



Legal Recognition of Same- Sex Marriage in India: A Contemporary Challenge

Asst. Prof. Fathima Ibrahim

Abstract

"It lies within the domain of Parliament and State Legislatures to determine the law on marriage."¹

Marriage is seen to be an agreement between a man and a woman, mostly for a purpose of bearing children and being each other's companion throughout life. According to Hindu law, marriage is a sacramental union. It is a valid contract under Mahomedan law. It has its own principles and values, whether it be a sacramental bond or a contract. However, novel forms of marriage are emerging, such as the effort to recognize same-sex marriages. Same-sex marriage did not exist until the twenty-first century, when a growing number of nations granted same-sex couples legal marriage rights. This has resulted in a new social phenomenon, including a new sort of family formation. Some jurisdictions either allow full marriage for same-sex couples or recognize same-sex civil unions under separate legislation. Other jurisdictions have imposed fines on homosexual partnerships. This momentous expansion has had an impact on Indian society as well. Same-sex marriage has garnered both widespread support and fierce opposition on social, political, and religious grounds. Given the lack of a globally standard strategy, there is a considerable danger of dispute and legal ambiguity. Interestingly, the Supreme Court's 2023 decision on the request for recognition of same-sex marriage said that the law does not acknowledge the right to marry or have a civil union for same-sex couples, and it is up to parliament to pass legislation on the subject. In contrast, Constitutional morality, with its concepts and values, advocates for an inclusive society and related institutions. This paper traces out the scope, significance and challenges to recognize same- sex marriage in India under the umbrella of Indian Constitution.

¹ cji dy chandrachud, supriyo @ supriya chakraborty & anr. vs. union of india, w.p.(c) no. 1011/2022
Fathima Ibrahim, Assistant Professor, School of Legal Studies, CUSAT. Research Scholar- The National University of Advanced Legal Studies, Cochin.

Keywords: Marriage, Same- Sex Marriage, LGBTQ+, Hindu Law, Muslim Law, Constitutional Morality

1. INTRODUCTION

Marriage between individuals of identical biological sex or gender identity is referred to as same-sex marriage (gay marriage). Marriage equality refers to the advocacy for the legal recognition of same-sex marriage. The legalisation of same-sex weddings is regarded in several countries as a civil right, political, social, moral, and religious matter.² The enactment of same-sex marriage has varied by jurisdiction due to legislative amendments to marriage laws and court disputes about constitutional equality mandates. Disputes arise about the permission of same-sex couples to marry, or whether they should be required to choose an alternative status such as a civil union, which may confer equal rights to marriage or diminished benefits compared to marriage, or lack any rights altogether.³

The issue of same-sex marriage poses significant challenges to the traditional notion of family and is contested under many national laws. Marriage is considered a society cornerstone; hence its legal and legislative regulation is associated with cultural and religious values.⁴ Religious doctrines are antagonistic towards same-sex unions. Although marriage has substantial religious roots, several jurisdictions have delineated the religious and secular aspects of marriage. Diverse jurisdictions exhibit differing legislative and policy reactions to same-sex couples. The initial form is intolerance, seen when states endeavour to criminalise same-sex relationships.⁵ Currently, several regimes impose penalties on same-sex partnerships, and homosexuality is frequently seen as a criminal violation, with marriage prohibited.⁶ The second reaction is intentional efforts to decriminalise homosexual relationships,

²stellina jolly and ritika vohra, "recognition of foreign same-sex marriage in india" 59(3) *journal of the indian law institute* 302-326 (july - september 2017).

³ chandrika, m. p, "changing dimension of the concept of marriage-a contemporary challenge to indian legal system" 5 *international journal of current research* 931-934 (april, 2013).

⁴ c. weisbrod, "family, church, and state: an essay on constitutionalism and religious authority" 26 *journal of family law* 754 (1988); k. hossain, "in search of equality: marriage related laws for muslim women in bangladesh" 5(1) *journal of international women's studies* 97 (2003).

⁵ w. n. eskridge, jr, "a history of same-sex marriage" 79 *virginia law review* 1469 (1993).

