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Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmanagarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

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Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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SAME SEX MARRIAGE: DISCUSSING THE LEGALITY, RELIGIOSITY AND SOCIAL NORMS

Authored by - Anupriya Kumari

Ph.D. Research Scholar, Central University of South Bihar, Gaya, Bihar, India

Email: anupriya@cusb.ac.in

Co-Author - Ridhanshu Singh

Ph.D. Research Scholar, Central University of South Bihar, Gaya, Bihar, India

Email: ridhanshu@cusb.ac.in

ABSTARCT

The issue of same sex marriage in India has stirred up great controversy and debate. Same Sex marriages remain to be not legally recognized even after the decriminalization of homosexuality by the Supreme Court of India by striking down Section 377 of the Indian Penal Code in 2018. The major factor behind this can be attributed to the fact that marriage is considered a religious sacrament within the purview of personal laws and such unions lack the recognition of social norms. As India continues to make strides towards greater acceptance and inclusion of the LGBTQ+ community, the issue of legalising same-sex marriages remains a complicated one, as it involves not just legal and political change but also a shift in religious and societal attitudes.

This paper aims at analysing the importance of marriage and the current personal laws governing the concept of marriage in India and the scope of inclusivity of same-sex marriages in the existing legal framework. Further, this paper will attempt to examine the intersection between religiosity and attitudes towards same-sex relationships has led to significant challenges for the LGBTQ+ community in India.

Keywords: Marriage, Same-sex marriage, Homosexuality, Matrimonial Laws, Religion.

AIM, OBJECTIVE & RESEARCH QUESTION

The aim of this paper is to analyse the status of same-sex marriages in India, specifically dealing with following objectives:

1. To explore the importance of the institution of marriage in the societal set-up and the status of the same-sex marriages in India.
2. To examine the possibility of granting the legal status to the same sex marriages in the existing legal framework.
3. To analyse the interplay of religion and social norms towards the acceptance of same-sex marriages in India.

Research Questions:

1. How are homosexual couples discriminated on the grounds of 'sex' under the constitutional premises when it comes to *Right to marry the person of own choice*?
2. Is the existing legal framework pertaining to the family law sufficient to address the acceptance of same-sex marriage?
3. What is the stance of religion, culture and social norms when it comes to the status of homosexuality and same-sex marriages?

“Love has no gender -Compassion has no religion - Character has no race.”

— **Abhijit Naskar, Either Civilized or Phobic: A Treatise on Homosexuality**

IMPORTANCE OF MARRIAGE

In the century's old human society, marriage remains one of the most significant and vital institutions that might have developed and its structure might have been transformed but the concept that marriage remains to be a universal fact remains unchanged. The relevance of marriage becomes deeper in India where sacramental values are attached to the institution of marriage and so intensely associated that everyone is anticipated to be its part. Marriages in India are considered to be sacred apart from the objectives of marriage attached to it which comprises procreation of children, legitimization of

relationships and the formation of the society.¹ The religious ceremonies and ritual performed during the solemnization of marriage are regarded as very significant. This is well sufficient enough to describe the eagerness of the LGBT people to get legal status to their marriages in India or the increased reported cases of same-sex marriages happening in India in the temples by exchanging garlands or friendship contracts of quasi-legal nature.

The legal and social acknowledgment as well as the benefits provided by the state to a married person are refused to the same-sex couples by the denial of equal rights of marriage to the people of LGBT community.² The same-sex marriages if legalised will give the same-sex couples someone who could take important decisions on their behalf, they will have a chosen family as they are refuted and discriminated by their natal families. They are simply barred from the bundle of privileges, social recognition and rights that comes along with marriage. Still, it is crucial to mention that the institution of marriage from the very beginning only, has eliminated a particular class of people and a conflict has always arisen amidst the societal principles, religion and policies when either of the included or excluded people have tried to break the norms set by the society.

