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## SAME SEX MARRIAGE AND THE LAW: RIGHTS, RECOGNITION AND LEGAL BATTLES

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### INTRODUCTION

*What if that 12 - year old girl, who has always been enchanted by Barbie dolls and fairy tales, discovers that her feelings of attraction are towards other girls, challenging the traditional notions of femininity and relationships she's grown up with?*

The above framed question may not hold any water from the point of view of that girl, but it can prove to be problematic and remains unsolved in the legal arena not only in India but around the world. Hence, it becomes significant to deal with this burning topic of homosexuality, its legal recognition and the legal intricacies in the prevailing laws which makes this battle troublesome.

Before delving into the topic further, it becomes important to note that when we talk about homosexuals then we must also understand the related aspect to it, as in the present day understanding legal intricacies concerning homosexuals is as difficult as defining roundness in geometry.

Having said that, let us first understand the term gender. "Gender" encompasses the economic, social, political, and cultural roles, attributes, and opportunities that societies associate with being male or female. These constructs are not fixed; rather they vary across different cultures and historical periods. Gender is best understood as a sociocultural construct that reflects the roles, behaviours and characteristics deemed appropriate for individuals based on their sex and sexuality.

Although the term sex and gender is used interchangeably, it has different purport when it comes to law and its related jurisprudential aspect. The term "sex" refers to biologically defined and genetically acquired differences between males and females according to their

physiology and reproductive capabilities or potentialities.

Furthermore, as far as the legal definition is concerned let us look into several legislations. Primarily as per *Indian Penal Code* section 8, gender is defined as “The pronoun (he) and its derivatives are used of any person, whether male or female.”

Whereas, section 10 defines “Man” “Woman” as the word “man” denotes a male human being of any age; and the word “woman” denotes a female human being of any age. On the other hand section 10 of *Bhartiya Nyaya Sanhita 2023* defining “gender” states that the pronoun he and its derivatives are used of any person whether male, female or transgender.

Whereas section 2 clause 19 of the *sanhita* defines “man” as a male human being of any age” and section 2 clause 35 defines “woman” as a female human being of any age.

While the term Sex as per black law dictionary is defined as “The distinction between male and female; or the property or character by which an animal is male or female.”

Sex is further divided into two categories HETRO SEXUAL; individuals who are primarily attracted to people of the opposite sex. Can also be referred to as straight.

And HOMO SEXUAL; also known as Queer community/people, LGBT, Non-Binary.

Furthermore, the homosexuals are divided into:

1. Lesbian: women are physically and romantically attracted to other women.
2. Gay: they are males who get attracted towards male.
3. Bi-sexual: sexually attracted towards both male as well as female.
4. Transgender: Individuals whose gender identity, expression, or behavior does not conform to the traditional expectations associated with the sex they were assigned at birth. Here, the sexual or reproductive organ is not fully developed.
5. Intersex: In this case, a person is born with a combination of both male and female reproductive organs simultaneously.

6. Asexual: individuals who do not have any sexual feelings or desire for anyone.

“Homosexuals” are individuals who feel romantic, emotional, and/or sexual attraction toward others of the same sex and gender.” Historically homosexuality has been stigmatised as abnormal or immoral in many cultures, largely due to philosophical and theological perspectives on natural law and morality. The term ‘homosexuality’ was first coined by

German psychotherapist *Karoly Maria Benkert* in the late 19th century. Also defined by the Oxford Dictionary as the “quality or traits of being sexually attracted primarily to members of one’s own sex”. The term LGBT stands for ‘lesbian’, ‘gay’, ‘bisexual’ and ‘transgender’ ‘intersex’ ‘asexual’.

“Sexual Orientation” on the other hand refers to a sustained pattern of emotional, romantic and/or sexual attraction towards individuals of the opposite sex, the same sex, or both. It also encompasses an individual's self-identification based on these attractions, associated behaviour and affiliation with a broader community of individuals who share similar orientations.

Sexual orientation is generally described in three main categories:

- **Heterosexual:** experiencing emotional, romantic, or sexual attraction to individuals of the opposite sex.
- **Gay/Lesbian:** experiencing emotional, romantic, or sexual attraction to individuals of the same sex.
- **Bisexual:** experiencing emotional, romantic, or sexual attraction to both men and women.

Therefore, sexual orientation should not be viewed solely as an individual trait. Instead, it plays a significant role in shaping the group of individuals with whom one is most likely to establish meaningful and fulfilling romantic relationships; an aspect that constitutes a vital component of personal identity for many individuals. Looking at the importance of sexual orientation being part of decision making ability and simply the part of Right to life, the Hon’ble Supreme Court has held in the landmark case of *Justice K.S. Puttaswamy (retd.) vs*

*Union of India*<sup>1</sup> the court held that privacy is an attribute of human dignity. The right to privacy safeguards an individual's ability to make personal choices and exercise control over important aspects of their life. It emphasizes that personal matters-such as marriage, procreation, family, and sexual orientation-are central to one's dignity.

The Court acknowledged that discrimination on the grounds of sexual orientation is "deeply offensive to dignity and self-worth." It emphasized that the right to privacy intersects with the protections guaranteed under Article 15 and 21 of the Constitution, referencing the *NALSA vs. Union of India* (2014) the ruling upheld the right to self-identify one's gender, with the Court affirming that the right to privacy reflects the principles of individual autonomy, dignity, and identity. As such, the right to privacy and sexual orientation is fundamental to the rights to equality, non-discrimination, and life. The Court affirmed that every individual's identity must be protected without discrimination, acknowledging that sexual orientation is a vital aspect of personal identity.

