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Embracing Homosexuality in Marriage: A Contemporary Perspective

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Homosexuality is a natural sexual orientation marked by romantic, emotional, and sexual attraction between individuals of the same gender. It is an intrinsic aspect of one's identity, not a choice or something that can be altered. However, homosexual individuals have historically faced a range of challenges and discrimination due to their sexual orientation. One of the most pervasive problems is social stigma resulting in prejudice, harassment, and even acts of violence. Additionally, some societies have deemed homosexual behavior as immoral and sinful. This research paper examines the issue of same-sex marriage in India, focusing on its legal, social, and human rights implications. Despite significant progress in LGBTQ+ rights globally, India still struggles with recognizing and legalizing same-sex unions as it had partially decriminalized Section 377 in Navtej Singh Johar v Union of India (2018), but the ruling was a significant milestone for LGBTQ+ rights in the nation. The paper explores the historical context, current legal framework, societal attitudes, and human rights considerations surrounding same-sex marriage in India. By analyzing existing research, legal cases, and social perspectives, this paper advocates for equal rights for all individuals, regardless of sexual orientation, and aims to analyze and determine the challenges that homosexuals experience in India, as well as the necessity of special legislation for governing same-sex marriages in India.

Keywords: *homosexuality, same-sex marriage, legalized, decriminalized, LGBTQ+.*

INTRODUCTION

'Homosexuality' according to Merriam Webster Dictionary means "*Characterized by sexual or romantic attraction to, or sexual activity with, people of the same sex; involving or relating to same-sex desire or sexual activity.*"¹

Initially, 'homosexual' was the commonly accepted term for same-sex desire and individuals, especially men, in the first half of the 20th century. However, since the 1960s, 'gay' has become the preferred term for many same-sex interested men due to its less formal and clinical connotation or being associated with medical or psychiatric conditions. 'Lesbian' is used when discussing same-sex attraction among women. In the 1990s, activists adopted the acronym LGB (lesbian, gay and bisexual) to represent their community. Over time, the term 'LGBT' has evolved to be more inclusive, with additional letters added to represent other marginalized sexual orientations and gender identities.²

Homosexuality has a complex and evolving history in India. Historically, Indian culture has recognized various sexual orientations and gender identities, as evidenced by ancient writings and images of same-sex couples and transgender people. Currently, India has an LGBTQIA+ population of 2.5 million according to government estimates.³ Despite its significant strength, the community has always been the victim of discrimination and social stigma. The decriminalization of the draconian Section 377⁴ in 2018 was greatly applauded and seen as a sign of hope for improving the community's status in Indian society. But even now, five years later, the community still fights for basic rights like adoption, inheritance, and marriage.

¹ 'Homosexual' (Merriam Webster) <<https://www.merriam-webster.com/dictionary/homosexual>> accessed 10 September 2023

² Erin Blakemore, 'From LGBT to LGBTQIA+: The evolving recognition of identity' (National Geographic, 20 October 2021) <<https://www.nationalgeographic.com/history/article/from-lgbt-to-lgbtqia-the-evolving-recognition-of-identity>> accessed 10 September 2023

³ 'India Has 2.5m Gays, Government Tells Supreme Court' (BBC News, 14 March 2012) <<https://www.bbc.com/news/world-asia-india-17363200>> accessed 10 September 2023

⁴ Indian Penal Code 1860, s 377

DELVING INTO SEXUAL IDENTITY AND SAME-SEX RELATIONSHIPS

Sexual identity refers to a person's sense of sexual orientation and desire. It is a very personal and subjective part of human identity that includes one's emotional, romantic, and sexual desires for others.⁵ Sexual identity is an essential component of who we are as people, influencing our relationships, self-image, and overall well-being.

Sexual identity and same-sex relationships are inextricably linked. Same-sex relationships involve emotional, romantic, and sexual bonds between people of the same gender and sex. They are founded on mutual attraction, affection, and commitment, much like relationships between people of opposite sexes. The letters 'LGBT' (LGBTQIA+) are used to describe sexual orientation. This evolving acronym stands for 'lesbian, gay, bisexual and transgender'.⁶

It is critical to understand that sexual identity is neither a choice nor the outcome of external influences. It is an inherent component of a person's personality that develops and solidifies during adolescence or early adulthood. However, it is crucial to highlight that in many nations, same-sex partnerships have historically encountered social, legal and cultural barriers. Individuals in same-sex partnerships have frequently faced prejudice, discrimination and unequal treatment, resulting in marginalization and restricted rights.

INTERNATIONAL PERCEPTION

The Global View: Homosexuality has been a subject of varying perspectives and attitudes throughout history and across cultures. It is crucial to recognize that opinions towards homosexuality vary greatly between countries and even within countries. Furthermore, social attitudes are always changing, and what is true today may not have been true in the past or might change in the future. The legal position of homosexuality differs around the world. Same-

⁵ 'Sexual Orientation and Gender Identity Definitions' (*Human Rights Campaign*)

<<https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions>>
accessed 10 September 2023

⁶ 'Lgbt Abbreviation - Definition' (*Oxford Learner's Dictionary*)

<<https://www.oxfordlearnersdictionaries.com/definition/english/lgbt#:~:text=LGBT,abbreviation,lesbian%2C%20gay%2C%20bisexual%20and%20transgender>> accessed 10 September 2023

sex relationships are fully recognized and protected by law in several countries, allowing LGBTQIA+ people equal rights and access to marriage or civil unions. Argentina, Belgium, Brazil, Netherlands, Canada, New Zealand, and the United Kingdom are a few examples.

