



## **MOVING AWAY FROM TRADITIONAL HOMOGENOUS FAMILIES: A CASE FOR SAME-SEX MARRIAGES IN INDIA**

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### **ABSTRACT**

In a country like India wherein equality serves as the base on which our Constitution is built on, the law has long discriminated homosexuality and until recently sodomy was considered as a penal offence. The celebrated judgment passed by the Supreme Court on 6<sup>th</sup> September 2018 came as a relief to the LGBTQI+ community but although homosexuality was decriminalized, the law still remains silent on same-sex marriages in India. The Indian societal structure where homosexuality itself is a taboo, same-sex marriage is unthinkable and the society has a huge aversion to it. The so-called liberal Indian society defies the fact that marriage can be a union between two consenting adults without taking into consideration the tender of the individual. The basic definition of marriage itself restricts the union to opposite-sex partners. However, with the shift in the legal scenario, the acceptance of homosexuality as a sexual orientation and not a disease has occurred but the legal recognition to the institution of homosexual marriage is yet not taken up. Different nations worldwide legalise same-sex marriages and both same-sex couples and heterosexual couples are treated equally in the eyes of law, however, the Indian laws have remained silent on this subject. Through this paper, the researchers will conduct a comparative study regarding the position of India and other nations with respect to same-

sex marriage. With the increase in acceptance of live-in relationships in the society and the legal recognition it gets, the paper will look into the scope of substituting same-sex marriage with live-in relationships or civil unions which is used as an alternative in different nations. The scope of amendments in the personal laws of the country will as well be discussed in this paper.

**Keywords:** homosexuality, aversion, legal recognition, marriage, civil-unions, live-in relationships, substitute, comparative study.

### **CHAPTER-I**

#### **OVERVIEW**

##### **1.1 INTRODUCTION**

In the Indian society, marriage has a very restricted construction. It is defined as a union between two individuals of opposite sexes. This leaves a lacuna wherein same-sex relationships has no place in the societal definition of marriage. Not only the society but also the legal system in India fails to identify any such thing as same-sex marriage, there exists no provision in the law that recognises the union of same-sex couples and neither any right nor any remedy is provided if such a union collapses. In Hindu law marriage is treated as a sacrament between individuals of opposite sexes, section 5 of the act which provides for the essentials for a Hindu Marriage fails to bring into its purview the institution of same-sex relationships. Although there is no explicit mention of two definite sexes in the section, the act when read as a whole very clearly brings out the essence of section 5 leaving no room for further interpretation. As the law does not recognise marriage itself, there exists no potential safe-guard for divorce and forecasts huge discrimination between heterosexual and homosexual couples. Different nations



across the world recognise same-sex marriage or at least gives rights to the same-sex couple to have a civil-union and provides certain legal safeguard to such union. However, India neither legally nor socially accepts same-sex marriage. The decriminalisation of homosexuality has resulted in a lot of people coming out and a dire need for legal acceptance of same-sex relationships has come to surface. The legislation of laws that not only allows homosexual couple to stay in live-in relationship but also allows them to marry or have civil unions has arisen.

### **1.2 RATIONALE**

Sodomy has been criminalised in India for a long time but recently by a celebrated judgment of the Supreme Court it was decriminalised. This although served as a start for India to undo its past mistakes, this same-sex relationship is still not legally recognised i.e. it is not a crime under the Indian Penal Law to have consensual sexual intercourse with same-sex individual, this relationship has no legal recognition neither any provision regarding the safeguards of aggrieved party is provided because same-sex relationship does not find a place in Hindu Marriage Act for a result of which there is no provision for divorce. This paper will deal with legal recognition of same-sex marriage and divorce and other alternatives to this union.

### **1.3 PRESENT LEGAL SCENARIO**

The decriminalisation of homosexuality creates a dire need for giving same-sex

couples legal recognition of their relationship and the safeguard for the collapse of such union. Countries like USA, UK as well as third world countries like South Africa has recognised same-sex marriage as well as divorce but India remains far behind. Therefore a dire need has arisen to reconsider the definition of marriage and bring same-sex marriage within the ambit of section 5 of Hindu Marriage Act 1955 and also allow the option for divorce under section 13 of the act.

