are equally deserving not only of legal protection but also of aid available under social welfare legislation. Thus, the court noted that queer relationships may also form one's family. Individuals involved in such partnerships are satisfying their innate and basic human need to be a part of a family and to create their familial bonds. This conceptualization of the term "family" may be non-conventional in nature but this characteristic does not diminish the fact that it is a family. These non-conventional family units equally constitute the fundamental components of our society. The Constitution acknowledges plural identities and values. The constitutional ideals protect the right of every individual to be different and unique. Non-conventional families, by their very nature, defend the right to be different. Discrimination against difference cannot be permitted simply because of its existence. The rights of all citizens are protected under Articles 19 and 21 of the Constitution of India, which

160 The constitutionality of the FMA is challenged by some of the Petitioners and have sought for a declaration that FMA applies to any two individuals who intend to marry, regardless of their sexual orientation and gender identity.

161 AIR 2022 SC 4108: 2022 (7) SCR 557.

includes the LGBTQ community. Principle 24 of the Yogyakarta Principles,[162] clearly states that "everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members". The court further noted that denying the opportunity to people of the LGBTQ community to enter into a union also results in denying (in effect) the legitimacy of their sexuality because their sexuality itself is the cause for such denial. This also would infringe the right to autonomy of the LGBTQ people which includes the freedom to choose one's sexual orientation and gender identity. The deed of engaging in an intimate relationship and the choices made therein are also sheltered by the right to privacy.[163]

In the present case, the Supreme Court also considered the right of people to form same-sex unions. In this connection, the court considered Article 25(1) of the Constitution which talks about the "freedom of conscience and free profession, practice and propagation of religion." The court decided that the right under article 25 is equally accessible to members of the LGBTQ community. Nevertheless, there are four exceptions to this right - health, public order, morality and the other provisions of Part III. The union formed by queer persons with their partners will not in any way threaten the maintenance of public order or the health of the public in general and at the individual level. It is a settled principle of law that article 25 pertains to constitutional morality and not societal morality.[164] Hence, none of these ideas impedes LGBT people from entering into a union with their chosen partner. On the contrary, these aforementioned principles bolster the idea that queer people have the basic right to enter into such a relationship. As a final point, the other provisions in Part III also do not create any barrier to exercising this right to form same-sex unions in the present case. Similar to the values advocated in the Preamble, they provide the foundation to enjoy the right to enter into a union.

Regarding the abovementioned issues and dilemmas, the Chief Justice of India, D.Y. Chandrachud has taken the most progressive view in understanding the plea forwarded by the queer community. He observed that India has long been aware of queerness and it has been a natural phenomenon since ancient times. It was not urban or elite. Legalization of same-sex marriage and regulating the same through the enactment of legislation is the jurisdiction of the state legislatures and Parliament. He emphasized

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162 Despite not being ratified by India, the Supreme Court has recognized the relevance of the Yogyakarta Principles in dealing with the cases concerning sexual minorities. See, *National Legal Services Authority* v. *Union of India*, AIR 2014 SC 1863: (2014) 5 SCC 438.

163 The right to privacy includes the right to be left alone and also extends to privacy of choice or decisional privacy. See, *Justice K.S. Puttaswamy* v. *Union of India*, AIR 2017 SC 4161: (2017) 10 SCC 1.

164 *Indian Young Lawyers Association* v. *State of Kerala* (2019) 11 SCC 1: [2018] 9 SCR 561.