On the other side, homosexuality is still criminalized in several nations, frequently under the guise of cultural, religious, or traditional values. Laws range from those prohibiting same-sex relationships to those criminalizing same-sex sexual activity, with severe penalties such as imprisonment, flogging, or even the death sentence. These countries are primarily concentrated in regions such as the Middle East, Africa and parts of Asia.⁷

LGBT Rights at the United Nations: International organizations such as the United Nations have indeed made significant strides in passing regulations and advocating for LGBTQ rights worldwide. However, despite these advancements, there remains a persistent challenge from member nations that are resistant to addressing their records on LGBTQ rights often impeding the adoption of official statements within the United Nations. In response to this resistance, informal groups like the LGBTI Core Group, Non-governmental organizations (NGOs), and other stakeholders play a crucial role in amplifying the voices of marginalized communities and promoting progressive policies by fostering dialogue, organizing events and lobbying for change.

The Universal Declaration of Human Rights, established by the UN in 1948, serves as the bedrock for safeguarding the rights of all people, regardless of their sexual orientation or gender identity. It emphasizes fundamental principles like non-discrimination, equality, and freedom from discrimination based on any factor. To advance these principles, the UN initiated the 'Free & Equal' campaign in 2013, aiming to raise global awareness and acceptance of LGBT rights. This campaign encompasses educational programs, public awareness initiatives, and advocacy work.⁸ The UN also appointed independent experts to address issues related to violence and

⁷ 'Homosexuality: The countries where it is illegal to be gay' (*BBC News*, 31 March 2023) <<https://www.bbc.com/news/world-43822234>> accessed 11 September 2023

⁸ 'UN Free & Equal: a global campaign to promote equal rights for LGBTI people' (*United Nations Human rights office of High Commissioner*, 2013) <<https://www.ohchr.org/en/sexual-orientation-and-gender-identity/un-free-equal-global-campaign-promote-equal-rights-lgbti-people>> accessed 11 September 2023

discrimination based on sexual orientation and gender identity. These experts offer valuable insights and recommendations to UN bodies, helping to improve the situation of LGBT individuals in various regions.⁹

On September 29, 2015, a collective of 12 United Nations agencies (including ILO, OHCHR, UNDP, UNESCO, UNHCR, UNICEF etc.) released a document titled 'Ending Violence and Discrimination Against Lesbian, Gay, Bisexual, Transgender and Intersex People' to eradicate violence directed towards the LGBT community and acknowledges the discriminatory treatment faced by them as a violation of international human rights principles.¹⁰

Public Acceptance: Public acceptance of the LGBTQ+ community has significantly increased over the past few decades. While perceptions vary across different countries, cultures, and generations, there has been a rise toward greater acceptance and support for LGBTQIA+ rights and equality.

According to the data released by the nonpartisan Pew Research Centre, it is evident that attitudes towards homosexuality have been undergoing significant changes in several surveyed countries since 2002.¹¹ In numerous nations, there has been a notable rise in the acceptance of homosexuality. For instance, South Africa witnessed a substantial 21-point increase in acceptance since 2002, while South Korea experienced a 19-point increase over the same period. Similarly, India observed a significant 22-point increase since 2014. The 2019 survey, encompassing 34 countries, revealed that a median of 52% of respondents agreed that homosexuality should be accepted, while 38% believed it should be discouraged. Regionally, Western Europe and North America displayed the highest levels of acceptance towards

⁹ 'Independent Expert on sexual orientation and gender identity' (*United Nations Human Rights office of High Commissioner*, 2016) <<https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity>> accessed 11 September 2023

¹⁰ 'Ending Violence and Discrimination Against Lesbian, Gay, Bisexual, Transgender and Intersex People' (*United Nations Human Rights office of High Commissioner*, 2015) <https://www.ohchr.org/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF> accessed 11 September 2023

¹¹ Juhie Bhatia, 'Global Acceptance of LGBTQ On the Rise' (*U S News*, 25 June 2020) <<https://www.usnews.com/news/best-countries/articles/2020-06-25/lgbtq-acceptance-growing-in-us-and-other-countries-over-time>> accessed 11 September 2023

homosexuality. However, the study also indicates that public opinion on the acceptance of homosexual rights remains divided based on factors such as age, education, wealth, and religion.¹²

INDIAN PERSPECTIVE

History of Homosexuality in India: Same-sex relationships in India have a complex historical context that has evolved. It is important to note that historical attitudes towards same-sex relationships in India varied across different regions and periods, and there is no singular narrative that encompasses the entire subcontinent. Some of the instances of same-sex relationships can be found in ancient books, art, and cultural practices.

1. Vedic Period (1500BCE-500BCE): Rigveda has an explicit mention of the concept of 'Ardhanarishvara' embracing a form of Shiva and Parvati in one body.

2. The period of Dharamsutras and Dharamshastras (600 BCE-200CE): The mention of the concept of homosexuality is found in the laws of Manu which are against the concept and provide certain types of punishment for practicing it.

3. References from Hindu text:

- **Instances from Ramayan:** In Valmiki Ramayan there was a mention of kissing of Two Rakshasa which lord Hanuman saw while returning from the territory of Lanka. In another instance, it is said that King Bhagirat who was created by bringing river Ganga on Earth was born out of the love of two mothers.
- **Instances from Mahabharata:** A character in this epic named Shikhandi, who was bestowed with the responsibility of the death of Bhishma is considered to be a transgender Warrior.¹³

¹² Jacob Poushter and Nicholas Kent, 'The Global Divide on Homosexuality Persists' (*Pew Research Center*, 25 June 2020) <<https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-persists/>> accessed 11 September 2023

¹³ Ruth Vanita, 'Wedding of Two Souls: Same Sex Marriage and Hindu Traditions' (2004) 20(2) *Journal of Feminist Studies in Religion*

4. Inscribed view of the concept in Khajuraho site: In this site, one of the pillars depicts scenes of men exposing genitals to other men and women being embraced and showing love to another woman. The site was built and is considered to be a legacy of the Chandela dynasty. In some pillars, the concept of bisexuality was also embraced, where it shows a 'man standing on his head and pleasuring three women, which further hints at bisexuality as women seem to pleasure one another as well'.¹⁴

5. Kamasutras: There have been references in the book regarding sexual activities like oral sexual acts (Anparistha) and 'Tritiya Prakriti'. The book does not favor the above sexual activities and concepts.