### **1.4 LITERATURE REVIEW**

Many sociologists classically define marriage as a union between a man and a woman. George Andrew Lundberg defines marriage as "rules and regulations that define the rights, duties and privileges of husband and wife with respect to each other."<sup>1</sup> Westermack opines that marriage is "the more or less durable connection between male and female lasting beyond the mere act of propagation till after the birth of offspring."<sup>2</sup> However, the concept of marriage has evolved over time and in some countries across the world marriage now includes a union of two individuals irrespective of sex. In the Indian context, however, the traditional definition of marriage is still observed. According to Hindu Law, marriage is considered to be a sacrament or 'samaskara' and is considered to be the last of the 10 sacraments that are enjoyed by the Hindus<sup>3</sup>. Although the Hindu Marriage Act, 1955 does not explicitly mention marriage to be a union between a male and a female, section 5<sup>4</sup> of the act that

<sup>1</sup> George A. Lundberg and others, *Sociology* (3<sup>rd</sup> edn, Harper and Row publishers).

<sup>2</sup> C.N. Shankar Rao, *Sociology, Principles of Sociology with an Introduction to Social Thought* p.327 (6th ed. 2007).

<sup>3</sup> Sir Dinshaw Fardunji Mulla, *Hindu Law* 812 (22<sup>nd</sup> edn, Lexis Nexis, 2016).

<sup>4</sup> The Hind Marriage Act 1955, s.5.



deals with the essentials for marriage implicitly indicates that union between opposite sexes only constitutes a valid marriage. Section 5(iii) reads that “the bridegroom has completed the age of<sup>4</sup> [twenty-one years] and the bride, the age of<sup>5</sup> [eighteen years] at the time of the marriage”. This section, however, nowhere provides the definition of bride and bridegroom but as every act should be interpreted as a whole and not by a part of it, section 13 (2) (iv) provides “that **her** marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.” Thus, the gender of the bride can be clearly understood leaving no space for interpretation.<sup>5</sup> Homosexuality has long since been a crime in India until recently when it was declared legal<sup>6</sup> by the supreme judicial authority in India. Although this shows a huge shift in the legal scenario of the country, it is still a taboo in society. In such a social context the Supreme Court has also preferred to remain silent in the case of same-sex marriage. The judgment delivered on 6<sup>th</sup> of September, 2018 has nowhere discussed the concept of same-sex marriage. In a poll conducted in India in January 2019 on whether same-sex

marriage should be allowed in India, 62% opined that same-sex marriage should not be allowed.<sup>7</sup>

Many countries across the world allow same-sex marriage and various other alternatives like civil-unions, registered-partnerships, etc. India has failed to recognise any such thing. According to Austin O’Malley “The three most important events of human life are equally devoid of reason: birth, marriage and death.”<sup>8</sup> Right to marry is a fundamental right under the Constitution of India, Article 21 although does not explicitly mention right to marry, the Supreme Court in a case<sup>9</sup> stated that “This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes.” However, the Hindu Marriage Act, 1955 does not recognise this right with regard to the LGBTQI+ community and there is no such provision in the law that protects or allows same-sex marriage.

In the USA, Baehr v Lewin(1993)<sup>10</sup>, the court first recognised gay rights. In Lawrence v Texas (2003)<sup>11</sup> the US Supreme Court struck down the law that criminalised sodomy. Following which in the case of Goodridge v Department of Public Health (2003)<sup>12</sup> in Massachusetts and in the case of Halpern<sup>13</sup>

<sup>5</sup> Rohit chabra, ‘Legality of Same Sex Marriages Under The Hindu Marriage Act, 1955’ (2017) JURIP 1 < <http://jurip.org/wp-content/uploads/2017/05/Ronak-Chhabria.pdf> > accessed on 15 September 2019.

<sup>6</sup> Navtej Singh Johar v Union of India, WP (Crl.) No 76/2016,order dated 12-07-2018.

<sup>7</sup> Nishtha Gupta, ‘Where is the love: 62 per cent Indians say same-sex marriages not accepted, finds Mood of the Nation poll’ India Today (New Delhi, 31st January 2019) < <https://www.indiatoday.in/magazine/web-exclusive/story/20190204-motn-same-sex-marriage->

[lgbt-rights-section-377-india-1439545-2019-01-25>](#) accessed on 15 September 2019.

<sup>8</sup> Anisa Shaikh, ‘Right to Marry under Right to Life: Panoramic View’(2012) SSRN <<http://dx.doi.org/10.2139/ssrn.2713789>> accessed on 15 September 2019.

<sup>9</sup> *Lata Singh v. State of Uttar Pradesh* AIR 2006 SC 2522.