⁶ the international lesbian, gay, bisexual, trans and intersex association, or ilga, lists 76 countries with criminal laws against sexual activity by lesbian, gay, bisexual, transgender or intersex people, available at: <http://76crimes.com/76-countries-where-homosexuality-is-illegal/> (last visited on oct. 03, 2024).

notwithstanding a split public view.⁷ The third stage is to acknowledge homosexual relationships and confer upon them varying degrees of status, from relationship to civil union to full marriage.⁸ So as to analyze the categorical legal development of same-sex marriage this paper focuses on same- sex marriage and human rights, same- sex marriage in foreign jurisdictions, legislative frameworks on marriages in India

A. SAME- SEX MARRIAGE AND HUMAN RIGHTS

Numerous countries have legalised same-sex weddings as human rights mandate equitable treatment for all individuals. The principal argument supporting same-sex marriage is that denying same-sex couples the legal right to marry and its associated benefits constitutes discrimination based on sexual orientation.⁹ Another argument supporting same-sex marriage is that it enhances an individual's financial, psychological, and physical well-being, and that children of same-sex couples benefit from being raised by two parents in a legally recognised union endorsed by societal institutions.¹⁰ Additional arguments in support of same-sex marriage include its recognition as a global human rights issue that confronts legal equality. Regardless of the specific human rights at question, all industrialised nations have permitted same-sex marriage and cohabitation. The acceptance of such weddings in India is challenging due to cultural and traditional opposition. Homosexuality was seen as a crime in our legal system,¹¹ with the 'Anti-sodomy Law' making it an offence. This legislation defined "consensual homosexuality" as a "unnatural offence" subject to a ten-year penitentiary penalty. The recent decriminalisation of homosexuality in India has instilled hope in many; yet, this optimism has proven futile in light of the Supreme Court's latest ruling on October 17th, 2023.¹²

B. SAME- SEX MARRIAGE IN FOREIGN JURISDICTIONS

⁷ allison r. o. neill, "recognition of same-sex marriage in the european community: the european court of justice's ability to dictate social policy" 37(1) *cornell international law journal* 212 (2004).

⁸ *supra* note 2.

⁹ *supra* note 3.

¹⁰ *ibid.*

¹¹ the indian penal code, 1860, section. 377

¹² *supriyo @ supriya chakraborty and anr v. union of india*, writ petition (civil) no. 1011 of 2022.

The Netherlands and Belgium has become the world's first countries to legalize same-sex marriage.¹³ South Africa was the first African country to include lesbian, gay, bisexual, and transgender rights in its constitution.¹⁴ Religious beliefs significantly influence Latin America, and opposition from the Catholic Church formerly led to a prohibition on same-sex marriage, which has since been removed.¹⁵ Except for Nepal and Taiwan, no country in Asia accepts same-sex marriage. Israel acknowledges same-sex marriages that take place outside of its boundaries.¹⁶

Same-sex marriage was proclaimed legal in the United States on June 26, 2015, when the US Supreme Court decided that same-sex partners could get married.¹⁷ With this momentous decision on same-sex marriage, the United States is following in the footsteps of several European nations¹⁸ notably the United Kingdom, which liberalized its regulations on same-sex marriage by implementing the Marriage (Same Sex Couples) Act in 2013.¹⁹ Within Europe, legislation concerning same-sex couples differs significantly; nonetheless, European nations tend to be more

¹³ r. j. brym and j. lie, *sociology: your compass for a new world* 327 (cengage learning, belmont, 2006); n. g. maxwell, "opening civil marriage to same-gender couples: a netherlands united states comparison" 18 *arizona journal of international & comparative law* 157 (2001).

¹⁴ m. p. byrn, "same-sex marriage in south africa: a constitutional possibility" 87 *minnesota law review* 512 (2002). constitution of the republic of south africa, 1996, art. 9(3); *fourie v. minister of home affairs*, 232/2003; (supreme court of appeal of south africa, nov. 30, 2004) declared that "under the constitution, the common law of marriage has been developed to include same-sex unions." available at: <http://www.worldlii.org/za/cases/zasca/2004/132.html> (last visited on oct. 03, 2024).