6. Medieval Period: In this period, the concept of homosexuality became more discussed but all its references under literature or poems are not considered to be religious literature but rather an opinion and expression of an author. During Mughal rule, many instances were recorded like the tale of 'Sarmad Kashani' who was later beheaded for falling in love with a Hindu boy.¹⁵

7. Colonial Period: With the advent of the colonial era in the Indian subcontinent, the Victorian philosophy was propagated and advocated which was not favoring homosexuality and same-sex marriage. The enactment of IPC containing section 377 prohibiting and punishing the act of unnatural offenses puts a restraint on the concept of same-sex marriage.¹⁶

All the above references some being in favor and some being against the concept of same-sex marriage and homosexuality prove that these practices were prevalent in ancient times and the concept is not a Western trend as such which is usually propagated in present times.

<<https://go.gale.com/ps/i.do?p=LitRC&u=anon~7c4dcbb&id=GALE|A139107488&v=2.1&it=r&sid=sitemap&asid=849197ab>> accessed 11 September 2023

¹⁴ Prabhash Dutta, 'Homosexuality in ancient India: 10 instances' (*India Today*, 10 July 2018)

<<https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10>> accessed 11 September 2023

¹⁵ Deepanshi Mehrotra, 'The Pre-Colonial History of Homosexuality in India' (*Lawctopus*, 29 June 2021)

<<https://www.lawctopus.com/academike/history-of-homosexuality-in-india/>> accessed 11 September 2023

¹⁶ *Ibid*

LEGAL FRAMEWORK FOR SAME-SEX RELATIONSHIPS IN INDIA

Section 377 - During British colonial rule, laws criminalizing homosexuality were enacted. In 1860, Section 377 of the Indian Penal Code rendered 'unnatural offenses' such as same-sex sexual activities illegal. Even after India attained independence in 1947, this law remained in effect.

S.377 of The Indian Penal Code,1860 states, "*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 for fine.*"¹⁷

This clause was added to make sodomy and bestiality punishable offenses. Such activities were regarded as a crime or sin, as well as a violation of our society's fabric and ethos. In an unexpected turn of events, the Supreme Court of India reviewed the matter in September 2018 and found Section 377¹⁸ unconstitutional in the Navtej Singh Johar v Union of India¹⁹ case. The court recognized LGBTQ+ people's rights and maintained their rights to equality, privacy and dignity. This judgment effectively decriminalized consenting adult same-sex relationships. While same-sex relationships are no longer criminalized, India does not currently have a statute that recognizes same-sex marriages or civil unions. When it comes to inheritance, adoption or spousal benefits, same-sex couples are not entitled to the same legal protections, privileges and rights as heterosexual couples.

Transgender Persons (Protection of Rights) Act 2019: In 2019, the Indian Parliament passed the Transgender Persons (Protection of Rights) Act, to safeguard the rights and well-being of transgender individuals in India. Despite its positive intent, this legislation has faced criticism from various segments of the transgender community and human rights activists.

This law defines transgender persons as those whose gender identity does not align with the sex assigned to them at birth²⁰. Furthermore, it requires the government to implement measures for

¹⁷ Indian Penal Code 1860, s 377

¹⁸ *Ibid*

¹⁹ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1

²⁰ Transgender Persons (Protection of Rights) Act 2019, s 2(k)

the betterment and progress of transgender individuals, encompassing healthcare, education, and skill development programs. Under the act, specific penalties are outlined for these offenses, making it clear that such actions will not be tolerated and that there are legal consequences for those who engage in discriminatory, hateful or violent behavior toward transgender people. These provisions reflect a broader commitment to fostering inclusivity and equality within society.

Reservations for Transgender People: In the case of the National Legal Services Authority v Union of India²¹, the Supreme Court of India ruled that transgender people belong to the third gender. As a result of this declaration, transgender people are now eligible for reservations under India's quota system. Transgender people have the right to economic and educational accommodations under the Indian Constitution.²²

THE PLIGHT OF INDIA'S LGBT COMMUNITY

The LGBT community faces numerous challenges and obstacles worldwide, including in India. Members of this community often encounter social stigma, discrimination, and a lack of legal protections. These problems can profoundly impact their lives, relationships, and overall well-being. The struggle for recognition of their sexual orientation, the pursuit of equal rights, and the freedom to openly embrace their gender preferences remains an ongoing and formidable challenge for members of the LGBT community, particularly within the context of family, home, and educational environment.

Challenges Encountered by India's LGBT Community and its Impact: The problems faced by the LGBT community in India are diverse and multifaceted. Deep-seated social prejudices, rooted in cultural and religious beliefs, contribute to the challenges experienced by LGBT individuals. Homophobia, transphobia and negative stereotypes can lead to exclusion, harassment and discrimination.