<sup>10</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>11</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>12</sup> *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>13</sup> *Halpern v Canada* (AG), [2003] O.J. No. 2268.



the court ruled in the favour of same-sex marriage. Some countries in the USA recognises same-sex marriages and civil unions while others don't, this creates a problem in cases of divorce. In the case of *Boddie v. Connecticut*<sup>14</sup>, i.e. an opposite-sex divorce case the US Supreme Court held that only through divorce couples can "mutually liberate themselves from the constraints ... that go with marriage." However, due to the non-concurrences of laws in different states, it becomes very difficult for same-sex couples to opt for divorce. In a research paper titled "No Exit: The Problem of Same-Sex Divorce"<sup>15</sup> Elisabeth Oppenheimer explains the problem through an illustration, she states "Suppose a same-sex couple marries in Massachusetts, which recognizes gay marriage, then moves to Pennsylvania, which does not. The relationship ends. Where can the couple divorce? The surprising answer is nowhere. Pennsylvania courts will not divorce them because Pennsylvania does not recognize their same-sex marriage. Massachusetts courts will not divorce them because Massachusetts-like every other state only grants divorces to current residents, even though it will marry non-residents".

The UK used to recognise civil partnership and not marriage as an option for same-sex couples. The Civil Partnership Act came into force in Britain in 2005 following which in a

case a High Court to state that to rule a marriage as partnership "fail to recognise physical reality"<sup>16</sup>. However, in 2013 in England and Wales same-sex marriage was made available to such couples and also the civil partnership option was kept open. In a recent judgment<sup>17</sup> by the UK Supreme Court, it was held that civil partnership should also be extended to heterosexual couples as it violated the European Federation of Human Rights. However, same-sex marriage in other jurisdictions is yet not recognised. The problem of divorce for same-sex couples exists in the UK as the USA due to the variety of law in different states, however, in UK residence is also taken into consideration while allowing divorce as opposed to the USA where the only domicile is considered.<sup>18</sup>

Despite the changing legal and social scenario across the world, India lags behind in recognising same-sex marriage and its high time that India gives the LGBTQI+ community the right to marriage as guaranteed by the Constitution and bring it under the ambit of section 5 and also allow same-sex couples the right to divorce under section 13 of the Hindu Marriage Act, 1955 or provide some other alternative.

### 1.5 HYPOTHESIS

Although there is no special provision for civil unions, section 5 and 13 of Hindu

<sup>14</sup> *Boddie v. Connecticut*, 401 U.S. 371 (1971).

<sup>15</sup> Elisabeth Oppenheimer, 'No Exit: The Problem of Same-Sex Divorce' (2011) 90 N.C. L. Rev.73 <<http://scholarship.law.unc.edu/nclr/vol90/iss1/3>>

accessed on 16 September 2019 .

<sup>16</sup> Jowett, A. & Peel, E., "Seismic Cultural Change?": British media representations of same-sex 'marriage' (2011) Women's Studies International Forum, 33(3) 206.

<sup>17</sup> R (on the application of Steinfeld and Keidan) (Appellants) v Secretary of State for International

Development (in substitution for the Home Secretary and the Education Secretary) (Respondent) [2018] UKSC 32.

<sup>18</sup> Barry Crown, 'Civil Partnership In The U.K Some International Problems' (2014) 8 New York Law School Law Review 697 <[http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/01/NYLS\\_Law\\_Review\\_Volume-48.Issue-4.Crown-article.pdf](http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/01/NYLS_Law_Review_Volume-48.Issue-4.Crown-article.pdf)> accessed on 16 September 2019.



Marriage Act, 1955 is such that it can accommodate same-sex marriage and divorce within the ambit.

#### 1.6 RESEARCH QUESTION

Is there any such provision in the Hindu Marriage Act, 1955 that can bring same-sex marriage and divorce within its ambit?

#### 1.7 OBJECTIVES

This paper will mainly deal with comparative study regarding the position of India and other nations with respect to same-sex marriage and divorce laws. Also, the paper will look into the scope of substituting same-sex marriage with live-in relationships or civil unions which is used as an alternative in different nations. The liberty of amendments in the personal laws and the need for legally recognising same-sex marriage and ending the age-old disparity between heterosexual and homosexual couples will be looked into in the paper.

#### 1.8 METHODOLOGY

The doctrinal research method is used in this research paper thus secondary data is mainly relied on and critically analysed. The top-down method of research is applied in this study wherein the end the hypothesis is verified and either validated or refuted.