MARRIAGE AND FAMILY

Indian people and all those citizens of India residing outside the country has been allowed to marry regardless of caste, faith and religion by the virtue of the Special Marriage Act, 1954. The laws pertaining to marriage in India has developed constantly but lacks any provisions for the marriage of the same-sex couples which also appears to be prudent as it is only 2-3 years since homosexuality was decriminalized by the Supreme Court of India. But this issue cannot be ignored for long as today or tomorrow, these issues will come up before the legislature and it did has started coming up.

A number of petitions are lined up before the Indian Judiciary concerning the issue of same-sex marriages. Hence, the next milestone to be achieved by the activists of the LGBT community is to advocate and appeal for the formulation of laws by the Legislature allowing the marriages among the LGBT couples, inheritance of the property of their partners, adoption and guardianship. But although

¹ Diva Rai, "Evolution of LGBT Rights in India and taking the narrative forward" *iPleaders*, 2020 available at: <https://blog.iplayers.in/evolution-of-lgbt-rights-in-india-and-taking-the-narrative-forward-living-free-and-equal/> (last visited April 30, 2023).

² *Ibid*

it may seem that the Central Government might have left it upon the judiciary in 2018 to decide upon the legality of homosexuality but has signalled that it does not favour any petition for the recognition for the marriages of the same-sex couples – the Central Government has opposed the petition for the recognition of the same-sex marriages presented before the Delhi High Court on the grounds that it has not been a part of the Indian culture and “*no one is dying due to the absence of marriage certificates and there lies legitimate state interest in limiting same-sex marriages.*”³

However, it appears to be violative of the legal principles in the context of judicial pronouncements as if we really wish to stand by the doctrine of equality and want to respect the equal rights of the people LGBT community, then right to marry, inheritance of the spouse’s property, sharing of insurance are all a part and parcel of this bundle of rights. Hence, Article 14 and Article 19 of the Indian Constitution guaranteeing right to equality and liberty respectively are being violated by the denial of these fundamental rights to the LGBT people and is at the same time unconstitutional.

LEGALITY OF RIGHT TO MARRY

The Constitution does not speak of right to marry specifically but the historic case of *Lata Singh v State of Uttar Pradesh*⁴ interpreted right to marry a part of Article 21 of the Constitution of India. It was a case of inter-caste marriage before the Supreme Court, where the Court held that a person after attaining the age of majority can marry anybody whom he/she wishes to. It was further said in the particular case that children doing so cannot be threatened or killed for marrying as per their wish, the only option available to their families is severing their relations.⁵

Sexual orientation has been identified as a concern of human rights by the United Nations Human Rights Treaty Bodies in the need of protection and equality. It has been affirmed by the Human Rights Committee that the Article 26 of the International Covenant on Civil and Political Rights include the discrimination on the grounds of sexual orientation. It has been reiterated by the Economic, Social & Cultural Committee that in accordance with Article 2.2 and 3 of the International Covenant on Economic, Social and Cultural rights, discrimination on any grounds including sexual

³ Udit Sood and Ors. V Union of India and Anr.

⁴ Lata Singh v State of U.P. & Another, AIR 2006 SC 2522

⁵ Abhinav Sandeep Khadikar and Rohit Ajay Deoras, “Same-Sex Marriage Rights in India: An Overview,” 4 Issue 5 *International Journal of Law Management & Humanities* [cviii]-1132 (2021).

orientation and HIV/AIDS in accessibility to health care is not permissible. Violence and torture based on the grounds of sexual orientation is prohibited under the Convention against Torture. Human Rights Charter along with numerous other covenants have also acknowledged the right to marry at the international platform under the chapter of *Right to have a family* the biggest question that remains is whether these conventions and covenants are sufficient to include and guarantee same-sex marriages.⁶ The next very crucial aspect that needs to be brought forwards is that where the world is embracing and becoming more open to changes, the parents are not even allowing their children to marry outside their caste reflecting the persisting conservative nature of the Indian society. Honour killings for marrying outside caste and religion remain very rampant practice in the Indian society even today making the acceptance of same-sex marriages a more difficult scenario.⁷