²¹ *National Legal Services Authority v Union of India* AIR 2014 SC 1863

²² Aashank Dwivedi, 'Problems Encountered by LGBT Youth in India' (*The Times of India*, 12 September 2022) <<https://timesofindia.indiatimes.com/readersblog/aashank-dwivedi/problems-encountered-by-lgbt-youth-in-india-44851/>> accessed 12 September 2023

According to a UNESCO Report, LGBT students face a range of forms of mistreatment, including teasing, bullying, social isolation, cyberbullying, physical and sexual assault, and even death threats. These incidents occur in various settings such as classrooms, playgrounds, online platforms, and during commutes to and from school.²³ All These issues can affect various aspects of their lives, including their relationships, access to healthcare, education, employment opportunities, and legal recognition, which gives rise to exclusion and prejudice like earlier school desertion, leaving their family and home, no access to regular employment and having fewer opportunities than others, unable to access a range of services, rights, mobility and relocating to new regions.²⁴

The Harrowing Reality of Honor Killings & Violence: Apart from heated debates over the internet, ‘Honor killings’ and violence against homosexual individuals are two deeply concerning and tragic manifestations of discrimination and prejudice in some areas of rural India. These are the heinous acts committed in the name of preserving a family's or community's perceived honor, that disproportionately affect LGBTQ+ individuals who may be perceived as bringing shame to their families by asserting their autonomy, pursuing relationships outside of cultural or religious expectations, or openly identifying as LGBTQ+. In some instances, lesbian women may experience sexual assault as a sanctioned corrective measure, often perpetrated by their family members. Understanding the problems faced by the LGBT community is crucial for fostering inclusivity, promoting equality, and advocating for their rights.

LGBTQIA+: DEMOGRAPHIC CHARACTERISTICS

“Beyond the 2.5 million LGBTQ population enumerated by the Ministry of Health and Family Welfare in 2012, activists have estimated the population of LGBTQ people in India to be at least 10 percent of the entire population, which comes to 135 million. This has been calculated using global estimates, tracing back to the pioneering ‘Kinsey Reports’ on sexuality conducted by

²³ ‘The inclusion of LGBT people in education settings of paramount importance to leaving no one behind’ (*Office of the United Nations High Commissioner for Human Rights*, 2 October 2019)

<<https://www.ohchr.org/en/statements/2019/10/inclusion-lgbt-people-education-settings-paramount-importance-leaving-no-one>> accessed 12 September 2023

²⁴ Dwivedi (n 22)

American biologist Alfred Kinsey in the mid-20th century. Since then, many other estimates based in the West have placed the number as above 10 percent as well.”²⁵

June is internationally recognized as Pride Month, and to commemorate this occasion, Ipsos surveyed 27 countries to explore LGBTQ+ issues. The survey findings indicate significant support for homosexual rights among urban Indians. Specifically, 66% of urban Indians believe that same-sex couples should possess the same rights to adopt children as heterosexual couples. Furthermore, the report breaks down the sexual orientations among Indians and shows that 3% identify as homosexual, 9% as bisexual, 1% as pansexual, and 2% as asexual. Urban Indians supported the idea of same-sex marriage in at least 4 in 10 (44%) and that they should be given some sort of legal status but not be able to wed (14%). Only 18% were against it, while 25% opted not to comment. It is interesting to note that 56% of urban Indians claim their opinions on homosexuality have changed from five years ago.²⁶

“We see a growing acceptance and support for the LGBTQ+ community among urban Indians, and most of the changes have come about after the doing away of article 377 by the apex court; the stigma has started to wane with more people coming out in the open about their sexual orientation and support and acceptance increasing, says Amit Adarkar, CEO, Ipsos India.”²⁷

Attitudes towards LGBTQIA+ visibility and Acceptance: “Almost 2 in 3 urban Indians (59%) have no qualms about LGBTQ people being open about sexual orientation or gender identity with everyone; 1 in 2 urban Indians (50%) also have no problems with openly lesbian, gay and bisexual athletes in sports teams, 55% of urban Indians (highest globally) approve of more LGBTQ characters on TV, in films and advertising but only 39% urban Indians approve of

²⁵ Chahat Rana, ‘In Another Realm’ (*The Indian Express*, 26 January 2020)

<<https://indianexpress.com/article/india/in-another-realm-lgbtq-community-networking-population-in-india-stigma-around-homosexuality-6235390/>> accessed 12 September 2023

²⁶ Madhurima Bhatia, ‘Significant Support for Rights of LGBTQ+ among Urban Indians: Ipsos LGBTQ+ Pride 2021 Global Survey’ (*Ipsos*, 29 June 2021) <<https://www.ipsos.com/en-in/significant-support-rights-lgbtq-among-urban-indians-ipsos-lgbtq-pride-2021-global-survey>> accessed 12 September 2023

²⁷ *Ibid*

LGBTQ people displaying affection in public (PDA), kissing/ holding hands. Only 37% of global citizens approve and only 5% of Russians approve.”²⁸

‘Mindset change for urban Indians is coming about, in accepting the LGBTQ+ community, but PDA is a cultural thing and there is discomfort with openly displaying affection even for straight individuals, not just for LGBTQ’ - adds Adarkar.²⁹

India's most friendly LGBTQIA+ destinations: India has made significant progress in terms of LGBTQ+ rights and acceptance in recent years. While there are no specific LGBTQ+-exclusive destinations in India, several cities and regions are known for being LGBTQ+-friendly. For instance, Bengaluru has a very open work atmosphere for everyone and is fairly receptive to the rainbow community as in 2013, the Silicon City organized the first-ever Lesbian Dykes on Bikes March in Bangalore Pride. Moreover, every year, Mumbai hosts events like the Queer Film Festival and the Queer Azaadi Mumbai Pride March, which serve as annual celebrations aimed at expressing solidarity and demonstrating support for the LGBTQIA+ community.