that marriage has attained significance as a legal institution due to the fact that the State provides material benefits that are only available to married couples. The Constitution, however, does not explicitly recognize a fundamental right to marry. As discussed above, the chief justice upheld that this court is in no position either to strike down the SMA on the grounds of constitutional validity or to introduce new words into the SMA because of its institutional constraints.[165] Part III of the Constitution protects the freedom of all individuals including queer couples to enter into a union or relationship. The failure on the part of the State to recognise the bouquet of entitlements stemming from a union towards queer couples would impact them disproportionately as they cannot marry under the current proposition of law. Hence, the State is duty-bound to recognize such unions and to extend legal benefits to them. Justice Chandrachud recorded the assurance provided by the Solicitor General that the Union Government would constitute a committee to be chaired by the Cabinet Secretary to elucidate and delineate the extent of the entitlements of queer couples who are in unions.[166] In addition to members of the queer community, the committee shall comprise professionals with knowledge and experience with regard to the social, psychological, and emotional needs of members of the queer community. The Committee shall before finalizing and submitting its judgment conduct extensive consultation with persons of the queer community, persons belonging to marginalized groups and the governments of the states and Union Territories. The Committee shall take into account the following points for entitling partners in a queer relationship (i) to be treated as members of the same family for the issuance of a ration card, (ii) to have the option to open a joint bank account with the facility to name the partner as a nominee, in the event of death, and (iii) to assure succession rights, maintenance, financial benefits such as those provided by the provisions of Income Tax Act 1961, rights flowing from employment such as gratuity and family pension and insurance benefits. The committee's recommendations shall be implemented by the Union Government and the governments of the States and Union Territories at the administrative level. In concurrence with this, Justice Sanjay Kishan Kaul upheld that the primary goal of the SMA was not to permit and regulate the marriage of heterosexual couples exclusively. Although only heterosexual relationships received provisional benefits under the fundamental schemes of the SMA, automatically this approach does not conclude that the underlying purpose of the SMA is limited to that extent only. He stated that the legal acknowledgement of non-heterosexual

165 The Supreme Court has no authority to read words into the provisions of the SMA and provisions of other related laws such as Hindu Succession Act, 1956 and Indian Succession Act, 1925 because this overreaching action would amount to judicial legislation, which is not at all accepted under the Constitutional framework of India.

166 This formation of the specific committee for reviewing the status of queer people is also supported by Justice S. Ravindra Bhat.

amalgamations signifies a stepping stone towards achieving equality in the sphere of marriage. Meanwhile, the institution of marriage should not be viewed as an end in itself. An all-inclusive acceptance of equality is promoted by our Constitution, which encompasses all aspects of life and dignity. The exercise of upholding the basic facets of equality requires recognition, protection and approval of personal preferences. Non-heterosexual couples have similar perspectives of love, fidelity, and accountability in comparison to heterosexual couples.

In similar line with the CJI, Justice S. Ravindra Bhat also upheld that legal appreciation of the right of queer people to enter into a union, whether comparable marriage or civil union, can only be accomplished by enacting specific legislation in this regard. Thus, by considering this stance, the court cannot enjoin or direct the legislature to enact a regulatory framework resulting in legal recognition of same-sex couples. However, he dissented from the view of assuring marital benefits as an outcome of same-sex unions. According to the ruling of Justice Bhat, previous judgments of this court have affirmed that the right to enter into a union or relationship of the queer and LGBTQ couples, be it mental, emotional, or sexual, is emanating from the Constitutional right to choice, right to autonomy, and right to privacy. He further clarified that this connotation, however, does not extend to a right to claim legitimacy for the said union or relationship. Even regarding the issue of declaring the SMA unconstitutional, Justice Bhat opined that the petitioner's plea to deduce various provisions of the SMA in a gender-neutral manner to facilitate the legal validity of same-sex marriage is untenable. Nevertheless, he agreed to provide a guarantee towards the earned or compensatory benefits or social welfare entitlements to same-sex couples and instructed the State to secure the enjoyment of such benefits by amending and removing marital status as a relevant eligibility factor. Consistent with this negative approach, Judge Hima Kohli held that the right to enter into a civil union cannot be regarded as a constitutionally protected right unless the right to marry receives the same protection under the existing Constitutional framework. She also agreed thatthe Parliament is the right forum to take a call on same-sex marriage. Additionally, Justice Pamidighantam Sri Narasimha also upheld a negative approach towards the recognition of same-sex marriage. He asserted that the claim of same-sex couples to marry each other contradicts the prevailing framework of statutes, and was a demand to establish a socially and legitimately enforceable status for same-sex marriage and nothing else.[167] The request to acknowledge such a right is not one that expects the State to refrain from interfering, but rather intends to inflict positive obligations to erect new legislations, or at least to alter the prevailing legislations to ensure legitimacy towards same-sex marriage. For this, there could not be a *mandamus* to amend the existing laws

167 Justice Pamidighantam Sri Narasimha stated that the prayer for requisite legislative and policy space creation for recognition of relationships such as marriages is nothing but a prayer of *mandamus* in the eyes of law.