Nevertheless, the different sexual orientation of the people of LGBT community cannot be made an excuse to justify the denial of right to marry to all of the LGBT community. Other than this, a very crucial issue that pops up is that if the notion of the majority of the population is sufficient for the law to snatch away the right of self-determination and personal autonomy and deny someone's basic and fundamental rights of someone who do not conform with the notion of the majority.⁸

EXAMPLES OF SAME-SEX MARRIAGES ACROSS THE COUNTRY

There have been instances of same-sex marriages across the country in spite of the fact that there exist no laws for regulating the same-sex marriages in India even then the courts have acknowledged and validated their marriages.⁹ The Court of Haryana was found to be efficiently acknowledging a same-sex marriage of two lesbians post the decriminalisation of same-sex activities in the year 2009. A more momentous decision followed in 2018 which section 377 of the IPC was struck down by the Supreme Court. Soon after the judgment in the same year, the High Court of Madras validated the solemnization of marriage between a heterosexual male and a trans woman as per the with further

⁶ *Supra* note 1.

⁷ *Ibid*

⁸ *Ibid*

⁹ "(PDF) Homosexuality In India - The Invisible Conflict," *available at*:

https://www.researchgate.net/publication/361792971_Homosexuality_In_India_-_The_Invisible_Conflict (last visited April 30, 2023).

orders to register the marriage under the Hindu Marriage Act, 1956.¹⁰ There are many more similar examples of same-sex marriages that have taken place in the communities. Much before the progressive judgments followed, marriage between two police women was solemnized as per the Hindu rituals in 1988. Although no such formal registration could be done but their families and the community approved and accepted their marriage. Another such instance is from a small village of *Angaar* that is situated in Gujarat where the tradition of same sex marriages is been continued in a community known as *Kutchi* for the last 150 years which have both male as bridegroom and bride.¹¹

It is really significant to mention that majority of such same-sex marriages, to be very specific lesbian marriages have been solemnized broadly taking place in small towns between women of lower or middle class who mostly don't speak English i.e., those who don't even have any relation with the LGBT movement.¹²

MARRIAGES UNDER PERSONAL LAWS

Family laws can be classified under two distinct categories in India:

- i. Personal Law: Personal laws are applicable to people of a particular religion and is different for every religion. Hindu marriage Act is applicable to Hindus, Sikhs, Jains and Buddhists whereas Shariat Law governs the Muslims, Christian Marriage Act and Parsi Marriage & Divorce Act governing the Christians and the Parsis respectively.
- ii. Secular Law: As the name suggests, it is applicable to every citizen of India irrespective of their religion, caste or class. For example, Special Marriage Act is one such secular law.

The following observations have been made on analysing the stance of personal laws on the same sex marriages in the country:

The perception of homosexuality differs from follower to follower of **Hinduism** but the religious texts and documents gives a very detailed account of the same-sex relationships and in continuation

¹⁰ Julie Bushyhead, "The Coquille Indian Tribe, Same-Sex Marriage, and Spousal Benefits: A Practical Guide National Native American Law Students Association 8th Annual Writing Competition," 26 *Arizona Journal of International and Comparative Law* 509–46 (2009).

¹¹ *Ibid*

¹² *Ibid*

discusses same-sex marriages.¹³ Same-sex relationships are illustrated in the form of art and carvings in the temples in India. The presence of the same can be established from a number of mythological stories, one such account is of Lord Shiva and Lord Vishnu giving birth to the God *Ayappa*. Another such account is of two women giving birth to *Bhagiratha* as a result of the queer romance under sacred blessings and he is named so because he was born to two mothers i.e., out of two vulvas.¹⁴ Some other historical events presenting evidences of same-sex relationships are the depiction of *Shikhandi* in the Mahabharata, tantric rituals native to homosexuals and Kamasutra's homosexual acts. But homosexuality is condemned in some of the text on the premises of undue importance being given to sex by the humans.¹⁵

Shariat laws stems from the *Sunnah* of the Mohammad and the holy Quran. **Islam** very clearly communicates that homosexuality is a sin punishable under the Shariat Law.¹⁶ All the primary schools of Sunni jurisprudence follow the same perception. It has been stated by the Muhammad that as per the principles of Islam men exhibiting feminine behaviour and women exhibiting masculine behaviour should be turned out of the homes and are entitled to be punished.¹⁷