Furthermore, the Chennai International Queer Film Festival which only addresses LGBTQ+ issues, was established in the city in 2004. These gatherings serve as platforms for enlightenment, education, and the unification of like-minded individuals and are crucial for fostering inclusivity, promoting equality, and advocating for their rights. Additionally, it is worth noting that Tamil Nadu was the pioneering Indian state in recognizing the rights of transgender individuals, a fact that may not be widely known.³⁰

Social and Political Debates: The debate surrounding same-sex marriage in India has emerged as a significant social and political issue in recent years. With a diverse population and a complex cultural and religious landscape, the topic has sparked intense discussions and raised profound questions about individual rights, social norms, and the role of the state. While India has made

²⁸ *Ibid*

²⁹ *Ibid*

³⁰ Priya Srivastava, ‘Pride Month: India’s Most-Friendly LGBTQ+ Destinations’ (*Times of India*, 07 June 2022) <<https://timesofindia.indiatimes.com/travel/destinations/pride-month-indias-most-friendly-lgbtq-destinations/photostory/92064094.cms>> accessed 12 September 2023

significant strides in recognizing and protecting the rights of LGBTQ+ individuals, the issue of legalizing same-sex marriage remains a subject of intense debate. This paper explores the different dimensions of arguments on same-sex marriage in India, examining the contrasting viewpoints, evolving societal attitudes, and the legislative landscape surrounding this contentious topic.

Arguments against Same-Sex Marriage: This argument revolves around matters of faith rather than politics. Numerous individuals, especially in India, express their disapproval, asserting that it goes against the natural order and is morally and ethically objectionable. Those who are against it draw upon religious and inherent moral principles to support their stance. Some individuals categorize such relationships as unnatural due to their inability to produce offspring.

“Why break God’s law by allowing gay marriage if nature wanted same-sex people to live together, there would only be one sex rather than different sexes. Our society is based on opposite-sex marriage. If gay marriage is OK, then why can't I marry my cousin, or my sister, or my cat? Don't I have the same rights as gays or are they now above the rest of us? Don't forget that the law is specific on this. It was created to keep the fabric of society together. It goes against the laws of the land that have been used for hundreds of years and were based on the commandments.”³¹ Here are some of the arguments being made:

- **Unnatural:** One of the initial arguments stated against homosexuality was that it is unnatural, which means that it did not arise naturally but is an acquired trait. As a result, homosexuals are deemed sacrilegious when they enter into marriage, which is regarded as holy in our society. “How homosexuals have brought the talk of sex to the roads makes

³¹ Vidhan Maheshwari, ‘Same Sex Marriage: Is It the Time for Legal Recognition’ (*Legal Service India*) <<https://www.legalserviceindia.com/articles/semar.htm>> accessed 12 September 2023

people uncomfortable. It's unnatural. Our society doesn't talk about sex. Heterosexuals don't talk about sex. It's a private matter."³²

- **Traditional and Cultural Values:** Some people argue that homosexuality goes against traditional and cultural values in India. They believe that societal norms and religious teachings condemn same-sex relationships.
- **Religious Beliefs:** Certain religious groups in India hold conservative views on homosexuality and consider it to be a sin or immoral based on their interpretations of religious texts.

Arguments in Favour of Same-Sex Marriage: It is important to acknowledge that consensual sexual relationships of any form between adults conducted in private are a matter of individual choice. It is their responsibility to understand and handle any potential social or other consequences arising from these activities. Therefore, Section 377 ought to be modified appropriately to grant all adults in society the freedom to make their own choices regarding sexual matters. "It is also equally important to establish that homosexuality cannot be deemed to be the natural form of sex. Gay sex for sexual gratification must be viewed as an exception to this law of nature. It may be argued that same-gender sex may come naturally to some and such sexual preference, of a few, would still be an exception to the normal law of nature as applicable to humanity across the universe"³³.

Here are some of the points being put forward:

Violation of the Right to liberty, as guaranteed under Article 21 of the Indian Constitution: It is a matter of grave concern as it encroaches upon one of the fundamental rights bestowed upon individuals. The concept of privacy is of paramount importance in this context, and it

³² Malathy Iyer, 'Homosexuality is unnatural, leading psychiatrist say' (*The Times of India*, 21 January 2014) <<https://timesofindia.indiatimes.com/india/homosexuality-is-unnatural-leading-psychiatrist-says/articleshow/29126819.cms>> accessed 12 September 2023

³³ Saroj Chadha, 'The Debate on Same Sex Marriage' (*Times of India*, 20 April 2023) <<https://timesofindia.indiatimes.com/blogs/blunt-frank/the-debate-on-same-sex-marriage/>> accessed 12 September 2023

encompasses a wide array of personal choices and no comprehensive definition of the term can be given. Even internationally, the recognition of the right to privacy has gained significant momentum, especially in advocating for the rights of lesbians and gay men.

Unreasonable & Arbitrary: The criminalization of homosexual conduct is not only a violation of individual rights but is also unreasonable and arbitrary. The legislative intent behind creating laws to govern sexual morality lacks a rational nexus and tends to have vague and ambiguous objectives, making them open to subjective interpretations and unjust applications. Instead of serving a legitimate public interest, these laws often perpetuate discrimination and stigmatization of certain individuals based on their sexual orientation.³⁴ By analyzing the arguments and counterarguments put forth by various activists, we gain a deeper understanding of the challenges and opportunities that lie ahead in the pursuit of marriage equality in India.

Same-Sex Marriage: Marriage is a social institution that brings together two individuals in a legally recognized union, often with the involvement of families and communities. Throughout history, marriage has played a crucial role in shaping familial relationships, defining societal norms, and providing a framework for the formation of families and the continuation of human civilization.

In India, marriages and weddings are revered as religious activities and a relationship that is built on emotional and financial interdependency in addition to regulating sexual behavior. While the path to legalizing same-sex marriage is yet to be fully paved, the conversation has begun to shift, creating hope for a more inclusive and equitable society, until now India has not legalized same-sex marriage, but they can still access certain rights and benefits similar to those of cohabiting couples.