or enact new laws. Furthermore, Justice Narasimh a disapproved of the opinion of the Chief Justice of India regarding the legitimacy of abiding cohabitation relationships for same-sex couples. He elucidated that the Chief Justice's outlook placed the right to choice regarding marital partner in general and the right regarding the legitimization of abiding relationships for same-sex couples within the purview of Article 25 of the Constitution. In this regard, prominence was positioned on the phrase "freedom of conscience" which was emphasized together with "the right to freely profess, practice and propagate religion." This judgement is situated on the basis of freedom of conscience, which includes the right to evaluate one's own action, and its moral quality and to act upon it. If this interpretation is acceptable under the constitutional values enshrined in article 25, then the documentary account of freedoms in provisional schemes of article 19 becomes superfluous, as all these enumerated freedoms can be interpreted as activities stemming from ethical perceptions of oneself. Justice Narasimha finds it tough to agree with such an interpretation of article 25.Nonetheless, reading the right to enjoy earned or compensatory benefits or social welfare entitlements, Justice Narasimha also suggested reviewing the existing policy and legislative schemes as certain classes of individuals, live-in relationships, same-sex couples, and non-intimate caregivers including siblings were included. However, he proposed that it should be done through legislative and executive actions as these organs are constitutionally suited and assigned to enacting laws to regularise marriages including same-sex marriage.

V Conclusion

Over time, the understanding of marriage - socially, culturally, and legally - has progressed significantly. Same-sex marriage came into society as a method to fulfil the lesbians' and gay men's right to form a familial relationship. The same-sex marriage has gradually legitimized attitudes through domestic and international legal assurances that have happened over the last decade.[168] The US Court observed marriage as one of the "basic civil rights of man", essential to our endurance and part of the "right of privacy".[169] Similarly, the US statutory framework recognised the right to marry as a fundamental right inherent in the rights related to personal freedom.[170] It also assures that four principles apply equally to heterosexual couples as well as same-sex couples: the right to intimate unions, the right to get married, the wellbeing of the children, and the central role of marriage in social order.[171] Primarily in a broader

168 David A. Gay, John P. Lynxwiler, and Patrick Smith, "Religiosity, Spirituality, and Attitudes toward Same-Sex Marriage: A Cross-Sectional Cohort Comparison" *SAGE Open* 1-14 (2015).

169 *Zablocki* v. *Redhail*, 434 US 374 (1978).

170 *Obergefell* v. *Hodges*, 576 US 644 (2015): No. 14-556, 2015 WL 2473451 (US June 26, 2015).

171 Melanie Escue and John K. Cochran, "Religion, Prejudicial Beliefs toward Sexual Minorities and Same-Sex Relations, and Opposition to Same-Sex Marriage: Hate the Sin but Love the Sinner" 53(4) *Sociological Focus* 399, 399 (2020).

sense, marriage was of two kinds, "legal marriage" (a marriage which is legitimate but not as per the religious requirements) and "religious marriage" (a marriage according to the religious requirements but not valid in the eye of law). However, in the event of legalizing same-sex marriage, one of the major outrages emerged from the religious sector. To avoid that a new concept of marriage has been introduced in many countries thereby, by-passing the traditional concepts of marriage, which is popularly known as "civil marriage", *i.e.*, a marriage performed by a State official with legal but not religious consequences. While a religious marriage can never be the same as a legal marriage (*i.e.,* have legal ramifications), in some European Nations, such as the Netherlands, Belgium, and France, the terms "civil marriage" and "legal marriage" are synonymous. Nevertheless, the situations in Canada or in the UK are different, where a religious official (such as one held in a Christian church) officiated marriage is considered both as a legal marriage as well as a religious marriage simultaneously.[172] To assure the religious officials' privileges, in the same-sex marriage legislation, a safeguard was invariably incorporated by providing an exemption clause for religious ministers who object to solemnising such marriages. On the contrary as civil marriage and primarily civil union are the way out for assuring marriage rights to same-sex couples, these legislations of Canada and the UK do not provide an accommodation on the foundation of the right of religious freedom and conscience for the governmental celebrants who have the duty to solemnize the same-sex marriage.[173]