¹⁵ j. m. vaggione, "sexual rights and religion: same-sex marriage and lawmaker's catholic identity in argentina" 65 *university of miami law review* 935 (2011); j. diez, *the politics of gay marriage in latin america: argentina, chile and mexico* 112 (cambridge university press, 2015); same-sex marriage has been banned in the constitutions of honduras (2005), el salvador (2009), and the dominican republic (2009). bolivia also permits marriage between opposite sex. in costa rica, same-sex unions have been declared invalid through judicial pronouncements

¹⁶ t. einhorn, "same-sex family unions in israeli law" 4(2) *utrecht law review* 226 (2008); *funk-schlesinger v. minister of the interior*, (1963) hcj 143/ 62.

¹⁷ *obergefell v. hodge*, 135 s.ct. 2584 (2015); in this case, an ohio resident sued the state when he failed to get his name registered on the death certificate of his partner of 23 years; f. s. befort and m. j. vargas, "same-sex marriage and title vii" 56 *santa clara law review* 207 (2016).

¹⁸ j. gardiner, "same-sex marriage: a worldwide trend?" 28(1) *law in context a socio-legal journal* 93 (2010); s. r. levit, "new legislation in germany concerning same- sex unions" 7 *the ilsa journal of international & comparative law* 470 (2001); b. d. oppenheimer, a. oliveira et.al., "religiosity and same-sex marriage in the united states and europe" 32 *berkeley journal of international law* 196 (2014).

¹⁹ marriage (same sex couples) act, (2013), uk, part 1: extension of marriage to the same-sex couples, available at: www.legislation.gov.uk/ukpga/2013/30/contents/enacted (last visited on oct. 03, 2023).

supportive of same-sex relationships, offering varying levels of recognition from partnerships to civil unions to complete marriages.²⁰

The normative discourse on the permissibility of same-sex individuals forming families through marriage, and its ramifications for traditional notions of family and marriage, is a sensitive and divisive issue in India.

1. LEGAL BATTLE FOR RECOGNITION OF SAME-SEX MARRIAGE IN INDIA

Section 377 of the Indian Penal Code, imposed by the British in 1860, criminalised homosexual activity and signifies the inception of LGBTQ+ rights in India. Despite India's independence in 1947, this legislation persisted, having been employed for over a century to oppress and discriminate against LGBTQ+ individuals.

Despite ongoing discussions to acknowledge and legalise same-sex weddings in India, they remain legally unrecognised. The Indian legal system does not recognise couples of the same sex, defining marriage only as a union between a man and a woman. On 18 December 2015, Shashi Tharoor presented a private member's bill to legalise same-sex marriage; however, it failed to progress due to insufficient support and was defeated in the House by a vote of 71-24.²¹ The Supreme Court of India decriminalised Section 377 of the Indian Penal Code in 2018, so rendering homosexuality no longer a criminal offence, marking a landmark victory for LGBTQ+ rights in the country.²² Nonetheless, the decriminalisation of homosexuality did not render same-sex marriages legal. The legalisation of same-sex marriage has been

²⁰ j. m. scherpe, "the legal recognition of same-sex couples in europe and the role of the european court of human rights" 10 *the equal rights review* 83(2010).

²¹ a. mandhani, "shashi tharoor submits private members bill to scrap s.377; jaitley, chidambaram and bhushan opine sc must review kaushal judgment" (2015), available at: <http://www.livelaw.in/shashi-tharoor-submits-private-members-bill-to-scrap-s-377-jaitley-chidambaram-and-bhushan-opine-sc-must-review-kaushal-judgment/> accessed last visited on oct. 03, 2024).

²² akshat anunay, "same sex marriages in india: a complete overview" *times of india*, may 06, 2023, available at <https://timesofindia.indiatimes.com/readersblog/dopamineffable/same-sex-marriages-in-india-a-complete-overview-53507/> (last visited on oct. 03, 2024); r. wintermute, "same-sex love and indian penal code s 377: an important human right issues for india" 4 *nus law review* 32 (2011); m.c. nussbaum, "disgust or equality: sexual orientation and the indian law", (the m.k. nambiar lecture, national university of juridical sciences kolkata 2015), available at: https://www.law.berkeley.edu/wp-content/uploads/2015/04/disgust-or-equality-sexual-orientation-and-indian-law_nussbaum.pdf (last visited on oct. 03, 2024).

challenged in several court cases in India; but, as of this writing, the courts have not ruled on the matter.