Current Marriage Law in India: Under the current Family law system in India, individuals have the option to choose between their respective religion-based and community-specific marriage laws. The diverse religious and cultural landscape of India has resulted in different personal

³⁴ Maheshwari (n 31)

laws governing marriage for various communities. While the existing family laws in India do not explicitly mention that marriage is restricted to a union between one man and one woman terminologies like 'Husband' and 'Wife' may imply that marriage is traditionally viewed as a union between a man and a woman.

LEGAL BENEFITS OF MARRIAGE IN INDIA

Due to the absence of a uniform code governing marriage in India, each religious law offers different benefits associated with marriage. Nevertheless, overall, some of the common benefits that come with marriage include:

Property Rights: Marriage provides spouses with legal rights to each other's property. Both partners have the right to jointly own and inherit property, including movable and immovable assets. In the event of the death of a spouse, the surviving spouse is entitled to a share in the deceased spouse's property.

Maintenance Rights: Marriage carries an obligation to provide financial support between spouses. If one spouse is unable to maintain themselves financially, the other spouse may be legally bound to provide financial support, including necessities, medical expenses, and other essentials. This obligation extends even after separation or divorce in certain cases.

Tax Benefits: Married couples in India can avail of certain tax benefits. The income tax laws in India often provide tax deductions, exemptions, and rebates for married individuals.

Adoption and Guardianship Rights: Married couples often find it easier to adopt a child after the new CARA guidelines as they are considered a stable and suitable environment for raising children. Marriage also establishes automatic guardianship rights for children born within the marriage, providing legal protection and recognition for both parents.

PATHWAYS TO LEGALIZE SAME-SEX MARRIAGES

There are several approaches which could legalize same-sex marriage in India:

Firstly, the Indian Parliament could pass a new legislative framework known as the 'Indian Homosexual Marriage Act' or amend the existing personal law Acts. This Act or amendment bill would be proposed by a Member of Parliament and in addition, public opinion on this matter should also be taken into consideration through referendums and initiatives, ensuring that the views and perspectives of the citizens are incorporated into the decision-making process which further ensures that it is implemented following the democratic principles of the country. The objective of the new act or amendment bill should be allowing same-sex couples to marry in civil ceremonies while giving religious organizations the choice to conduct same-sex marriage ceremonies based on their customs. It must ensure that religious organizations and their representatives are not legally penalized for not opting out of same-sex marriages. Additionally, the approach should simplify the process for individuals to change their gender without dissolving their existing marriage. Overall, it must aim to promote equality in marriage and respecting religious freedom.

Secondly, the Indian Parliament has the option to introduce and implement a Uniform Civil Code (UCC), which proposes a unified legal framework that would replace religious-based personal laws with a uniform set of civil laws applicable to all citizens, irrespective of their religious affiliations. The adoption of a UCC could potentially eliminate the obstacles currently hindering the recognition of same-sex marriages, allowing for their solemnization, and providing legal protections to such couples. Furthermore, the UCC would create pathways for adoption, inheritance, and custody rights for children within same-sex marriages. By embracing a Uniform Civil Code, India can strive towards equality, justice, and social harmony in the realm of personal laws.

Lastly, the Supreme Court has the authority to issue an order that could carry the force of law. Suppose a Public Interest Litigation is submitted concerning a constitutional issue, specifically the acknowledgment of equality as per Article 14 and the Special Marriages Act. If the Supreme Court issues an order that reinterprets the Special Marriages Act of 1954, permitting marriage between individuals of the same gender, this ruling would then become the prevailing legislation in the country.

Positive Impact of Legalizing Same-Sex Marriages: Legalizing same-sex marriage could contribute to greater social acceptance and understanding of LGBTQ+ individuals in Indian society. It may help in reducing existing stigmas and prejudices and promote inclusivity. It would be a significant step towards ensuring equal rights for LGBTQ+ individuals and affirming their right to form legally recognized relationships and access the benefits and protections that marriage provides, such as inheritance rights, adoption, maintenance, and tax benefits.

Same-sex marriages would also contribute to economic benefits by stimulating various industries associated with weddings and marriages, such as event planning, hospitality, tourism, and retail. Legal recognition could also enhance financial security for same-sex couples by providing access to shared benefits and entitlements.

“An online survey conducted by a group of six researchers found that legislation of same-sex marriage would lead to improvement in wellbeing, legal safety, and access to legal rights. The researchers surveyed to acquire more knowledge about Indians' attitudes toward same-sex marriage legalization. Out of a total of 5,825 respondents, 95% supported the legalization of marriage for LGBTQIA+ people, and 93% agreed that marriage equality would reduce mental health-related distress in youth. The study also discovered that the Supreme Court's decriminalization of Section 377 had a favorable influence on the mental health of LGBTQIA+ people. Further, 93% of respondents agreed that legalizing same-sex marriage will enhance mental health outcomes in LGBTQIA+ people and families, such as lower levels of anxiety, depression, suicidal thoughts, grief, etc.”³⁵

Public Acceptance: A recent Pew Research Centre survey found that 53% of adult Indians favor legalizing same-sex unions. According to the survey, 28% of those in favour of such a union ‘strongly favour’ it while 25% ‘somewhat favour’ the notion. However, 31% of Indian adults ‘strongly oppose’ 12% ‘somewhat oppose’ and 43% ‘completely oppose’ such marriages.