### **Chapter-II**

#### *SAME-SEX MARRIAGE A COMPARATIVE STUDY*

The Hindu Marriage Act, 1955 states all the conditions necessary for a marriage to be a valid marriage according to the Hindu Marriage Act. Section 5 of the Hindu Marriage Act states that, “a marriage may be

solemnized between any two Hindus, if the following conditions are fulfilled, namely-

- (i) Neither party has a spouse living at the time of the marriage;
- (ii) At the time of the marriage, neither party,
  - (a) Is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
  - (b) Though capable of giving valid consent, has been suffering from mental disorder of such a kind or to such an extend as to be unfit for marriage and procreation of children; or
  - (c) Has been a subject to recurrent attacks of insanity [(\*\*\*)];
- (iii) The bridegroom has completed the age of twenty-one years and the bride age of eighteen years at the time of the marriage;
- (iv) The parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;
- (v) The parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.<sup>19</sup>”

Though the essentials laid down in the Hindu Marriage Act does not specify any gender-based distinction, that will deem a marriage to be valid or void, but the term bride groom and bride seem to implicate to the terms male and female respectively. Though the section or the act does not explicitly define marriage as a union between man and woman, the laws have heteronormative underpinning, which does not recognise the union of two men or

<sup>19</sup> Hindu Marriage Act 1955, s 9.



women as a valid marriage<sup>20</sup>. This sort of differential behaviour has caused a lot of disturbance in the society. There has been many same sex marriage and suicide cases that has caught media's attention. In the year 1980, two women Lalitha and Mallika attempted suicide, the same year two women in Gujarat namely Jyotsna and Jayashree attempted suicide by jumping in front of the train<sup>21</sup>. These suicides caught the attention of media and people alike of the much-shunned issue in India. Over the years the issue has evolved and the Indian judiciary and government have tried to resolve the issue keeping in mind the public interest and peace in the society is not disturbed. But it was not until 2018 that the rights of the LGBT community were recognised by the state and the judiciary.

The decriminalisation of section 377 of the Indian penal code in the landmark judgement of *Navtej Singh Johar v Union Of India*<sup>22</sup>, endowed upon the LGBT community with a whole new set of rights and gave them equality as promised in the constitution under article 15<sup>23</sup>. Though section 377 was decriminalized the union of two men or women did not get any validation under the Hindu Marriage Act. In the Indian society according to the law, a sexual relationship between two consenting individuals, both homosexual and heterosexual is legal, but only the heterosexual relationship can be

legitimately be married and have all the legal duties and rights bestowed upon them. Whereas the homosexual couple fail to befall in the category of the legitimised married couple and do not share any legal marital rights and duties as laid down in the Hindu Marriage Act of 1955.

Contrasting to this concept that is followed in India, other countries like USA and UK have legalised same sex marriage. They have given equal rights to both hetero sexual and homosexual couples.

**2.1 USA:** The recognition of homosexual couples began in the USA in different parts in different times<sup>24</sup>, the campaigning and protest started nearly around 1970s, the people of USA wanted their civil rights to percolate down to each and every individual irrespective of their sexual orientation. The first case ever filed in the Supreme Court of USA was in the year 1972, where the bench laid down that "loving does indicate that not all restrictions upon the right to marry are beyond the reach of the fourteen amendment. But in common sense, there is a clear distinction between a marital restriction merely based race and one based upon the fundamental difference in sex<sup>25</sup>." This decision was challenged in the Supreme Court of US a number of times, where the same style and genre of judgement was upheld by the US Supreme Court<sup>26</sup>. After

<sup>20</sup> Ruth Vanita "Wedding of Two Souls": Same-Sex Marriage and Hindu Traditions" (2004) 20 Journal of Feminist Studies in Religion 119 <[www.jstor.org/stable/25002506](http://www.jstor.org/stable/25002506)> accessed on 20 September 2019.

<sup>21</sup> R.Vanita, *Love rites: Same sex marriage in India and the West* (1<sup>st</sup> edn, Macmillian, 2005) 48.

<sup>22</sup> Id 6.

<sup>23</sup> Constitution Of India (One Hundred And Third Amendment,) 1950, a.15.

<sup>24</sup> Lynn D Wardle, "Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage"(1998) 39 S Tex L Rev 735.