It also noted that while the right to privacy stems primarily from Article 21, it is reinforced by the values reflected in other fundamental rights, thus calling for a comprehensive and integrated approach to interpreting fundamental rights.

Looking at the present discussion the main question which arises is *whether the transgender and homosexuals are the same?*

To answer the above query let us understand both the terms in length, the word "transgender" (often shortened to "trans") refers to a person whose gender identity is different from the sex they were assigned at birth. It encompasses a diverse range of experiences and identities. Individuals may identify with various labels to describe their gender which can be sometimes confusing for those exploring their gender.

A person's assigned sex at birth may not be the same with their gender identity. For instance; A person born female with a masculine sense of self may identify as Transgender.

Whereas a person born male with feminine sense may also identify as transgender.

Transgender individuals may use various labels to describe their gender, such as trans man

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<sup>1</sup> (2017) 10 SCC 1

(individuals who were assigned female at birth and live as male and who seek, or have undergone medical interventions to align their physical characteristics with their gender identity -are referred to as transexual men or trans men (also known as female-to-male or FTM), transwoman (individuals who were assigned male at birth and live as female- and who seek or have undergone medical interventions to align their physical characteristics with their gender identity - are referred to as transexual women or trans woman (also known as male-to-female MTF), non binary (those who have a gender that can't be exclusively categorized as man or woman), genderqueer (refers to individuals whose gender identity falls outside the traditional male-female binary), or gender fluidperson whose gender identity is not fixed. Sexual orientation can be fluid and may change over time or even from day to day. Homosexuality is a sexual orientation in which individuals experience romantic and sexual attraction to others of the same gender. The term "gay" is commonly used to refer to male homosexuals, while "lesbian" specifically refers to female homosexuals.

Homosexual individuals, along with bisexual and transgender people, form the part of the LGBTQ+ community.

Further the term "LGBTQIA+" represents a diverse range of individuals whose identities and experiences extend beyond traditional notions of heterosexuality and binary gender. This acronym encompasses various groups, including lesbian, gay, bisexual, transgender, queer, individuals, intersex and asexual. The plus sign (+) in LGBTQIA+ acknowledges the existence of additional identities and experiences beyond those explicitly listed, promoting inclusivity and diversity within the community.

#### ***\*Divisions in world level;***

As of January 2025, 38 countries recognize same-sex marriage, marking significant progress in LGBTQ+ rights<sup>2</sup>. However, many countries still have laws and practices that discriminate against LGBTQIA+ individuals.

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<sup>2</sup> Human Rights Campaign, Marriage equality around the world  
(<https://www.hrc.org/resources/marriage-equality-around-the-world#:~:text=There%20are%20currently%2038%20countries,%2C%20the%20Netherlands%2C%20New%20Zealand%2C>)

### Countries with Harsh Penalties for Same - Sex Acts.

- Death Penalty; Iran and Afghanistan are believed to impose the death penalty for consensual same-sex acts.
- Officially Law but Rarely Practiced; Mauritania, Saudi Arabia, Somalia (in Jubaland), and the United Arab Emirates have laws that prescribe the death penalty, but it is generally not enforced.
- Extrajudicial Killings: LGBTQ+ individuals face extrajudicial killings in Chechnya, a region in Russia.

In 2011, the United Nations Human Rights Council adopted its first resolution acknowledging LGBTQ+ rights, representing a major milestone in the global recognition of the community's challenges. This resolution led to a comprehensive report by the Office of the United Nations High Commissioner for Human Rights, documenting human rights violations against LGBTQ+ individuals.

The report highlighted three primary areas of concern:

- *Hate crimes* which involve targeted violence and harassment,
- *Criminalization* which encompasses laws penalizing homosexual activity and
- *Discrimination* characterized by unequal treatment and exclusion.

The United Nations urged countries to enact laws protecting LGBTQ+ rights, emphasizing the importance of creating inclusive environments.

Marriage is a universal institution that holds varied meanings and interpretations across different cultures and societies.. Its nature varies significantly with some societies pursuing it as a religious ceremony and others viewing it as a contractual agreement. For instance, in Hinduism, marriage is considered one of the 16 essentials Sanskars (along with other samskaras some of them are Garbhadhan, Jatakarma, Namakarana, Karnavedh, Vedarambh, Keshanta, Vivaha among others), for attaining Moksha, while in Islam it is regarded as a civil contract for cohabitation, providing legitimacy to the children and consequently establishing

mutual rights and duties.

Various sociologists have attempted to define marriage in an inclusive manner. For example; Westermarck describes marriage as a durable union between a man and a woman that extends beyond just procreation and childbirth. In contrast, Malinowski sees marriage as a contract centered on the bearing and raising of children. Meanwhile, Horton and Hunt consider marriage to be a socially approved structure for establishing a family. The institution of marriage forms the cornerstone of all human societies that constitute civilization. It represents the most profound and intricate of human relationships, as it involves the challenging task of two individuals; each with their own perspectives and lifestyles, sharing a life together. Marriage and family, as social institutions, encompass both formal and informal components, along with objective and subjective dimensions.

The family serves as a foundational unit of civilization, with marriage acting as the bond that unites it. The well-being of a culture, its people, and future generations is closely tied to the strength and success of marital relationships. This paper explores the portrayal of marriage as a social institution in the works of Indian English writers, highlighting how literature reinforces the societal acceptance of marriage as a fundamental social construct.

Also known as Gay Marriage, same sex marriage is the marriage of two people of the same legal sex. It represents a profound shift in the understanding of love equality and human dignity. This type of marriage is about the recognition of love and commitment between two people of the same gender i.e. male to a male and a female to a female.