³⁵ Alisha Dutta, ‘Study finds legalization of same-sex marriage to have positive impact on mental health of LGBTQIA+ individuals’ (*The Hindu*, 17 April 2023) <<https://www.thehindu.com/news/national/study-finds-legalisation-of-same-sex-marriage-to-have-positive-impact-on-mental-health-of-lgbtqia-individuals/article66745345.ece>> accessed 13 September 2023

According to the survey, India showed that they 'consider religion to be important' but at the same time, showed over 50 percent acceptance of same-sex marriages.³⁶³⁷

In April 2022, Supriya Sule, a Member of Parliament, introduced a bill in the Lok Sabha aimed at legalizing same-sex marriages. The proposed bill seeks to amend the Special Marriage Act of 1954 and establish a minimum marriage age of 21 for male same-sex couples and 18 for female same-sex couples.³⁸

Government Views: The Union Government opposes same-sex marriage and believes that 'legal validation of same-sex marital unions will cause 'complete havoc' with the delicate balance of personal laws in the country and in accepted societal values. The Centre asserted that it is 'impermissible' for the apex court to change the entire legislative policy of the country that is deeply embedded in religious and societal norms, which would further trigger an 'irreconcilable violence' to a large number of statutes defining 'husband' as a biological man and 'wife' as a biological woman.'³⁹

Children raised by Same-Sex Parents: The question of children raised by same-sex parents has become a subject of research, social debate, and legal consideration with increasing recognition of the rights of same-sex couples. It has gained significant attention and sparked extensive discussions in various societies. Numerous studies conducted over several decades have shown that 'there is no evidence to suggest that lesbian women or gay men are unfit to be parents or that psychosocial development among children of lesbian women or gay men is compromised relative to that among offspring of heterosexual parents. Not a single study has found children

³⁶ Jacob Poushter et al., 'How people in 24 countries view same-sex marriage' (*Pew Research Center*, 13 June 2023) <<https://www.pewresearch.org/short-reads/2023/06/13/how-people-in-24-countries-view-same-sex-marriage/>> accessed 13 September 2023

³⁷ Mythreyee Ramesh, '53% Indians Support Legalisation of Same-Sex Marriages: Pew Global Survey' (*The Quint*, 15 June 2023) <<https://www.thequint.com/gender/india-legalisation-of-same-sex-marriages-pew-global-survey>> accessed 13 September 2023

³⁸ 'NCP MP Supriya Sule introduces bill in Parl on legalizing same-sex marriage' (*Hindustan Times*, 01 April 2022) <<https://www.hindustantimes.com/india-news/ncp-mp-supriya-sule-introduces-bill-in-parl-on-legalising-same-sex-marriage-101648829254101.html>> accessed 13 September 2023

³⁹ Utkarsh Anand, 'Same-sex marriages will wreak havoc: Govt in SC' (*Hindustan Times*, 13 March 2023) <<https://www.hindustantimes.com/india-news/samesex-marriages-will-wreak-havoc-govt-in-sc-101678653887822.html>> accessed 13 September 2023

of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by lesbian and gay parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth."⁴⁰

According to research conducted by BMJ Global Health, children brought up by same-sex parents typically achieve similar or even better outcomes compared to those raised by heterosexual parents. The study also suggests that nurturing by same-sex parents 'may confer some advantages to children' possibly because they are more tolerant of diversity and more nurturing towards younger children than heterosexual parents.⁴¹⁴²

ROLE PLAYED BY JUDICIARY

A judicial analysis of LGBTQIA+ rights in India reveals that, while the legislature has lagged on this issue, the judiciary has been quite proactive in recent years. Specifically, the Supreme Court has issued several significant judgments in the past decade that have prepared the way for the acknowledgment of this marginalized group's basic rights. The following are some of the most prominent Supreme Court judgments on the issue.

The Evolution of Gender Identity: Transgender as the Third Gender: The division bench of the Supreme Court in *National Legal Services Authority v Union of India*⁴³ stated that "(1) *Hijras, Eunuchs, apart from binary gender, be treated as 'third gender' to safeguard their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.* (2) *Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State*

⁴⁰ Charlotte J. Patterson, 'Lesbian and Gay Parenting' (*American Psychological Association*) <<https://www.apa.org/pi/lgbt/resources/parenting>> accessed 13 September 2023

⁴¹ Yun Zhang et al., 'Family outcome disparities between sexual minority and heterosexual families: a systematic review and meta-analysis' (2023) 8 *BMJ Global Health* <<https://gh.bmj.com/content/bmjgh/8/3/e010556.full.pdf>> accessed 13 September 2023

⁴² Robert Hart, 'Kids raised by Same sex parents fare same as- or better than-kids of Straight Couples, Research Finds' (*Forbes*, 06 March 2023) <<https://www.forbes.com/sites/roberthart/2023/03/06/kids-raised-by-same-sex-parents-fare-same-as-or-better-than-kids-of-straight-couples-research-finds/>> accessed 13 September 2023

⁴³ *National Legal Services Authority v Union of India* (2014) 5 SCC 438

Governments are directed to grant legal recognition of their gender identity such as male, female, or third gender.

(3) We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.”

The right to privacy extends to all Individuals: In *K.S. Puttaswamy v Union of India*⁴⁴, the court addressed the issue of the rights of the LGBTQ+ community and stated *“Discrimination against an individual based on sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.”*

Constitutionality of Section 377 IPC: In *Navtej Singh Johar v Union of India*⁴⁵, the Supreme Court declared portions of the law relating to consensual sexual acts between adults as unconstitutional and stated *“Given the aforesaid findings, it is declared that insofar as Section 377 criminalizes consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private is violative of Articles 14, 15, 19 and 21 of the Constitution. It is, however, clarified that such consent must be free consent, which is completely voluntary, and devoid of any duress or coercion.”*

Recognition of Marital rights for LGBTQ+ individuals: The Madras High Court has taken a progressive step concerning the marital rights of the LGBTQIA+ community in the case of *Arun Kumar v The Inspector General of Registration*⁴⁶. On April 22, 2019, the Madras High Court upheld the right of a transwoman and a man to register their marriage under the Hindu Marriage Act, 1955. The court recognized their marriage as valid and interpreted that the term ‘bride’ in the Hindu Marriage Act 1955 encompasses both transwomen and individuals who identify as women at birth and emphasized that the definition of ‘bride’ in HMA should not be

⁴⁴ *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1

⁴⁵ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1

⁴⁶ *Arunkumar v The Inspector General of Registration* (2019) SCC OnLine Mad 8779

rigid and fixed. The court stated “A marriage solemnized between a male and a transwoman, both professing Hindu religion, is a valid marriage in terms of Section 5 of the Hindu Marriage Act, 1955, and the Registrar of Marriages is bound to register the same. By holding so, this Court is not breaking any new ground. It is merely stating the obvious. Sometimes to see the obvious, one needs not only physical vision in the eye but also love in the heart.”