The only doubt that lingers in the **Christianity** regarding homosexuality is the treatment of the homosexuals – whether their treatment should be at par with criminals or attempts should be made to rectify their behaviour. However, in any case the stance of Christianity remains very apparent that it does not encourage any homosexual behaviour.¹⁸

Zoroastrianism also strongly forbids and regard homosexuality as evil. But the LGBT community is supported by some of the followers of the said faith regarding the above-mentioned interpretation as a misinterpretation of the fundamental principle of “good thinking, good words and good actions”.¹⁹

¹³ “Stances of Faiths on LGBTQ Issues: Hinduism - Human Rights Campaign,”*available at:* <https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-hinduism> (last visited April 30, 2023).

¹⁴ *Ibid*

¹⁵ *Ibid*

¹⁶ “Homosexuality and transgenderism in the Quran - GALE,”*available at:*

<https://www.gale.info/en/database/reading/homosexuality-and-transgenderism-in-the-quran> (last visited April 30, 2023).

¹⁷ *Ibid*

¹⁸ *Supra* note 13.

¹⁹ *Ibid*

The perception of **Jainism** remains very crystal-clear regarding homosexuality. All forms of sexual activities that are done with the objective of other than reproduction is strongly discouraged i.e., even heterosexual sex, pre-marital sex and sex for fun is also prohibited leave aside homosexuality.²⁰

Buddhism allows any sexual activity as long as it is done out of affection and consent. A similar perception is shared by the Dalai Lama that unless there is no harm to anybody and the act is consensual, homosexual act is allowed.²¹

Same-sex marriages are not held in the Gurudwaras owing to the silence of the religious text of **Sikhism** on homosexuality.²²

It is crucial to review the perceptions of the various religions regarding the issue of same-sex marriages prior to the formulation of laws and policies concerning same-sex marriages as the marriages under every particular religion that are governed by the personal laws are borrowed from the existing literature and texts of the said religion.²³ So, things have to kept in mind during the formulation of such laws when majority of the faiths curb homosexuality and consider it unacceptable other than Buddhism and Hinduism. Hence, making amendments to the personal laws is not a good idea when such discrepancies exist regarding LGBT rights.²⁴

Also, it must also must be taken in account of the events that whenever attempts have been made previously to bring in a Uniform Civil Code, a great resistance has been made owing to the fear of the minorities that the freedom of their religion could be restricted by the UCC in India. This is the major cause behind the rejection of UCC in August 2018 by the Law Commission as a suggestion.²⁵

The most feasible option that remains for the recognition of the same-sex marriages provided the given circumstances could be accommodated through the amendments in the Special Marriage Act

²⁰ Keya Das and T. S. Sathyanarayana Rao, "A Chronicle of Sexuality in the Indian Subcontinent," 1 *Journal of Psychosexual Health* 20–5 (2019).

²¹ *Ibid*

²² *Ibid*

²³ Samanwaya Rautray, "Same sex marriages cannot be given legal sanction: Government" *The Economic Times*, Feb 25, 2021.

²⁴ *Ibid*

²⁵ *Supra* note 20.

which is discussed elaborately in the next section.

It was recognized by Hon'ble Justice Chandrachud in the case of Navtej Singh Johar²⁶ that the exercise of intimacy in any manner an individual wishes to is not the concern of the State's legitimate interest. But the said judicial pronouncement did not issued any guidelines to the government to bring in the necessary amendments to the existing laws or to formulate new legislations as per the requirement of the situation in spite of awarding everyone the right to intimacy. When the term 'union' was recognised by Justice Misra while granting right to union under Article 21 of the Indian Constitution the context referred here did not meant marriage rather it meant companionship.²⁷

It has also been brough to the notice that numerous recommendations for making the reforms in the family law to make it more inclusive for same-sex couples have been suggested by the activists of LGBT rights to the Law Commission but no due consideration has been received by the Law Commission. But a number of these restrictions can be now called upon post the judicial pronouncements by the Supreme Court in the NALSA and Navtej Singh Johar laying down a strong foundation by recognising rights against discrimination and right to equality.²⁸