<[https://heinonline.org/HOL/Page?collection=sccjournals&handle=hein.journals/stexlr39&id=746&men\\_tab=srchresults](https://heinonline.org/HOL/Page?collection=sccjournals&handle=hein.journals/stexlr39&id=746&men_tab=srchresults)> accessed on 21 September 2019.

<sup>25</sup> Baker v Nelson, 191 N.W 2d 185(1971).

<sup>26</sup> Williams, R., "Same-Sex Marriage and Equality. Ethical Theory and Moral Practice" (2011)



many attempts of the Supreme Court to curb such an uprising the state Supreme Courts started making legislations against the homosexual union. The first legislation made by the state in the against a homosexual union was in the year 1993 with the enactment of DOMA( Defence of marriage act) in 1996, the Supreme Court of Hawaii laid down that, " that it was unconstitutional under the state constitution for the state to abridge marriage on the basis of sex<sup>27</sup>." The same judgement was given by the Massachusetts Supreme Court, in the case Goodridge v Department of Public Health<sup>28</sup>. It was not until the year 2015 that the homosexual union was recognised in USA in all its states and territories and the US Supreme Court passing the judgement on the same binding on all the states that were part of USA. Although, since the year 2004, that the states started making legislations and laws relating to homosexual marriage, before the US Supreme Court passed a judgement to create a uniform civil right for marriage there were thirty-eight states, one district and one district that had passed laws in favour of homosexual marriage<sup>29</sup>. The judgement of Baker v Nelson was overruled by the US Supreme Court listed four reasons to accept such a union they were, "First, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." Second, "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals," a principle applying

equally to same-sex couples. Third, the fundamental right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education"; as same-sex couples have children and families, they are deserving of this safeguard—though the right to marry in the United States has never been conditioned on procreation. Fourth, and lastly, "marriage is a keystone of our social order," and "there is no difference between same- and opposite-sex couples with respect to this principle"; consequently, preventing same-sex couples from marrying puts them at odds with society, denies them countless benefits of marriage, and introduces instability into their relationships for no justifiable reason.<sup>30</sup>" this judgement turned the meaning of the term marriage in the USA and gave the union of homosexual and heterosexual the same validation and legitimacy. There are yet a few challenges that need to be looked into, the federal system of government traditionally did not make laws regarding the civil matters of marriage that would be in all states, the states had the power to make their own marriage civil laws. The marriage that was accepted by any one of the states was accepted by the federal government even though it was not recognised by other states of USA<sup>31</sup>. After the judgement of Obergefell v Hodges all the 50 states had to legalise homosexual marriage, and thus it reversed the position of the authorities in cases of recognising

14(5) Springer 589  
<http://www.jstor.org/stable/41472625> >accessed on 21 September 2019.

<sup>27</sup> Baehr v Mike, 852. P2d 74(1993).

<sup>28</sup> Goodridge v Department of public health, N.E.2d 941(2003).

<sup>29</sup> Chamie, Joseph, and Barry Mirkin. "Same-Sex Marriage: A New Social Phenomenon" (2011) 37 Population and Development Review 529 <

[www.jstor.org/stable/23036054](http://www.jstor.org/stable/23036054) > accessed on 21 September 2019 .

<sup>30</sup> Obergefell v Hodges, 2015 BL 204553.

<sup>31</sup> Dinno, Alexis. "Comment on 'The Effect of Same-Sex Marriage Laws on Different-Sex Marriage: Evidence From the Netherlands'" (2014) 51 Demography 2343 <[www.jstor.org/stable/43697509](http://www.jstor.org/stable/43697509)> accessed on 21 September 2019.



homosexual marriage. The Supreme Court of US laid down that, "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfilment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right<sup>32</sup>." Thus, with evolution of time USA mixed the old traditions with the modern ones to create a society that is fair to all and gives every individual equal right in civil marriage cases irrespective of the sexual orientation of the people.