Ongoing Proceedings for legal recognition of same-sex marriage: The Constitutional Bench of the Supreme Court is currently addressing issues related to the legal recognition of same-sex marriage in India. In the case of *Supriyo v Union of India*⁴⁷, the petitioners are advocating for the legal acknowledgment of same-sex marriages under various acts, including the Special Marriage Act of 1954, the Foreign Marriage Act of 1969, and the Hindu Marriage Act of 1955. Their central argument is to amend these laws to be gender-neutral, allowing individuals of the same sex to enter into marriages with the same rights as opposite-sex couples. This case marks a pivotal moment in the struggle for LGBTQIA+ rights in India, as its outcome has the potential to significantly influence the legal framework surrounding same-sex marriages and LGBTQIA+ rights in the country.⁴⁸

THE PATH FORWARD

As the world progresses towards greater inclusivity and equality, it is time for India to carefully consider the way forward for same-sex marriage. As societal attitudes evolve and awareness grows, India must embark on a constructive and inclusive dialogue that respects diverse perspectives while embracing the fundamental rights of its LGBTQIA+ individuals.

The first misconception that needs to be addressed is it is a matter of choice and the state should take responsibility by enacting anti-discriminatory laws. Further, it is crucial to launch education and awareness campaigns across various sectors, encompassing schools, universities, media, and community groups, aimed at addressing societal biases and prejudices against

⁴⁷ *Supriyo v Union of India* WP No 1011/2022

⁴⁸ Sucheta, ‘Mapping the Progression of LGBTQ+ Rights in India- Important Laws and Judicial Pronouncements’ (SCC Online, 18 June 2023) <<https://www.sconline.com/blog/post/2023/06/18/mapping-the-progression-of-lgbtq-rights-in-india-important-laws-and-judicial-pronouncements/>> accessed 13 September 2023

LGBTQIA+ individuals. Providing sensitivity training to both public and private sector workers is indispensable in eradicating discrimination and partiality in the workplace. In addition, they require an atmosphere of acceptance where they feel comfortable sharing their feelings, and platforms like Gaysi, Queerala and India Aces have helped carve out spaces for LGBTQIA+ people to interact, share, and collaborate.

As far as homosexual marriages are concerned, it is imperative to enforce a new legal framework that officially recognizes same-sex marriages and extends essential rights and protections to LGBTQIA+ individuals. This comprehensive framework should effectively address critical issues like inheritance rights, property rights, maintenance rights, and the legal recognition of children born through surrogacy or adoption to same-sex couples. However public opinion or the 'voice of the people' also plays a crucial role in influencing the legislative process by providing input on politico-social-economic issues, and policies related to the LGBTQIA+ community during public consultations, surveys, polling, and social media analysis. Legislators may draft legislation by strong public support or approval for legalizing same-sex marriages which can be ascertained through referendums or initiatives. These mechanisms allow citizens to propose or vote on specific laws or constitutional amendments. The outcome of such votes can lead to the creation or modification of current marriage laws in India enforcing same-sex marriages based on public sentiments. Therefore, seeking public opinion on homosexual marriages can shape the content and scope of marriage laws in India.

The government should also set up an autonomous body to oversee the enforcement of same-sex marriage laws and assessing their societal impact is crucial. Such a body would help in recognizing successful aspects and pinpointing areas that might require enhancements. Doing so would reinforce the notion that the legalization of same-sex marriages constitutes a progressive and beneficial advancement for Indian society at large.

CONCLUSION

It is time to recognize the presence of a community among us who have a different sexual orientation than heterosexual individuals. This acknowledgment is a crucial step towards

fostering a more inclusive and equal society. It is essential to understand that their sexual preference is just one aspect of their identity, and they are equally human, and deserving of the same respect and consideration as any heterosexual person. Our focus should be on promoting social inclusivity and normalizing this understanding while eradicating the harmful notion of shame and ensuring the legal recognition of same-sex marriages.

Legalizing same-sex marriage in India would represent a significant stride in the journey toward creating a society that celebrates diversity and upholds fundamental human rights. Such legalization would signify the acknowledgment of the rights and dignity of the LGBTQ+ community, enabling them to enter into legal unions and enjoy the same legal benefits and protections as heterosexual couples. To achieve this, a new legal framework needs to be established, one that officially recognizes same-sex marriages and extends essential rights and protections to LGBTQIA+ individuals. This comprehensive framework should effectively address critical issues such as inheritance rights, property rights, maintenance rights, and the legal recognition of children born through surrogacy or adoption to same-sex couples. By ensuring legal equality and protection, society would demonstrate its commitment to upholding human rights and promoting equality for all its citizens, irrespective of sexual orientation. This step would align with international standards and set a positive example for other nations, encouraging a global movement towards inclusivity and respect for diverse identities.

Ultimately, the legalization of same-sex marriage in India would not only contribute to dismantling societal prejudices and stereotypes but also represent a triumph for love, acceptance, and social progress, enriching the cultural and social fabric of the nation.