Marriage should be available to couples regardless of their genders as segregation is not what we call as equality. Same sex marriage equality will enable the LGBTQ+ community a sense of belonging and will help them to gain acceptance, the recognition they are seeking in society. Legalize same sex marriage is a victory for civil rights, it promotes equality among every individuals of society. As rightly said by someone, to love and to be loved is the greatest gift no matter who it is with.

As India progresses in its quest for social justice, the recognition of same-sex marriage has become a crucial issue. With its rich cultural heritage and diverse population, India stands at a crucial juncture, navigating the delicate balance between embracing modern egalitarian values and preserving traditional practices. The push for legalizing same sex marriage

embodies a broader quest for equality, reflecting the opportunities and challenges inherent in living in a rapidly changing society. The recognition of same sex marriage has been gaining traction globally, marking significant progress in social justice and human rights. However, the fight for equality remains ongoing, with women and individuals of diverse gender identities still facing prejudice and discrimination. To ensure equal legal recognition and protection for same sex partnerships, legislative action is crucial.

Speaking of the legislations and legislative actions, it is to be understood that marriage is a legally and socially sanctioned union usually between a man and woman, that is regulated by laws, rules, customs, belief and attitudes that prescribe the rights and duties of partners and accords status to their (offspring) if any.

The 21st century saw significant changes in the institution of marriage in western countries, particularly regarding procreation and divorce. A notable shift was the legalization of same - sex marriage.

The Netherlands became the first country to legalize same sex marriage in 2001. Other countries followed, including Canada in 2005, France in 2013, the United States in 2015 and Germany in 2017. Some countries also introduced registered partnerships or civil unions, extending benefits and obligations to same-sex couples. Further, as already mentioned earlier that as of January 2025, 38 countries recognize same-sex marriage, marking significant and a positive progress when it comes to LGBTQ+ rights and its recognition.

This long-term decline is attributed to various factors, including increased educational and employment opportunities for women, shifts in societal attitudes toward marriage, and a rise in cohabitation without formal marriage.

In England and Wales, individuals born in recent decades are significantly less likely to marry, and this trend is evident across all age groups. Two primary factors contribute to this shift: a growing proportion of people are choosing not to marry at all, and many are postponing marriage until later in life.

Data from the 2021 Census indicates that the percentage of adults who have never married or entered a civil partnership has risen steadily, from 26.3% in 1991 to 37.9% in 2021. This



increase is particularly pronounced among younger adults. For instance, in 2021, 84.2% of women aged 25-29 had never married or been in a civil partnership, up from 73.9% in 2011.

## **HISTORICAL PERSPECTIVE OF MARRIAGE**

The concept of marriage has surprisingly evolved over time. While human relationships date back to ancient times, the institution of marriage as we know it today is relatively modern, spanning only a few thousand years. The idea of monogamous, lifelong partnerships and romantic love as a foundation for marriage are even more recent developments.

In traditional Indian settings, marriage extends beyond the couple, involving a union between two families. Women often transition from their own families to their husband's, taking on new roles and responsibilities. They are expected to adapt to their new family dynamics, navigating relationships like daughter-in-law and sister-in-law, each with its own set of traditional expectations. The profound impact of marriage on women's lives has led researchers and policymakers to scrutinize it through a human rights framework. The Universal Declaration of Human Rights (1948) asserts that marriage requires the "free and full consent" of both partners, emphasizing equal rights for men and women. Building on this, the UN Convention on Consent to Marriage (1962) recommends a minimum marriage age of 15, which was later increased to 18 years following conventions in 1979 and 1990. This evolution underscores the global commitment to protecting young women's rights and ensuring informed consent in marriage. By setting these standards, the international community aims to safeguard women's autonomy, health and well-being, and promote more equitable and just marital relationships. Marriage has long been acknowledged as a crucial institution shaping gender relations (Desai, 2010). Despite this, demographic studies on marriage patterns in developing countries have often overlooked this aspect. In contrast, research in Western societies, where individuals typically make marital decisions, has explored how men and women negotiate marital formation and dissolution, yielding valuable insights and debates (Oppenheimer, 1997; Ruggles, 1997). However, in societies where families, rather than individuals, drive marital decisions, demographic research faces challenges. In such contexts, studies often focus on the political economy of the family, examining partner selection and marriage timing within this framework (Fricke et al., 1986; Thornton and Fricke, 1987). This disparity highlights the need for more nuanced research on marriage and gender dynamics in diverse cultural settings.

## World view

The quest for a compatible life partner is a pivotal moment in anyone's life, with profound implications, particularly for women. In many societies, patriarchal norms and power dynamics often limit women's agency in choosing their partners. However, women with strong convictions and determination strive to find partners who respect their autonomy and treat them as equals.

The growing acceptance of live-in relationships and same-sex unions has gradually transformed the concept of marriage over recent decades. These societal shifts reflect a more open-minded attitude toward diverse forms of relationships and a willingness to challenge traditional norms. Apart from marriage, living together without marriage has been slowly accepted in society. This shift has been driven by various factors, including evolving views on personal freedom, economic influences, and a growing desire for greater flexibility in relationships. The earliest documented marriage ceremonies between one man and one woman date back to around 2350 B.C. in Mesopotamia. In the centuries that followed, marriage became a common institution among ancient Hebrews, Greeks, and Romans.