The judiciary has repeatedly considered several petitions for the recognition of same-sex marriage. The Delhi High Court declared in 2017 that same-sex couples possess the right to engage in a committed relationship, however it abstained from endorsing same-sex marriage.²³ Recent modifications to the legal system in India may influence the future of same-sex relationships. The Personal Data Protection Bill, enacted by the Indian government in 2023, recognises the right to privacy as a basic right. This provision, as per several legal experts, may be utilised to advocate for the legalisation of same-sex weddings, as it recognises people's autonomy to govern their own lives.²⁴

The struggle for LGBTQ+ rights in India gained momentum in the late 20th century. The AIDS Bhedbhav Virodhi Andolan (ABVA), the inaugural LGBTQ+ organisation, was founded in Delhi in the 1990s to address violence and discrimination against the LGBTQ+ community. In 2001, the non-governmental organisation Naz Foundation initiated a public interest lawsuit (PIL) challenging the constitutionality of Section 377. The LGBTQ+ community and its supporters continued their pursuit of equality despite significant opposition from conservative groups and religious institutions, culminating in the 2009 ruling by the Delhi High Court that deemed Section 377 unconstitutional and decriminalised homosexuality. However, in 2013, the Supreme Court overturned this decision and reinstated Section 377. The five-judge panel of the Supreme Court of India, which annulled the previous verdict, reinstated the decriminalisation of homosexuality in 2018, deeming Section 377 unconstitutional. This represented a significant victory for LGBTQ+ rights in India and a progression towards eradicating discrimination and promoting equality. The legal acknowledgement of same-sex marriage for LGBTQ+ couples in India remains an elusive objective despite recent legislative successes. The LGBTQ+ community in India continues to encounter significant challenges. The absence of legal recognition subjects' persons to increased vulnerability to discrimination and violence, while also depriving them of legal and social benefits.²⁵

²³akshat anunay, "same sex marriages in india: a complete overview" *times of india*, may 06, 2023, available at <https://timesofindia.indiatimes.com/readersblog/dopamineffable/same-sex-marriages-in-india-a-complete-overview-53507/> (last visited on oct. 03, 2024).

²⁴ *supra* note 3.

²⁵ *supra* note 25.

In a gist, all the events revolving around the quest of recognising same-sex marriage can be traced as following. Initially in the year 1860, the British colonial authority enacted Section 377 of the Indian Penal Code, which made homosexual behaviour a penal conduct since it was "against the order of nature." Seeing the struggles of this marginalised community various NGOs started to raise their voices. A prominent one is The AIDS Bhedbhav Virodhi Andolan (ABVA), the first LGBTQ+ organization, was established in Delhi in the 1990s to combat violence and prejudice aimed at the LGBTQ+ community. The year 2001 has its importance because of the PIL filed by the Naz Foundation in the Delhi High Court contesting the validity of Section 377.²⁶ The Delhi High Court's 2009 ruling decriminalized homosexuality and ruled that Section 377 was unconstitutional.²⁷ Unfortunately this landmark shift was shattered in the year 2013, the Indian Supreme Court reversed the Delhi High Court's decision and reinstated Section 377, making homosexuality a crime once more.²⁸ Momentously, the Supreme Court judgment in *Navtej Singh Johar case*, 2018, a five-judge bench overturned the earlier ruling and once more decriminalized homosexuality by declaring Section 377 unconstitutional.²⁹ After the progressive rulings, the Transgender Persons (Protection of Rights) Act was enacted in 2019 to safeguard the rights and provide legal recognition to transgender individuals.³⁰ A five-judge bench, presided over by Chief Justice D.Y. Chandrachud, commenced hearings on petitions for the recognition of same-sex marriage on April 18, 2023. Following extensive deliberations, the Supreme Court reserved its judgement and, on October 17, 2023, declined to grant legal recognition to same-sex marriages in India. However, the bench has instructed the Union to establish a committee to investigate the rights and entitlements of individuals in queer unions, despite the absence of legal recognition as "marriage" or "civil unions."³¹ The court observed that the existing legal framework does not acknowledge the civil union or marriage rights of same-sex partners, and that it is the responsibility of Parliament to enact laws to recognise these rights. The court determined that same-sex couples lack the legal entitlement to adopt children. The

²⁶ *naz foundation v. government of nct of delhi*, 2009 (160) dlt 277.

²⁷ *ibid*.