SPECIAL MARRIAGE ACT AND SAME-SEX MARRIAGES

There has been a huge uproar in the Supreme Court regarding the legalisation of same-sex marriages in India and the Union Government has been constantly opposing the recognition of same-sex marriages, citing it to a matter of state policy and the possibility of it creating a havoc in the personal laws & social norms, which altogether holds no merit as same-sex marriage is a matter of determination of rights and not a matter of state policy which is subject to judicial interference and there will be minimal alterations in the personal laws.²⁹ The very foremost premise for this discussion is Article 14 and 15 which prohibits discrimination on the grounds of sex which implies sexual orientation as well according to the interpretation given by the Supreme Court in the case of Navtej

²⁶ AIR 2018 SC 4321

²⁷ *Ibid*

²⁸ Mishka Paswan and Jivitesh Sisodia, "Same Sex Marriage: A Taboo in Indian Society," 5 Issue 4 *International Journal of Law Management & Humanities* 349–62 (2022).

²⁹ "Same-sex marriage: All that is needed is a small change in the Special Marriage Act," *The Indian Express*, 2023 available at: <https://indianexpress.com/article/opinion/columns/same-sex-marriage-small-change-special-marriage-act-8498683/> (last visited April 30, 2023).

Singh Johar (2018). And granting the same right to marriage to the heterosexual couples and denying the same to homosexual couples is a clear discrimination on the above stated ground. The another right recognised by the Supreme Court is Right to privacy which in the Puttuswamy case (2017) which provides a person with the autonomy and decision-making power over the matters of family life and marriage which is again being violated for the homosexual couples.

One of the major grounds for opposition of same-sex marriages by the Central Government is the disruption of the balance of personal laws in the country which is regarded as really fragile. However, the determinative yardstick should be that of constitutional morality and not that of popular morality. One cannot be simply denied the constitutional right to equality over the fear of disruption of morality that is popular. But even if we leave the personal laws untouched as of now, we still can look up to the Special Marriage Act, 1954 – a secular law that runs parallel to personal laws and facilitates the marriage of two persons outside the purview of religion. Indeed, there are certain provisions that make use of the term ‘Husband’ and ‘Wife’ and this ‘husband’ and ‘wife’ will continue to be there even in the same-sex marriages, the only point of difference will be there will be two husbands or two wives at times.³⁰ This will be a minor legal step as the language of the Special Marriage Act is less opposing and there lies more possibilities of accommodation.

Including the Rights of the Same-sex Couples in the Matrimonial Laws

New laws need to be formulated, amended or introduced in order to acknowledge the same-sex marriages as the existing laws does not prove to be sufficient for the recognition of same-sex and LGBT marriages. The matrimonial laws can be made inclusive for the LGBT community in three ways.³¹ The first notion recommends the modification, reinterpretation or amendment of the existing laws or if the language of the Act is made gender neutral. The other notion suggests the formulation of a completely new Act permitting the same-sex marriages. The third notion provides an experimental approach due the conservative nature of the Indian society that is still not tolerant and

³⁰ “Same-sex marriage hearing | The case so far,” *The Hindu*, 26 April 2023, section India.

³¹ Sharif D Rangnekar, “The battle for same-sex marriage is essentially a fight for civil rights” *Scroll.in*, Mar 01, 2021.

open enough towards the concept of marriages of LGBT.³² Hence, a different status can be bestowed to the same-sex marriages instead of granting them a legal status such as quasi-legal friendship contract, civil partnership, etc. which might not guarantee equal rights to those of a marriage but still significant rights such as inheritance, insurance sharing, joint tax returns, etc. can be permitted – recognition of a relationship dependent on economical and emotional dependence can be sought.