However, during that time, marriage was largely unrelated to love or religious practices. The main purpose of marriage in ancient times was to connect women to men and make sure a man's children were really his, especially in male-led societies where sons often took over important roles. Marriage also meant that a woman became a man's property, also referred to as *Doctrine of Coverture* in English common law, meaning thereby that the married woman derives her legal identity from her husband. In ancient Greece, for example, a father would give away his daughter during a ceremony saying, "I give you my daughter so you can have legal children." In those days, Hebrew men could have more than one wife. In Greek and Roman societies, married men were allowed to have sex with other women or even young male lovers, while their wives had to stay at home and take care of the house. If a wife couldn't have children, the husband could leave her and marry someone else. As the Christian Church gained influence in Europe, it became more common for priests to give blessings during weddings. According to the Christian-based Nelson University, over time, there have been different opinions on whether weddings are mainly religious or secular events. During much of the early Christian era, the Church did not get involved in weddings and left the union of man and woman to be managed by the State. However, by the eighth century, Christian

churches began to conduct wedding ceremonies, and the practice gradually became recognized as a sacred ritual.

It is to be noted that marriage rates are declining in many countries, for example Historical data on U.S. marriage rates, dating back to the late 19th century, provides insight into how social and economic factors have influenced marital trends over time.

In 1920, shortly after World War I, the U.S. experienced a marriage rate of 12 marriages per 1,000 people. This rate was approximately double the current figures. However, during the Great Depression in the 1930s, marriage rates declined sharply, reaching a low of 7.9 per 1,000 in 1932<sup>3</sup>.

Following World War II, there was a significant surge in marriages, culminating in a peak rate of 16.4 per 1,000 people in 1946—the highest recorded in U.S. history. This post-war boom was followed by a decline in the 1950s, with rates stabilizing around 8.5 per 1,000 between 1959 and 1962. The 1960s saw a modest rebound, with rates reaching 10.9 per 1,000 in 1972<sup>4</sup>.

Since 1972, marriage rates in the U.S. have experienced a steady decline. By 2018, the rate had fallen to 6.5 per 1,000—the lowest since the federal government began tracking such data in 1867. In 2022, the rate slightly decreased further to 6.2 per 1,000<sup>5</sup>.

This long-term decline is attributed to various factors, including increased educational and employment opportunities for women, shifts in societal attitudes toward marriage, and a rise in cohabitation without formal marriage.

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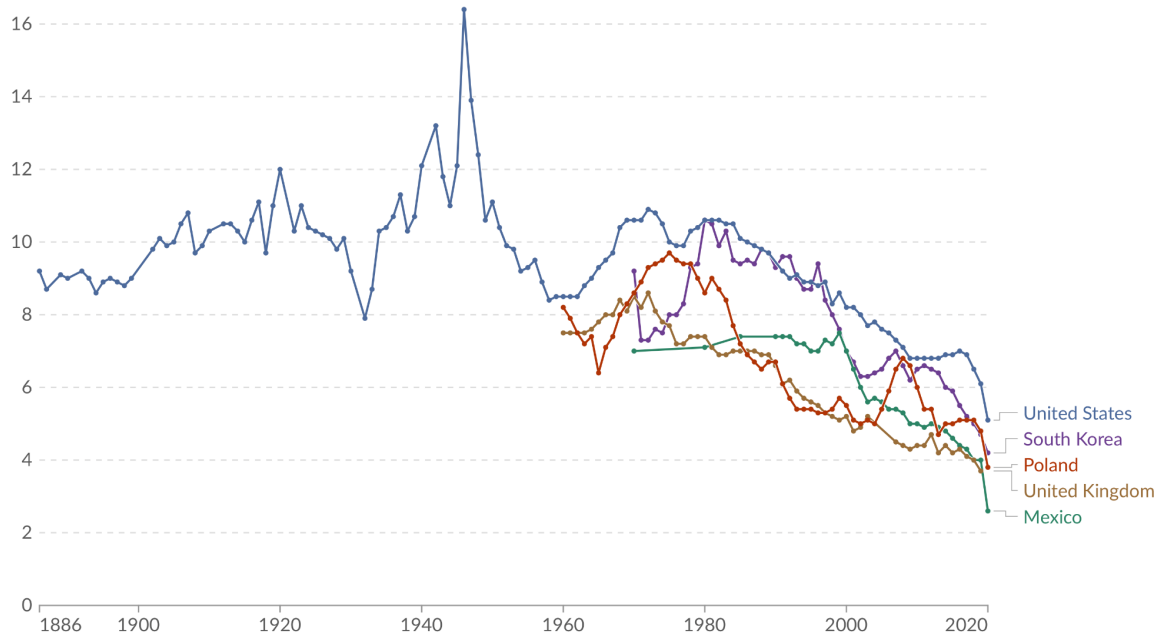
<sup>3</sup>[https://www.cdc.gov/nchs/data/hestat/marriage\\_rate\\_2018/marriage\\_rate\\_2018.htm?utm\\_source=chatgpt.com](https://www.cdc.gov/nchs/data/hestat/marriage_rate_2018/marriage_rate_2018.htm?utm_source=chatgpt.com)

<sup>4</sup>[https://www.cdc.gov/nchs/data/hestat/marriage\\_rate\\_2018/marriage\\_rate\\_2018.htm?utm\\_source=chatgpt.com](https://www.cdc.gov/nchs/data/hestat/marriage_rate_2018/marriage_rate_2018.htm?utm_source=chatgpt.com)

<sup>5</sup> [https://www.axios.com/2020/04/30/us-marriage-rate-sinks-record-low?utm\\_source=chatgpt.com](https://www.axios.com/2020/04/30/us-marriage-rate-sinks-record-low?utm_source=chatgpt.com)

## Marriage rates

Number of marriages during a given year per 1,000 people.



Data source: OECD (2024); US Census Bureau (1949); Centers for Disease Control and Prevention (2020)

OurWorldinData.org/marriages-and-divorces | CC BY

In England and Wales, individuals born in recent decades are significantly less likely to marry, and this trend is evident across all age groups. Two primary factors contribute to this shift: a growing proportion of people are choosing not to marry at all, and many are postponing marriage until later in life.