²⁸ *suresh kumar koushal & anr v. naz foundation & ors*, civil appeal no.10972 of 2013, (arising out of slp (c) no.15436 of 2009).

²⁹ *navtej singh johar v. union of india*, air 2018 sc 4321.

³⁰ *supra* note 24.

³¹ *supriyo @ supriya chakraborty and anr v. union of india*, writ petition (civil) no. 1011 of 2022.

judges unanimously concurred that same-sex couples cannot claim marriage as a basic right and that there is no unequivocal right to marriage. Furthermore, it dismissed the argument advocating for acknowledgement under the Special Marriage Act, 1954.³² The Supreme Court affirmed that transgender individuals in heterosexual unions has the right to marry under existing laws or personal statutes but refraining from acknowledging LGBTQ weddings in India. In this context, the Chief Justice asserted in his judgement that an individual's gender is separate from their sexual orientation. A union between a transman and a transwoman, or vice versa, may be acknowledged under the Special Marriage Act 1954, as a transgender individual can engage in a heterosexual relationship.³³

In India, same-sex marriage remains unrecognised despite legislative victories, denying LGBTQ+ couples social and legal rights. The transition from the ban of homosexuality to its decriminalisation and subsequent legal recognition of LGBTQ+ individuals has significantly influenced India's perception of LGBTQ+ rights. Given the persistence of hurdles and discrimination, activism and involvement must continue to provide equal rights and protection for the LGBTQ+ community in India. The nation's legal system does not recognise marriage equality or the associated rights and benefits, such as inheritance rights, joint property ownership, and adoption rights.

2. LEGISLATIVE FRAMEWORKS ON MARRIAGES IN INDIA

In India, every religious community possesses own personal rules governing marriage and divorce. This section examines the many laws governing weddings in India and evaluates whether any of these Acts permit the recognition of same-sex marriage. The Acts referenced include the Hindu Marriage Act of 1955, the Indian Christian Marriage Act of 1872, the Special Marriage Act of 1954, and the Foreign Marriages Act of 1969.

³² available at <https://www.livelaw.in/top-stories/supreme-court-same-sex-marriage-equality-queer-couple-240341> (last visited on oct. 17, 2023).

³³ available at <https://www.livelaw.in/top-stories/transgender-persons-in-heterosexual-relationships-have-right-to-marry-under-existing-laws-supreme-court-240366> (last visited on oct. 17, 2023).

The Hindu Marriage Act, 1955 applies to Hindus.³⁴ The conditions of a valid marriage between two Hindus are given under Section 5 of the Act. Section 5 prescribes that:

- (1) Parties to marriage do not have an existing living spouse,
- (2) There is no lack of consent due to unsoundness of mind or because of a mental disorder, which makes a person unfit for procreation,
- (3) The minimum age for a bridegroom is 21 and for a bride 18 years,
- (4) The parties cannot be within the specified prohibited degrees of relationship or sapinda relationship,³⁵ unless the custom or usage permits such a marriage.³⁶

The Act employs gender-neutral wording, asserting that marriage may occur between two Hindus; but, by stipulating the ages of both the bride and bridegroom, it underscores that a lawful marriage necessitates the presence of both a bride and a bridegroom, so indicating a heterosexual union. This argument has been discredited on the basis that same-sex couples may pursue marriage solemnisation by identifying as bride and bride, groom and groom, or even groom and bridegroom, thereby indicating that the terminology of bride and bridegroom in the provision does not inherently denote a heterosexual marriage.³⁷ This argument is challenging to substantiate under statutory interpretation as it conflicts with the conventional meanings and concepts associated with the terms bride and bridegroom. Can a 21-year-old and an 18-year-old gay couple designate themselves as bridegroom and bride to comply with the Hindu Marriage Act? Permitting such a proposition would contravene the legislation's objective. Jurisdictions permitting same-sex weddings have explicitly authorised same-sex couples to enter into marriage or have modified their legislation to facilitate such unions.³⁸ A comprehensive analysis of the Act's entirety is necessary to discern other legislative intentions, rather than relying on an isolated provision. Section 13(2) of the Act delineates certain reasons for divorce

³⁴ the hindu marriage act, 1955 provides a comprehensive definition to the term 'hindu'. s. 2 defines hindus as anyone who is a hindu, sikh, jain or buddhist by religion or who follows any of its forms or developments (such as brahmo samaj, arya samaj etc.).