Further, the arguments for not upholding same-sex marriage in these two countries (Canada and the UK) are rooted in irrational animus and discrimination toward same-sex couples. The opponents of legalizing same-sex marriage justified the traditional marriage framework in a societal context rather than in well-being terms, which in supplementary ways interrupt the enjoyment of human rights by sexual minorities. They also attempted to advance the commonly expressed Roman Catholic view that same-sex marriage can never be treated on an equal footing with marriage because marriage must be open to procreation. This proposal, however, does not align with the current marriage law, which allows marriage between individuals unable to bear children together[174] and allows marriages to be consummated by sexual relations utilizing contraception.[175] Another argument put forth was that same-sex marriages cannot be equal to opposite-sex marriages because the laws pertaining to them do not include provisions regarding adultery or non-consummation. This is based on a formalistic social conception of equality that holds that heterosexual and same-sex

172 Robert Wintemute, "Same-Sex Marriage: When Will It Reach Utah?" 20(2) *BYU Journal of Public Law* 527, 527 (2006).

173 Rex Ahdar, "Solemnisation of Same-sex Marriage and Religious Freedom" 16(3) *Ecclesiastical Law Journal* 283-305 (2014).

174 Leslie Green, "Sex Neutral Marriage" 64(1) *Current Legal Problems* 1-21 (2011).

175 *Baxter* v. *Baxter* [1947] 2 All ER 886: [1948] AC 274.

couples can only be treated equally if all marital law provisions are applied to them in the same manner. The author preferred to argue in contradiction to this. As a vulnerable group, same-sex couples should be protected differently with an added advantage to secure them a similar position in comparison to heterosexual couples. The doctrine of protective discrimination should be applicable in this regard, which allows discrimination in favour of a specific group (same-sex couple) on the grounds of upholding social justice and also protecting them from all forms of exploitation.[176] In parity with the perspective of liberal democracy, this positive ideology necessitates the States to implement affirmative action for the benefit of underprivileged sections of society. Hence, the measures taken by the legislatures in Canada and the UK to legalize same-sex marriage is a positive decision to uphold the rights of same-sex couples in those countries. The suitability of same-sex partners as parents has been another major sub-topic of discussion regarding the ability of same-sex partners to marry. Gary Gates, however, draws the right conclusion that same-sex couples are just as capable of raising children as their heterosexual counterparts by endorsing their marriage rights.[177]

Evidently, by legislating the 2005 Civil Marriage Act and the 2013 Marriage (Same Sex Couples) Act, same-sex marriages were legalized in Canada and the UK respectively, sometimes by overpowering the abovementioned obstacles and sometimes by providing an option towards the non-willing party that they may not take part in same-sex marriage rituals. Nevertheless, both Canada and the UK followed a specific pattern. The primary step was the decriminalization of homosexuality, either through judicial pronouncements or a legislative approach. In Canada, the decriminalization of homosexuality occurred through an amendment to Canada's Criminal Code in 1969,[178] while in the UK, it was done primarily through the Sexual Offences Act 1967. Later on, by taking a backward step, through the Local Government Act 1986 certain prohibitions were imposed on promoting homosexuality by teaching or by publishing material. Finally, through the Local Government Act, 2003,[179] decriminalization of homosexuality took final shape in the UK. The next development was the adoption of explicit anti-discrimination laws, such as equality rights legislation. In 1996, Canada did this by amending the Human Rights Act. Similarly, in the UK, by enacting the Civil Partnership Act 2004, a similar right was assured to same-sex couples by recognising them as civil partners in the eye of the law. The acceptance of same-sex

176 B. Sivaramayya, "Protective Discrimination and Ethnic Mobilization" 22(4) *Journal of the Indian Law Institute* 480, 480 (1980).

177 Gary J. Gates, "Marriage and Family: LGBT Individuals and Same-Sex Couples" 25(2) *FALL* 67, 67 (2015).

178 For reference see, J. Fisher, *Outlaws and Inlaws: Your Guide to LGBT Rights, Same-Sex Relationships, and Canadian Law* (Egale Canada, Toronto, 2004).