Data from the 2021 Census indicates that the percentage of adults who have never married or entered a civil partnership has risen steadily, from 26.3% in 1991 to 37.9% in 2021. This increase is particularly pronounced among younger adults. For instance, in 2021, 84.2% of women aged 25-29 had never married or been in a civil partnership, up from 73.9% in 2011. Similarly, 63.8% of men aged 30-34 were unmarried in 2021, compared to 54.7% a decade earlier<sup>6</sup>. Additionally, the average age at which people marry has been increasing. In 2022, the most common age group for opposite-sex marriages was 30 to 34 years for both men and women. This marks a shift from earlier decades when individuals typically married in their

<sup>6</sup> [https://www.itv.com/news/2023-02-22/marriages-fall-to-record-lows-as-fewer-young-adults-get-hitched-than-ever-before?utm\\_source=chatgpt.com](https://www.itv.com/news/2023-02-22/marriages-fall-to-record-lows-as-fewer-young-adults-get-hitched-than-ever-before?utm_source=chatgpt.com)

twenties<sup>7</sup>.

Several factors contribute to these trends, including shifting societal attitudes toward marriage, greater acceptance of cohabitation, and economic considerations such as the high cost of weddings and housing. These changes reflect a broader transformation in how relationships and family life are approached in contemporary society.

After looking at the data on the rate of marriage now let us delve into the aspect of marriage equality. Marriage equality has evolved into a widely recognized human and civil right, carrying profound political, social, and religious significance globally.

In 1989, Denmark pioneered legal recognition for same-sex couples by introducing "registered partnerships," granting nearly all the rights afforded to heterosexual marriages, though stopping short of labeling them as marriages.

A significant milestone was reached in December 2000 when the Netherlands became the first country to legalize same-sex marriage. The law came into effect on April 1, 2001, with Amsterdam's mayor officiating the first ceremonies<sup>8</sup>.

Since then, the legalization of same-sex marriage has rapidly expanded. By 2024, over 30 countries, including Belgium, Spain, Canada, South Africa, and the United States, have recognized same-sex marriage. Notably, Thailand became the first Southeast Asian country to legalize same-sex marriage in 2024<sup>9</sup>.

These developments reflect a global shift towards inclusivity and equal rights for LGBTQ+ individuals.

## THE INDIAN CONTEXT

In traditional Indian society, marriage is deeply rooted in religious and spiritual values, often prioritizing familial and communal obligations over individual desires. The institution of marriage is viewed as a sacred duty, particularly among Hindus, where it is considered a

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<sup>7</sup>[https://www.beta.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/marriagesinenglandandwalesprovisional/2021and2022?utm\\_source=chatgpt.com](https://www.beta.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/marriagesinenglandandwalesprovisional/2021and2022?utm_source=chatgpt.com)

<sup>8</sup> [https://www.pewresearch.org/religion/2007/07/11/samesex-marriage-redefining-legal-unions-around-the-world/?utm\\_source=chatgpt.com](https://www.pewresearch.org/religion/2007/07/11/samesex-marriage-redefining-legal-unions-around-the-world/?utm_source=chatgpt.com)

<sup>9</sup>[https://www.britannica.com/topic/same-sex-marriage/The-future-of-same-sex-marriage?utm\\_source=chatgpt.com](https://www.britannica.com/topic/same-sex-marriage/The-future-of-same-sex-marriage?utm_source=chatgpt.com)

sacrament rather than a personal choice. This perspective emphasizes fulfilling responsibilities to family and community, often at the expense of personal aspirations and interests. Individual preferences and needs are often secondary to the expectations of family, community, and tradition, reflecting a collectivist approach to marital decisions.

### **Historical perspective of same sex marriage:**

Marriage has undergone significant transformations throughout history. Initially, it centered on property transfer, with women often treated as possessions. Various forms of marriage existed, including polygamy in some biblical contexts. Over time, the institution has evolved, shaped by cultural, social, and economic factors. In the west, this evolution has led to the recognition of same-sex marriage, reflecting changing understandings of partnership, love, and legal rights.

### **SOCIETAL ACCEPTANCE OF HOMOSEXUAL MARRIAGE**

Between 2002 and 2019 numerous countries witnessed a significant surge in acceptance of homosexuality. Countries like South Africa and South Korea saw increases of 21 and 19 percentage points, respectively. India, which was first surveyed on this topic in 2014, recorded a 22 point increase. Mexico and Japan also experienced notable shifts, with acceptance rising from around 50 % to nearly 70%. Even in Kenya, acceptance grew from 1% to 14%. The survey also revealed that factors like age, education, income, gender, religion and political ideology influence opinions on homosexuality. Those affiliated with religious groups and individuals with right wing political views tend to be less accepting. Acceptance of homosexuality varies significantly across different demographics and countries.

Younger adults, educated individuals and those with higher incomes tend to be more accepting. Women are also more likely to accept homosexuality than men in some countries. Religion plays a substantial role, with those affiliated with religious groups generally being less accepting than unaffiliated individuals, often referred to as religious “nones”. Additionally, political ideology influences opinions, with those on the left more accepting than those on the right. Supporters of right -wing populist parties in Europe tend to be less accepting of homosexuality. It is also seen that a country’s wealth also correlates with an attitude towards homosexuality with wealthier and more developed economies exhibiting higher levels of acceptance. For instance, countries like Sweden and Germany, with high per

capita GDP show higher acceptance rates as compared to less wealthy countries like Nigeria and Kenya.