**2.2 UK:** United Kingdom legalised same sex marriage in the year 2005 and was amongst one of the pioneers to legalise same sex marriage. The first homosexual marriage in UK took place in the year 1860, when Arabella Hunt married James Howard, their marriage was annulled on the basis that two women with perfectly womanly parts cannot marry each other<sup>33</sup>. A same judgement was

given in 1866, it was stated that, "Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others<sup>34</sup>." This was followed by a number of cases with the same decision that disregarded the marital union of two homosexuals, on the basis that Christianity did not permit them to have a matrimonial alliance between two male or two females. It only considered the matrimonial alliance between a man and a woman. It was only in the year 2003, Celia Kitzinger and Sue Wilkison, were legally married<sup>35</sup>. Their marriage was not recognised a marriage under British law rather it was converted into civil partnership. The judgement was passed in the year 2006, where the high court stated that, "Abiding single sex relationships are in no way inferior, nor does English law suggest that they are by according them recognition under the name of civil partnership<sup>36</sup>." According to the new act passed to legitimise the union of homosexual couples, the civil partnership is a different union and doesn't bring along the rights and duties that are brought upon a couple under civil marriage. The concept of civil partnership can only take in the permitted premises of the United Kingdom. The first civil partnership took place on 5<sup>th</sup> December 2005 between Mathew Roche and Christopher Camp, the venue of this historic event was at St Barnabas Hospice, Worthing, West Sussex<sup>37</sup>. According to this law the civil

<sup>32</sup> Id 12.

<sup>33</sup> Willets, Marion C. "Registered Domestic Partnerships, Same-Sex Marriage, and the Pursuit of Equality in California" (2011) 60 Family Relations 135 <[www.jstor.org/stable/41236754](http://www.jstor.org/stable/41236754)> accessed on 21 September 2019.

<sup>34</sup> Hyde v Hyde , (L.R.)1 P.&D. 130

<sup>35</sup> Bernstein, Mary. "Same-Sex Marriage And The Future Of The Lgbt Movement: SWS Presidential

Address" (2015) 29 Gender and Society 321 <[www.jstor.org/stable/43669974](http://www.jstor.org/stable/43669974)> accessed on 22 September 2019 .

<sup>36</sup> Wilkinson v. Kitzinger and Others, (2006) EWHC 2022(Fam).

<sup>37</sup> 'First civil union in united kingdom' BBC news (6 Dec 2005) <[http://news.bbc.co.uk/2/hi/uk\\_news/england/souther](http://news.bbc.co.uk/2/hi/uk_news/england/souther)



partnership thus formed will have the same rights as a married couple and will be entitled to the same property rights as the married couple, they will have the same exemptions as that of the married couple for example the exemption on inheritance tax, social security and pension benefits. In the year 2013, the marriage act of 2013 was passed which legalised same sex marriage in England and Wales, and also granted the ability to the civil partnership to convert into marriage. This was though reviewed again in the year 2018 and the government passed a legislation stating that civil partnership will be allowed throughout the United Kingdom, and the homosexual matrimonial alliance would have an option to either form a civil partnership or a marriage. A civil partnership is formed once both individuals have signed the civil partnership document in the presence of a registrar and two witness<sup>38</sup>. Thus, with progression of time the ideologies based on homosexual matrimonial alliance evolved in the United Kingdom, from annulling the homosexual union to giving them right as, civil partnership, and then giving the couple the freedom of choice to choose between legitimisation of union as a matrimonial alliance or a civil partnership.

India, as country should now consider the concept of homosexual marriage and include them in the personal laws, or specific marriage laws if not the inclusion of the homosexual marriage in the personal laws to avoid disturbance of public harmony at large. It should set specific provisions or provide the provisions of civil partnership to

[n\\_counties/4505010.stm](#) accessed on 21 September 2019.

<sup>38</sup> ‘Registering civil partnership in Scotland’ (4 June 2019) Wayback machine <<https://www.nrscotland.gov.uk/regscot/registering->

legitimise the union of a homosexual couple.

### CHAPTER-III

#### DIVORCE IN RESPECT OF SAME-SEX MARRIAGE OR CIVIL UNION- A COMPARATIVE ANALYSIS

Divorce can be defined as a derivative benefit of marriage which can be opted in case of the collapse of a legal union. It provides a way for the spouses to end the institution in a dignified manner and liberates individual from such a union. Recognising divorce is as essential as recognising marriage itself, identifying an institution as a legal union without this derivative benefit leaves spouse devoid of legal safeguards. In this part, a comparative study is done with respect to divorce from the standpoint of India, USA and UK with regards to same-sex marriages.