179 Local Government Act, 2003, s. 122.

partners and the assuring of partner's benefits constitute the last step towards the legalization of same-sex marriage. The Canadian Civil Marriage Act, 2005 fulfils this requirement. It acknowledges the right to equality without discrimination for both opposite-sex and same-sex couples. Likewise, the Marriage (Same Sex Couples) Act, 2013 of the UK ensures the solemnisation of marriage through a civil ceremony for same-sex couples. While primarily in the UK there is no institution available to both sets of partners, with the institution of marriage earmarked for the partners of the opposite sex and the institution of civil partnership earmarked for partners of the same sex, in Canada the institution of marriage is available to both sets of partners, and in addition, some provinces provide a civil union-type alternative to both sets of partnerships.[180] Later on, with the enactment of the 2013 Marriage (Same Sex Couples) Act, the scenario changed. Thus, Canada addressed same-sex marriage through a sexual orientation-neutral legal framework, while, the UK preferred to deal with same-sex marriage with sexual orientation-specific law. While the legalization of marriage between same-sex couples is a positive stride in the social and political landscape, social stigma's enduring effect persists. It is evident that the societal scenario has not changed much. The proportion of places of worship in the UK that are registered for solemnization of same-sex marriage is significantly lower than that of heterosexual marriages.[181] The brunches of worship registered to solemnize same-sex marriages in the UK and Canada will probably remain small compared to the total number of places of worship registered to solemnize marriages unless a greater number of religious groups choose to allow same-sex marriages.

The Indian scenario concerning the legal status of marriage rights of same-sex couples is drastically different. Traditionally, the various Indian kingdoms have made numerous references to same-sex relationships and transgender people. The concept of gender fluidity is reflected in Hindu scriptures, art, and architecture from the Vedic era. Manusmriti, Arthasastra, and Kama Sutra also have referred to attraction between the same sexes and behaviour.[182] The Khajuraho temples serve as a prime illustration of the community's previous tolerance.[183] There are depictions of same-sex relationships in the temple sculptures, such as an open portrayal of nude men and women erotically embracing fluid sexuality.[184] The British Empire brought about a

180 Bruce MacDougall, ElsjeBonthuys, Kenneth McK Norrie and Marjolein van den Brink, "Conscientious Objection to Creating Same-Sex Unions: An International Analysis" 1(1) *Canadian Journal of Human Rights* 127, 136 (2012).

181 *Supra* note 105 at 20-25.

182 Keya Das and T. S. Sathyanarayana Rao, "A Chronicle of Sexuality in the Indian Subcontinent," 1(1) *Journal of Psychosexual Health* 20, 23 (2019).

183 Gurvinder Kalra and Susham Gupta, "Sexual Variation in India: A View from the West," 52(7) *Indian Journal of Psychiatry* S264, S267 (2010).

184 These same images can be seen at Kornak's Sun Temple. These paintings of women and men having same-sex relations can also be noticed in the Ellora caves.

more anglicised understanding of society in India, which led to changes in legal and societal norms. The Indian system was forced to adopt the concepts of Western thought, which were primarily shaped by the Church. With the growth of Victorian morality, the Indian Penal Code was drafted and homosexuality was declared as a criminal offence.[185] The British, who inducted this criminalising approach towards homosexuality within the four corners of the law, revoked a similar provision in 1967 in their own legal system but with the Indian legal structure, the criminalising provision persisted till 2018. The journey of decriminalizing homosexuality started with the judgment of the High Court of Delhi in *Naz Foundation* v. *Government of NCT of Delhi*,[186] where the court ruled that criminalization of adult consensual homosexual sex is an infringement of the fundamental rights safeguarded by the Constitution of India. However, this decision was reversed in the case of *Suresh Kumar Koushal* v. *NAZ Foundation*.[187] Finally, the apex court in *Navtej Singh Johar* v. *Union of India*,[188] made it apparent that Section 377 forbids private consensual sexual acts of adults by criminalising the same and it is a blatant infringement of the constitutional provisions specified in articles 14, 15, 19, and 21.[189] Thus, through this decree of the Supreme Court decriminalization of homosexuality has taken its final shape. Though judicial precedents played a pivotal role in decriminalizing homosexuality, there is no such affirmative action on the part of the legislature. Unlike the legislatures in Canada and the UK, even after taking note that the part of Section 377 of the IPC that addresses homosexuality is unconstitutional, the legislatures remain silent about it and have not initiated any bill to remove or delete the unconstitutional portion from the Act Please look at BNS, 2023. As a consequence, that portion remains in IPC as a dormant and inoperative portion. Thus, though not from the legislative angle, from the viewpoint of domestic legal structure, India adopted the primary step of decriminalization as Canada and the UK. Please rewrite this sentence as the meaning is not clear.