## LEGAL COMPLEXITIES

Marriage is a legally and socially recognized union between two people that establishes rights and obligations between them, their families, and society. Traditionally associated with love, companionship, and the creation of a family, marriage also carries legal, cultural, and sometimes religious significance. Marriage offers several advantages, including emotional support, companionship, and legal benefits such as tax advantages, inheritance rights, and healthcare access. It also brings social recognition and can provide a stable environment for raising children, with shared responsibilities easing the burden of daily life. However, marriage can also have downsides. Some individuals may feel a loss of personal freedom or independence, and if the relationship breaks down, the legal and financial implications of divorce can be challenging. Additionally, marriage may bring pressure to meet social expectations or navigate complex family dynamics, which can strain the relationship. It serves not only as a personal commitment but also as a social institution that helps structure society and provide stability.

If we talk about the marriage for same sex people it has certain complexities attached to it like:-

### ● Legal and Financial Protections:

Marriage provides same-sex couples with critical legal and financial benefits that are often unavailable through other forms of partnership. These include inheritance rights, hospital visitation privileges, joint tax filing, access to spousal health insurance, and more. These protections not only offer security but also contribute to greater financial stability and equality in day-to-day life.

### The provisions in this regard which are to be considered as follows:-

Section 4 of *Special Marriage Act, 1954* especially clause (c) which indicated that the couple who are eligible to marry will be heterosexual i.e. Male having the minimum age of 21 years and his counterpart female having minimum age of 18 years.

Again, Section 4 clause (c) of *Foreign Marriage Act, 1969* also stipulates the same age criteria of the intended couple i.e. 21 years and 18 years for the bridegroom and bride respectively.

Section 5 clause (iii) of *Hindu Marriage Act, 1955* also stipulates the age of 21 and 18 years of bridegroom and bride respectively.

Section 7 and 8 of *Hindu Adoption and Maintenance Act, 1956* provides for the capacity of Hindu male and female respectively in the matter concerning adoption of child wherein the consent of each other's living counterpart i.e. wife and husband as the case may be is required.

Hence after looking at the above mentioned provisions of the law it is evident that these legal provisions are neither gender neutral nor recognize homosexuals couples in express sense.

- **Parenting and Family Structure:**

For same-sex couples raising children, marriage offers vital legal recognition and protection. It helps establish both partners as legal parents, ensuring that their children are protected in cases of illness, death, or separation. Furthermore, children in families where parents are legally married tend to benefit from a more stable and secure environment, just like children in heterosexual married households.

- **Challenges and Ongoing Issues:**

Despite these advancements, same-sex couples may still face challenges. In some communities or countries, social resistance, discrimination, or legal loopholes continue to create obstacles. Additionally, the experience of marriage for same-sex individuals can be affected by other intersecting factors such as race, religion, location, and income level, which influence how accepted or supported they feel even within the institution of marriage.

- **Emotional and Psychological Well-Being:**

Marriage can have a profoundly positive impact on the mental health and emotional stability of same-sex individuals. Research has consistently shown that access to legal marriage is associated with lower levels of depression, anxiety, and stress among LGBTQ+ people. The ability to marry legally also reinforces a sense of legitimacy and personal validation, allowing individuals to feel that their love and commitment are recognized and valued by society.



- **Social Acceptance:**

The legalization of same-sex marriage plays a significant role in reducing societal stigma. When same-sex relationships are afforded the same legal recognition as heterosexual ones, it helps normalize those relationships in the public eye. Many LGBTQ+ individuals also experience improved family relationships after marriage, as some family members begin to view the union as more valid or respectable within traditional norms.

- **Lack of Civil Union Legislation**

India currently does not recognize civil unions or domestic partnerships, which could offer same-sex couples legal recognition and rights as an alternative to marriage. In contrast, many countries have adopted civil union frameworks or similar arrangements that grant same-sex couples essential legal protections, such as rights related to property ownership, medical decision-making, and inheritance. In the absence of legal recognition for same-sex marriages, there is growing advocacy in India for the establishment of civil union laws to address the legal gaps faced by LGBTQ+ couples and provide them with much-needed protections.

- **Adoption Rights**

In India, adoption regulations primarily governed by the Central Adoption Resource Authority (CARA) typically favor heterosexual married couples as already mentioned earlier under the legal provisions of *Hindu Adoption and Maintenance Act, 1956*. Due to the lack of legal recognition for same-sex relationships, same-sex couples face significant barriers when attempting to adopt children jointly. Even single LGBTQ+ individuals often encounter bias and heightened scrutiny during the adoption process, limiting their ability to provide a loving home to children in need. Advocates are pushing for reforms to make adoption laws more inclusive, ensuring that both same-sex couples and single LGBTQ+ individuals have equal opportunities to adopt and form families.

- **Violation of Fundamental Rights**

Across many countries, including India, the LGBTQ+ community has historically faced significant limitations on their rights due to entrenched social biases and restrictive legal frameworks. Although recent legal progress has been made, substantial challenges persist,

and the pursuit of equal rights continues to encounter resistance. In India, the struggle for LGBTQ+ equality is grounded in several key provisions of the Constitution-namely Articles 14 (*Right to equality*), 15(1) (*Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth*), 19(1)(a) (*Right to freedom of speech and expression*), and 21 (*Right to life*) which guarantee fundamental rights that LGBTQ+ individuals are still often denied in practice.