**3.1 USA:** Same-sex marriage was only recently legalised in the States and in some parts of it same-sex marriage is still not allowed this creates a problem in cases of divorce. In the case of *Boddie v. Connecticut*<sup>39</sup>, i.e. an opposite-sex divorce case the US Supreme Court held that only through divorce couples can "mutually liberate themselves from the constraints ... that go with marriage." However, due to the non-concurrences of laws in different states, it becomes very difficult for same-sex couples to opt for divorce. In a research paper titled “No Exit: The Problem of Same-Sex Divorce”<sup>40</sup> Elisabeth Oppenheimer explains the problem through an illustration, she states “Suppose a same-sex couple marries in Massachusetts, which recognizes gay marriage, then moves to Pennsylvania,

[a-civil-partnership-in-scotland.html](#) accessed on 22 September 2019.

<sup>39</sup> *Boddie v. Connecticut*, 401 U.S. 371 (1971).

<sup>40</sup> Id 15.



which does not. The relationship ends. Where can the couple divorce? The surprising answer is nowhere. Pennsylvania courts will not divorce them because Pennsylvania does not recognize their same-sex marriage. Massachusetts courts will not divorce them because Massachusetts-like every other state-only grants divorces to current residents, even though it will marry non-residents". Judges while dealing with cases of divorce in such circumstances use two approaches one is equity and the other is originalism. In a case wherein a gay couple travelled from Texas to Vermont to get their union registered under civil-partnership, but after a year when they wanted a divorce the Vermont law's domicile requirement came as a barrier, post this they filed a divorce in Texas wherein the District judge allowed, however, the attorney general of Texas told the judge that 'a divorce can't be granted where there existed no marriage at the first place'<sup>41</sup> following which the judgment was overturned. In the case of re KJB v JSP<sup>42</sup> a lesbian couple who was not a resident of Vermont but Ilowa filed a suit for divorce in Vermont. The court although lacked jurisdiction, the divorce was granted, although he received a lot of criticism he was of the opinion that "[T]his [is] a dispute between parties that in some way I'm going to have to solve." In these cases the court took an equity approach whereas in cases like Chambers v Ormiston<sup>43</sup> following the same problem of domicile requirement and

disqualifying the divorce petition through the originalistic intent, the court was of the view that "sometimes our decisions result in palpable hardship to the persons affected by them," but also was of the opinion that the legislature should legislate laws on such matter and not the judiciary.

**3.2 UK:** The UK used to recognise civil partnership and not marriage as an option for same-sex couples. The Civil Partnership Act came into force in Britain in 2005 following which in a case a High Court to state that to rule a marriage as partnership "fail to recognise physical reality"<sup>44</sup>. However, in 2013 in England and Wales same-sex marriage was made available to such couples and also the civil partnership option was kept open. In a recent judgment<sup>45</sup> by the UK Supreme Court, it was held that civil partnership should also be extended to heterosexual couples as it violated the European Federation of Human Rights. However, same-sex marriage in other jurisdictions is yet not recognised. The problem of divorce for same-sex couples exists in the UK as the USA due to the variety of law in different states, however, in UK residence is also taken into consideration while allowing divorce as opposed to the USA where only domicile is considered.

The problem with divorce even in the UK is due to multiple jurisdictions and a variety of laws concerning it. However, English courts

<sup>41</sup> Fred A. Bernstein, 'Gay Unions were only Half the Battle' *The New York Times* (3<sup>rd</sup> April 2003).

<sup>42</sup> Id 15.

<sup>43</sup> *Chambers v. Ormiston*, 935 A.2d 956 (2007).

<sup>44</sup> Jowett, A. & Peel, E., "Seismic Cultural Change?": British media representations of same-sex 'marriage' (2011) Women's Studies International Forum, 33(3) 206.

<sup>45</sup> R (on the application of Steinfeld and Keidan) (Appellants) v Secretary of State for International Development (in substitution for the Home Secretary and the Education Secretary) (Respondent) [2018] UKSC 32.



have jurisdiction to deal with any case of divorce considering that the union is registered under English civil-partnership act.

In India, however, the Hindu Marriage Act does not recognise same-sex marriage and subsequently no divorce clause exists that allows same-sex divorce, Section 13 (1) of the act that deals with condition relating to divorce reads “Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the *husband or the wife*, be dissolved by a decree of divorce on the ground that the other party.....” ruling out any scope of interpreting it otherwise and largely excluding same-sex divorce cases. Even if considering that a totally different position is made available to same-sex couples, i.e. of civil-unions, it is mandatory that the collapse of such should also be brought under the clause of divorce giving same-sex couples a legally recognised institutionalised relationship and a dignified way of leaving such a union in case of its collapse. India will not have a problem of multiple jurisdiction or inconsistency in law if the Hindu Marriage Act is amended as every person who is a Hindu and who married according to section 5 of the act will have access to divorce and can contest in a court of appropriate jurisdiction.