CONCLUSION

The religious perspectives on same-sex marriage play a crucial role in shaping public opinion about LGBTQ rights in India. Many people hold strong religious beliefs that influence their stance on same-sex relationships and marriage. Religious leaders also play an important role in shaping public opinion about these issues. Despite the challenges posed by religious perspectives, there are many activists working towards legalising same-sex marriage in India while respecting diverse religious beliefs and opinions. Advocacy efforts by LGBTQ groups and allies in India have played a crucial role in the fight for same-sex marriage legality and religiosity.

While some proponents argue that India should follow suit and legalise same-sex marriage, opponents cite religious and cultural traditions as reasons to maintain the status quo. The Supreme Court of India's decision to decriminalize homosexuality in 2018 was a significant milestone for LGBT rights in the country, but it did not address the issue of same-sex marriage. However, with growing global acceptance of same-sex marriage and increasing advocacy efforts by LGBT groups within India, there is hope that the country will eventually recognize the legal rights of same-sex couples.

Nonetheless, given the continued influence of religion on Indian society and politics, progress will most likely be slow. Despite the recent legalisation of homosexuality in India, same-sex marriage remains illegal and unrecognised by the government. The LGBTQ community has faced several obstacles as a result of the lack of legal recognition, including discrimination and societal shame. However, there is hope for future progress in India towards greater legal recognition and societal acceptance of LGBTQ people.

³² Ruth Vanita, *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society* (Routledge, 2013)..

A WAY FORWARD

In earlier times, people accepted their status by way of fate and did nothing to change it – they simply acquired it and stepped into it. However, lately the possibility of changing one’s status by the means of contract where an individual can determine his fate and status based on his considerations that is free from any externally imposed forces.³³ Likely, resisting same-sex marriages on mere grounds of religiosity and social norms is like just accepting whatever is offered and doing nothing to change it. The society and the rule of law should be a dynamic one and not static.

We have a number of countries that have come up with equal marriage rights for same sex couples and are continuously working towards their betterment. Majority of these countries account from Europe and America where indeed Christianity is followed which considers homosexuality a sin. In spite of it, these countries have given preference to rule of law rather than the popular morality. So, we can take inspiration from the following countries and if not more, we can at least go along their paved paths as of now:

1. In England and Wales Civil marriages were introduced by *The Marriage (Same-sex Couples) Act, 2013*³⁴ for the same sex couples prioritizing equality and human rights law.
2. *Northern Ireland (Executive Formation etc) Act 2019* and *The Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019*³⁵ authorised same sex couples to enter into civil partnership and form civil marriages in Ireland. And they even held consultation on religious marriages to under the needs and concerns of its people.
3. Scotland allowed the same-sex couples to enter into civil partnership under *Civil Partnership Act, 2004* and later on, further moved towards permitting same-sex couples to marry by way of *The Marriage and Civil Partnership (Scotland) Act, 2014*³⁶ implying a choice for the said couples between a civil partnership or marriage. It created a balance between religion and rule of law by giving the choice to the Churches whether to conduct such marriages or not.

³³ R. H. Graveson, “The Movement from Status to Contract,” 4 *The Modern Law Review* 261–72 (1941).

³⁴ “The law of marriage,” available at: <https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/lawofmarriage-/> (last visited April 28, 2023).

³⁵ David Masci, Elizabeth Podrebarac Sciupac and Michael Lipka, “Same-Sex Marriage Around the World” *Pew Research Center’s Religion & Public Life Project* available at: <https://www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world/> (last visited April 28, 2023).

³⁶ “Civil Partnership (Scotland) Bill,” available at: <https://www.parliament.scot/bills-and-laws/bills/civil-partnership-scotland-bill> (last visited April 28, 2023).

4. United States of America passed *Respect for Marriage Act* on December 2022 legalising same-sex marriages in America³⁷ on the pretext of the 14th Amendment in line with equal protection and due process mandating the States to provide licence to lawfully same-sex married couples as well as recognise same sex couple marriages performed outside the State.

Therefore, if legalising same sex marriages in India seems so all of sudden for now, a similar approach that of civil partnership somewhat like above countries can be adopted temporarily to ascertain the forthcoming challenges and then move forward in a more nuanced manner.

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