- **Legal challenges for LGBTQ individuals in Same-Sex abuse cases**

The LGBTQ community often faces challenges in the application of various sections of the *Indian Penal Code* (IPC), or the BNS which were originally designed to address offences involving cisgender, heterosexual individuals. Sections such as 8, 9, and 10 of the IPC define gender in binary terms-referring only to “man” and “woman” and do not account for individuals with diverse sexual orientations or gender identities. This creates significant legal gaps when it comes to addressing issues like sexual harassment or domestic violence within same-sex relationships. For instance, if a person from the LGBTQ community experiences abuse from a same-gender partner, the current framework may not adequately recognize or protect their rights, as it does not explicitly include or define such relationships. As a result, despite the legal recognition of same-sex partnerships in certain contexts, the absence of inclusive language and definitions within the IPC/BNS complicates the access to justice and legal recourse for LGBTQ individuals facing gender-based violence within their own communities.

## **JUDICIAL DEVELOPMENT**

It was Massachusetts Supreme Judicial Court that ignited a nationwide debate in the late 2003 in its judgement that the State must allow gay and lesbian couples to marry. And in no time same sex marriage became a major national issue. Over the next year the ensuing battle over gay marriage could be heard in the halls of U.S. Congress in dozens of State legislatures. Later on in march 2008 in California a high profile case challenging the constitutionality of a state law banning same sex marriage was argued before the state's highest court. Like the opposers of same sex marriage the supporters are of belief that same sex marriage should be legalised as gay and lesbian couples should be treated equally than their heterosexuality and that they should be allowed to marry anyone of their choice regardless of their gender. While the

opposers of this type of marriage asserts that marriage between a man and a woman is the bedrock of a healthy society.

It was in the year 2023, april when the Honourable Supreme Court began hearing petitions seeking the legalisation of same sex marriage under the *Special Marriage Act, 1954*. But it all started in the year 2022, November 25 when the two same sex couples approached the Supreme Court to request the recognition of same sex marriage. Following it in December, 2022 the Supreme Court issued notices for a plea by another same sex couple, consisting of an Indian and a US citizen seeking recognition of their marriage under *Foreign Marriage Act, 1969*.

In the landmark case of *Supriyo v. Union of India*<sup>10</sup> This case started from a *Writ petition* filed in November 2022 by two same sex couples- Supriyo Chakraborty and Abhay Dang and Parth Mehrortra and Uday Raj Anand who challenged the constitutional validity of section 4(c) of *Special Marriage Act, 1954*. The petitioners formulated that this provision limits the scope of marriage to heterosexual relationships which violates their fundamental rights to equality, non-discrimination, privacy and dignity. The case progressed with the transfer of similar petitions from various high courts, all collectively challenging the exclusion of same sex couples from the scope of marriage. On March 13, 2023 a three judge bench of the Supreme Court led by the then Chief Justice D.Y. Chandrachud referred the case to a 5 judge Constitution Bench for a comprehensive examination. After 10 days of hearing on May 11th 2023 the five judge bench reserved its judgement which was pronounced on October 17, 2023. It was a mixed bag of judgement reflecting the court's attempt to strike a balance between the rights of the LGBTQIA+ community and limitations of its own institutional role. Through this case, the Honourable Supreme Court advanced a progressive and transformative body of jurisprudence.

In *Lata Singh v. Union of India*<sup>11</sup> the hon'ble Supreme Court held that the petitioner had the right to choose her marriage partner, and that inter-caste marriages are not prohibited by law. The court further drew on the interpretation established in *Justice K.S.Puttaswamy (Retd.) v. Union of India*<sup>12</sup> that while upholding the right to privacy under Article 21 it was pointed out

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<sup>10</sup> [2023] 16 S.C.R. 1209.

<sup>11</sup> 2006 (5) SCC 475.

<sup>12</sup> (2017) 10 SCC 1.

that the right to marry is a personal choice which comes in the extent of dignity and privacy of the individual.

The Apex Court in *Shakti Vahini v. Union of India*<sup>13</sup> held that the consensual choice of a partner is an expression of the freedom of choice guaranteed under Article 19 and 21 of the Constitution of India.

Subsequently, in *Shafin Jahan v. K.M. Asokan*<sup>14</sup> the hon'ble Supreme Court affirmed that the right to marry a person of one's own choice is an essential component of Article 21.

The same was in the case of *Laxmibai Chandaragi B. v. State of Karnataka*<sup>15</sup> it was similarly held that the right to marry a person of one's own choice is an integral part of

Article 21. Beyond these judicial precedents, India is also a signatory to the Universal Declaration of Human Rights. Article 16(1) of UDHR, 1948 mentions that men and women of full age without any limitations due to race, nationality or religion have the right to marry and to found a family. It recognises the right to marry as a fundamental right.

Though the above mentioned precedents and international covenants imply a fundamental right to marry, this specific question was not answered by court. The court made a narrow distinction between the right to marry and the right to choose partner and refused to engage with international instruments while deciding this issue. The supreme court's judgement in *Supriyo v. UOI*<sup>16</sup> while recognising the rights of LGBTQIA+ community left the burning issue of same sex marriage unresolved. This placed onus on legislature to undertake certain steps and making certain legal reforms which are necessary to address this long standing demand.

Every individual has the right to freely choose their sexual or gender identity, and consequently, their choice of sexual partner. In *NALSA v. Union of India*<sup>17</sup>, Hon'ble Court affirmed in this case that the right to self-identify one's sex or gender is a fundamental aspect of personal autonomy and identity. Sexual autonomy and the freedom to select a partner are

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<sup>13</sup> (2018) 5 SCALE 51.

<sup>14</sup> AIR ONLINE 2018 SC 1136.

<sup>15</sup> AIR ONLINE 2021 SC 85.

<sup>16</sup> [2023] 16 S.C.R. 1209.

<sup>17</sup> AIR 2014 SC 1863.

intrinsic to a person's sense of self and individuality. As societies around the world increasingly acknowledge evolving concepts of conjugal relationships, the law must evolve in tandem, serving to uphold rather than undermine human dignity and personal freedom.