Regarding the next step of enacting explicit anti-discrimination laws, unlike Canada and the UK, India only managed to enact the Transgender Persons (Protection of Rights) Act, 2019 (TG Act)" to protect the rights of transgender persons and their welfare and for matters connected therewith."[190] Section 3(b) of the TG Act stipulates that neither an individual nor an institution is allowed to discriminate against a transgender, *inter alia*, by providing unjust treatment concerning employment or

185 Indian Penal Code, 1860, s. 377.

186 2010 Cri LJ 94: (2009) 160 DLT 277.

187 AIR 2014 SC 563: (2014) 1 SCC 1.

188 AIR 2018 SC 4321: (2018) 10 SCC 1.

189 This view was also reiterated in Justice *K.S. Puttaswamy* v. *Union of India* [AIR 2017 SC 4161: (2017) 10 SCC 1].

190 Transgender Persons (Protection of Rights) Act, 2019, Preamble.

occupation. Furthermore, it forbids discrimination against transgender identity in hiring decisions or the termination of jobs.[191] Under section 8, an obligation is cast upon the applicable government to secure the comprehensive and meaningful involvement of transgender individuals, as well as their assimilation into society. Section 9 forbids discrimination in employment and provides that no organization shall treat any transgender individual discriminatorily in any area related to employment, encompassing but not restricted to recruitment, promotion and other associated issues.[192] The TG Act also ensures the rights of transgender people concerning admission to educational institutions, vocational training, self-employment and enjoyment of healthcare facilities.[193] However, this Act is only applicable in cases of transgender people and does not consider gays and lesbians within its purview.[194] The rights of gays, lesbians and same-sex couples remain unattained. Thus, the Indian legal structure is able to partially match Canada and the UK in fulfilling the second requirement of equality rights legislation in the path of legalizing same-sex relationships. Concerning the third requirement of legislating specific law for ensuring the entitlement of same-sex couples to move into marital relationships and form a marital family, neither the Union Parliament nor the Union Government has taken any initiative till date. However, the Supreme Court as mentioned above considered the quest of legalizing same-sex marriage within the present marriage jurisprudence. The court concluded that there is no scope to declare same-sex marriage as valid under the prevailing personal laws relating to marriage and also under the secular SMA, 1954. Even while rationalizing the purpose of judicial review, this court refused to make any guidelines regarding this and left the matter in the hands of legislatures. Thus, as of now, the only way to legalize marriage between same-sex couplesis to enact specific secular legislation particularly addressing this matter along with other allied rights. This proposed specific legislation should cover legal formulations regarding adoption, inheritance and other ancillary rights related to marriage. As drafting a new legislation and enacting the same is a lengthy process, a civil partnership should be recognised through policy orientation. For this purpose, a survey should be conducted by the Union Government to understand the real picture related to human rights violations of same-sex couples. Nevertheless, it is evident that as time passes, Indian society is also accepting gays, lesbians and people of other sexual minorities with an open mind

191 *Id.,* s. 3(c).

192 *Shanavi Ponnusamy* v. *Ministry of Civil Aviation*, Writ Petition Civil No. 1033 of 2017, Decided on September 8, 2022.

193 Transgender Persons (Protection of Rights) Act, 2019, ss. 13-15.

194 Shamayeta Bhattacharya, Debarchana Ghosh, and Bandana Purkayastha, "Transgender Persons (Protection of Rights) Act' of India: An Analysis of Substantive Access to Rights of a Transgender Community" 14(2) *Journal of Human Rights Practice* 676-697 (2022).

and the way to see homosexuality as a sin is now becoming an old-school thought. Yet, even after all these changed attitudes the Indian society is not ready to accept same-sex unions as a marital union which is evident from the argument of the Union Government given in *Supriyo* v. *Union of India*.[195] Hence, recognition of civil partnership is the primary way forward to evaluate the social impact of legalizing same-sex unions in India. In this regard, the roles of NGOs and civil society are also vital. The NGOs and civil organizations should conduct awareness campaigns by addressing the discriminating practices faced by gays and lesbians among heterosexual people so that these people can understand the situations of same-sex-oriented people and can positively shape their mindset towards these sexual minorities.

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