³⁵ *id.*, the term 'sapindas' is unique to hindu law. two persons are sapindas, when they have a common ancestor.

³⁶ *id.*, section. 5; saxena, *family law lectures: family law ii* (lexis nexis, 3rd edn., 2011).

³⁷ *supra* note 2.

³⁸ netherlands while allowing same -sex marriage made amendment in their marriage legislations and prescribed that "a marriage can be contracted by two people of different or the same sex."

applicable to the wife. Section 13 (2)(iv) stipulates that her marriage, regardless of consummation, was formalised prior to her turning 15 years old, and she annulled the marriage after attaining that age but before reaching 18.³⁹ Moreover, the stipulations for permanent alimony and maintenance designate the husband as 'he' and the wife as 'she,' indicating a heterosexual marriage.⁴⁰ These passages unequivocally indicate that the Act exclusively acknowledges heterosexual marriages, excluding other unions.

Opponents of same-sex weddings have centred their arguments on reproduction as an essential criterion of the Act.⁴¹ It is important to note that the Act's stipulations require that neither couple has a mental disease that impairs their ability to procreate, indicating that this condition pertains solely to mental disorders and not to physical disabilities. Moreover, the Act prohibits divorce or annulment of marriage on the grounds of infertility, as affirmed by judicial decisions.⁴² It is questionable if this clause may be expanded to support same-sex unions. In one narrative, a Tarulata had a gender reassignment process to become Tarunkumar, who then married Lila in 1989. The Gujarat High Court considered a plea by Lila's father seeking a declaration of the marriage's nullity on the grounds of Lila's inability to conceive. The high court sent a notice to the marriage register office and the surgeon, seeking justification for the denial of the petition.⁴³

Furthermore, in *X v. Hospital Z*, the court observed that "marriage is the sacred union, legally sanctioned, of two healthy individuals of opposite sexes," while interpreting marriage as an aspect of the "right to privacy" under Article 21 of the Constitution. The ruling defines marriage as a heterosexual union in the traditional sense.⁴⁴ The absence of consummation resulting from the respondent's impotence

³⁹ *supra* note 35, s. 13(2).

⁴⁰ *id.*, section. 25(3) reads: "if the court is satisfied that the party in whose favour an order has been made under this section has re-married or, if such party is the wife, that she has not remained chaste or if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just."

⁴¹ r. vanita, *love's rite: same-sex marriage in india and the west* 88 (springer, 2015).

⁴² *alka sarma v. abhinesh chandra sarma*, air 1991 mp 201; sheikh danish, "the road to decriminalization: litigating india's anti-sodomy law" 16(1)(3) *yale human rights & development law journal* 104-132 (2013).

⁴³ *alka sarma v. abhinesh chandra sarma*, air 1991 mp 201

⁴⁴ *x v. hospital z* (1998) 8 scc 296.

constitutes a solid basis for the annulment or invalidation of a Hindu marriage.⁴⁵ Penetration serves as the standard for potency. The criterion that legitimises marriage is heterosexual penetration, with consummation acting as the physical bond that connects law and marriage, ultimately fulfilled by vera copula, or the authentic union of bodies, by heterosexual penetration. The case law of the Act suggests the legislature's intention to permit only heterosexual penetration.⁴⁶

Christian marriages are regulated under the Indian Christian Marriage Act of 1872. The essential provisions of the Hindu Marriage Act are analogous to those of this Act. In Islamic jurisprudence, marriage is seen as a bilateral contract involving an offer, acceptance, and the dower as the consideration.⁴⁷

The Special Marriage Act of 1954 was enacted to grant Indian individuals the liberty to marry beyond their religious affiliations or caste. This law also encompasses the conditions established by the Hindu Marriage Act of 1955.⁴⁸ Marriages that include at least one Indian person are regulated under the Foreign Marriage Act of 1969. A marriage of this nature may be finalised abroad and then registered in conformity with this Act.⁴⁹

None of the previously stated Acts consider a marriage between two individuals of the same sex. The stipulations within the Acts concerning the minimum age for both bride and groom, along with the specific grounds for divorce applicable to the wife, suggest that homosexual marriages are not permissible in India under current legislation, despite the absence of an explicit clause mandating that marriage must be heterosexual. According to Section 2 of the Dissolution of Muslim Marriages Act, 1939, if the husband is afflicted with a severe venereal disease, the wife is entitled to get a divorce decision.⁵⁰ Nevertheless, alternative arguments assert that these Acts might be interpreted to encompass same-sex marriage, given they do not explicitly

⁴⁵ *supra* note 36, s.12.