However, in a study, it was found that there exist higher chances of divorce in case of same-sex relationships due to the lack of normative pressure and a lesser

institutionalised form of the relationship.<sup>46</sup> This makes it very important to amend section 13 along with section 5 to bring into its purview same-sex marriage and divorce.

## **CHAPTER-IV**

### **CONCLUSION AND RECOMMENDATIONS**

#### **CONCLUSION:**

In the summary, provisions in the Hindu Marriage Act, 1955 for providing legitimacy to the same sex marriage after the landmark judgement of decriminalisation of section 377 is looked into. The first part of the paper gives an overview of the research paper, hypothesis, research methodology, literature review and the objective that are being addressed by the paper.

The first part of the second chapter deals with the provisions of a valid Hindu marriage under the Hindu Marriage Act. Even though there has been no mention of the union of a heterosexual couple, the heterosexual underpinning indicates only the union of a man and woman can be claimed to be a valid marriage. Comparison is drawn from two of the major countries namely, United States of America and United Kingdom and how the evolution of same sex marriage took place in these countries and how they legitimised same sex marriage. Though the same sex marriage is not a legitimised concept in our country but the government and the citizens are progressing towards, it was not until the recent time that in Gurgaon a homosexual couple got recognised as a married couple and the courts ruled in their favour<sup>47</sup>.

<sup>46</sup> Gunnar Anderson and others, ‘The Demographics of Same-sex marriage in Norway and Sweden’ (2006) 43 *Demography* 79

<<https://www.jstor.org/stable/413723>> accessed on 18<sup>th</sup> September 2019.

<sup>47</sup> Dipak Kumar Dash & Sanjay Yadav, ‘Gurgaon court recognises lesbian marriage’ *Times of India* (29



The second part of the chapter deals with divorce and other remedies available to a homosexual couple in India with comparison to USA and UK. It is seen that the occurrence of divorce in homosexual couples are more compared to heterosexual couples due to the lack of normative pressure and lesser form of institutionalised relationship. Both in US and UK there exists a problem with domicile and residence when treating same-sex divorce cases due to it not being legally accepted in most of the country. If section 13 of Hindu Marriage Act is amended then this problem will not arise as any individual who is a Hindu and has registered their marriage under the said act can contest for divorce in any court of appropriate jurisdiction.

All the above instances portray that there should be provisions made in The Hindu Marriage Act for the incorporation of the matrimonial alliance of the homosexuals. The instances drawn from the comparison from USA and UK depicts ways in which same sex marriage can be incorporated in the Hindu Marriage Act in section 5 and section 13. This with all the above instances refutes the hypothesis- *Although there is no special provision for civil unions, section 5 and 13 of Hindu Marriage Act, 1955 is such that it can accommodate same-sex marriage and divorce within the ambit.*

**RECOMMENDATIONS:**

1. The underpinning heterosexual concept of section 5 of the Hindu Marriage Act should be transposed off with. This gives a whole meaning to essentials for a valid Hindu marriage and makes it more holistic and

July 2011)  
<<https://timesofindia.indiatimes.com/city/gurgaon/In-a-first-Gurgaon-court-recognizes-lesbian-marriage/articleshow/9401421.cms>>, accessed on 22 September 2019.

broadened such as to include every matrimonial alliance irrespective of their sexual orientation.

2. New provision should be made in the Hindu Marriage Act with consideration to the removal of gender-based legitimisation of the Hindu marriage and homosexual marriage should be recognised under section 5 of the Hindu Marriage Act.
3. The proposal made in the law commission report 2018, with respect to reformation of family law must be taken into consideration and laws must be passed with regard to. The law commission report proposed that there should be uniform civil code for marriage that allows the marriage of homosexuals<sup>48</sup>.
4. Section 13 of the act should also be amended to bring into its ambit same-sex divorce. Recognising divorce is as essential as recognising marriage itself, identifying an institution as a legal union without this derivative benefit leaves spouse devoid of legal safeguards.

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<sup>48</sup>*Reform on Family Law* Law commission report consultation paper,2018  
<[http://www.lawcommissionofindia.nic.in/reports/CP\\_onReformFamilyLaw.pdf](http://www.lawcommissionofindia.nic.in/reports/CP_onReformFamilyLaw.pdf)> accessed on 22 September 2019.