Also, consensual sexual relationships among same-sex people were decriminalized by the Supreme Court's landmark judgment in *Navtej Singh Johar v. Union of India*<sup>18</sup>, which struck down Section 377 of the Indian Penal Code, 1860. This historic ruling has had a profound psychological and legal impact on LGBTQ+ individuals, enabling them to live more openly and without the fear of criminal prosecution.

Furthermore, looking at the approaches of the courts worldwide, the 1999 case of *M v. H*<sup>19</sup> becomes very significant to mention, which was adjudicated in Ontario, the case was more than just legal definitions; rather it was about the lives and shared home of a lesbian couple. The case involved two women who had lived together as partners for ten years before separating. Following their split, M sought spousal support under Ontario's Family Law Act, challenging the existing definition of "spouse." The court found that the Act's exclusion of same-sex couples conflicted with the Canadian Charter of Rights and Freedoms, which guarantees equality for all individuals. The Supreme Court of Ontario granted the legislature six months to amend the law to recognize same-sex couples as spouses. The ruling sent a powerful message: *love is love, and the law must evolve to reflect and protect the rights of LGBTQ+ individuals.*

*"The exclusion of same-sex partners promotes the view that M and individuals in same-sex relationships generally are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples without regard to their actual circumstances. Such exclusion perpetuates the disadvantages suffered by the individuals in same-sex relationships and contributes to the erasure of their existence."*

Again the 2015 U.S. Supreme Court decision in *Obergefell v. Hodges*<sup>20</sup> was a pivotal moment in the advancement of marriage equality for same-sex couples. In a narrow 5-4 ruling, the Court determined that the Fourteenth Amendment of the US Constitution guarantees same-

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<sup>18</sup> 2018 INSC 790.

<sup>19</sup> 2 S.C.R. 3.

<sup>20</sup> 576 U.S. 644 (2015).

sex couples the right to marry, thereby mandating that all states both license and recognize such marriages.

The Court affirmed that marriage is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex cannot be denied their right to liberty. This decision underscored that denying same-sex couples the right to marry would violate their constitutional rights. As a result of this landmark ruling, same-sex marriages became legally recognized across all 50 states, ensuring uniformity in marriage laws and providing same-sex couples with the same legal rights and protections afforded to opposite-sex couples.

## **SUGGESTIONS AND CONCLUSION**

The recognition of same-sex marriage is a crucial step towards ensuring that all individuals are treated equally under the law. It embodies fundamental human rights principles and promotes social justice by challenging discriminatory practices.

The right to marry is a basic human right of every citizen and should be afforded to everyone, no matter which sex they belong to. Refusing same sex couples the right to marry violates their equality and dignity. Legalizing same-sex marriage helps to promote equality and non-discrimination, ensuring that all individuals have the same opportunities and protections under the law. It affirms that love and commitment are not exclusive to heterosexual couples.

The recognition of same-sex marriage is a significant step towards social justice, as it challenges discriminatory attitudes and practices. It fosters a more inclusive society where all individuals, regardless of their sexual orientation, can enjoy equal rights and recognition.

In India, while homosexuality was decriminalized in 2018, same-sex marriage remains unrecognized. As already mentioned the Supreme Court, in its 2023 verdict, acknowledged the rights of queer individuals but stated that legalizing same-sex marriage falls under the purview of the legislature. Until now, this issue is left in the lurch. This highlights the ongoing struggle for marriage equality and the need for legislative action to ensure equal rights for all citizens. India's LGBTQ+ community has experienced several pivotal moments throughout its history, transitioning from prolonged periods of discrimination and criminalization to increasing legal recognition and social acceptance. A major turning point came in 2018 when

Section 377 was decriminalized, marking a significant step toward a more inclusive society. However, full equality remains elusive. Despite legal progress, neither same-sex marriages nor civil unions are legally recognized in India, denying LGBTQ+ individuals crucial rights and protections. To uphold the constitutional principles of equality and non-discrimination, legislative action is essential to guarantee equal rights for same-sex couples.

The demand for legal validation and recognition of same-sex marriage is gaining momentum across international borders, emerging as a prominent and often contested topic among various societal groups. Globally, there has been a progressive shift, with an increasing number of countries acknowledging same-sex unions-whether through civil unions, partnership agreements, or full marriage rights-on par with heterosexual couples. However, a significant portion of the queer community worldwide continues to face denial of basic fundamental rights, persistent threats of violence, sexual and physical abuse, and widespread discrimination by dominant societal structures. Extending legal recognition to same-sex unions would represent a critical step toward building a more equitable and just society.

In our concerned opinion the *Special Marriage Act, 1954* stands as a strong example of inclusivity, offering a legal framework that allows individuals to marry regardless of gender, caste, religion, or creed. Extending this law to include same-sex marriages would be a significant step toward building a society that values freedom of choice and celebrates diversity. As India continues to progress, it is vital for lawmakers, political leaders, and the broader public to recognize the importance of granting marriage rights to all individuals, regardless of their gender or sexual orientation. Such a move would not only uphold the principles of equality and human rights but also convey a powerful message of progress, acceptance, and unity. By embracing diversity and safeguarding the rights of every citizen, India can truly realize its constitutional promise of justice, liberty, equality, and fraternity for all.

Hence, in our opinion the legislature should take the command of this job and do the needful by extending the legal protection and recognition to the said community by bringing the necessary amendment in the civil law matters and bring inclusivity.

As rightly said by Albert Einstein and we quote that “*The world will not be destroyed by those who do evil but by those who watch them without doing anything.*”