⁴⁶ srimati basu, *the trouble with marriage: feminists confront law and violence in india* 74 (university of california press, 2015).

⁴⁷ a. ahmed, *mohammedan law* 14 (central law agency, allahabad, 2012).

⁴⁸ special marriage act, 1954, section. 4.

⁴⁹ foreign marriage act, 1969, section. 4, specifies the conditions for a valid marriage and specifically prescribes the age for bride and bridegroom as at least 18 and 21 years respectively.

⁵⁰ dissolution of muslim marriages act, 1939, section. 2.

forbid it.⁵¹ They reference several media reports that depict occurrences of homosexual relationships following religious ceremonies.⁵² However, such ceremonies and weddings will not have any legal standing in the absence of a clear legal provision allowing same-sex unions.

In the pivotal case of *Naz Foundation v. NCT Delhi*,⁵³ the court determined that section 377 of the IPC contravenes constitutional requirements by criminalising consensual sexual conduct between adults in private. The court observed that Article 15 of the Constitution, which prohibits discrimination based on "sex," is sufficiently expansive to encompass discrimination based on "sexual orientation."⁵⁴ The court opinions, however, appear to suggest that personal legislation cannot be evaluated in the context of basic rights.⁵⁵ In the appeal of the case of *Suresh Kumar Koushal v. NAZ Foundation*,⁵⁶ the Supreme Court of India reversed the high court's ruling and determined that "unnatural sex" is a "perversity of mind," hence affirming the legality of Section 377 IPC based on public morality.⁵⁷ The court observed that section 377 is pre-constitutional legislation and that Parliament would not have retained the section had it infringed upon the fundamental rights enshrined in the Constitution.⁵⁸ The subject of same-sex unions, whether as marriage or partnerships, was not considered in this instance. This lawsuit solely concerned section 377 of the IPC, which prohibits sexual acts that contravene the laws of nature. Nonetheless, the case illustrates that same-sex marriage is not recognised in India. The implication is that, even if one argues that section 377 of the IPC does not prohibit same-sex marriage, the pair would still be vulnerable to prosecution under section 377, adversely impacting their relationship.⁵⁹ The recent ruling on the petitions for the recognition of same-sex marriage likewise fails to acknowledge it. A legal problem that would emerge in a scenario where India's domestic legal framework prohibits

⁵¹ n. ravichandran, "legal recognition of same-sex relationships in india" 5(1) *journal of indian law & society* 102 (2014).

⁵² *id.* at 103.

⁵³ *naz foundation v. government of nct of delhi*, 2009 (160) dlt 277.

⁵⁴ *id.*

⁵⁵ *id.*

⁵⁶ *suresh kumar koushal v. naz foundation* (2014) 1 scc 1.

⁵⁷ *id.*

⁵⁸ r. berapalli, "same sex marriage in india: a socio –legal analysis" 1(4) *international journal of legal developments & allied issues* 130 (2015).

⁵⁹ *id.* at 134.

same-sex unions is how the Indian legal system would address the interests of players involved in overseas same-sex marriages.

3. CONCLUSION AND SUGGESTION

Revisions to personal marriage laws to incorporate same-sex marriage may facilitate broader acceptance of such relationships, but it is totally a challenging task. Significant question arises regarding the permissibility of modifications to personal legislation, necessitating consideration of the prevailing religious sentiments of the populace. Proposing amendments to the Special Marriage Act 1954, is a decision that will not impinge upon religious convictions. The Special Marriage Act 1954, a secular statute, permits couples from diverse religious affiliations to wed in a civil ceremony, which is conducted through registration before a marriage commissioner. The responsibility lies with the legislative body to undertake this legal endeavour. This issue is significant because to its connection to the essential human rights of LGBTQ+ persons and the acknowledgement of their partnerships. Legalising same-sex marriage would confer legal recognition and protection to LGBTQ+ couples, while also fostering enhanced societal acceptance and mitigating prejudice against the group.