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TOWARDS INCLUSIVITY: EXPLORING THE ADDITION OF SAME-SEX MARRIAGE TO THE SPECIAL MARRIAGES ACT

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I. ABSTRACT

In recent years, India has made progress in LGBTQIA+ rights, notably by legalizing consensual same-sex relationships in 2018 through the *Navtej Singh Johar v. Union of India*² ruling, which struck down Section 377 of the IPC. However, the article argues that more steps are needed to fully eliminate discrimination against same-sex couples. While the criminalization of homosexuality has been lifted, legal recognition for their relationships is still lacking. India's existing marriage laws only recognize unions between heterosexual couples, leaving same-sex couples without benefits and legal acknowledgment. The article underscores the need for legal recognition of same-sex marriage in India to ensure full LGBTQIA+ equality and dignity, emphasizing the importance of societal acceptance and constitutional principles like Article 14. The article explores strategies for achieving legal recognition, including the adoption of 'civil union' as seen in other countries. Changing personal laws to recognize these unions may face opposition based on religious beliefs, making amendments to the Special Marriage Act of 1954 or introducing a new law governing the civil rights of same-sex couples more practical options. Activists and organizations continue to advocate for the legalization of same-sex marriage through legal challenges. Legalizing same-sex marriage is seen as a transformative step towards justice and inclusivity.

II. KEYWORDS

Marriage, same-sex, rights, unions, legal, couples, marriages, recognition, society

III. INTRODUCTION

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² *Navtej Singh Johar v. Union of India*, (2018) SCC OnLine SC 1350.

On September 6, 2018, the LGBTQIA+ community in India achieved a significant victory when the Supreme Court struck down Section 377 of the Penal Code, decriminalising consensual same-sex relationships. However, this ruling did not address the issue of civil rights for the LGBTQIA+ community, leaving the legal status of same-sex marriage uncertain. While the battle to secure social equality for homosexual couples continues, the recognition of same-sex marriage remains a contentious issue in India. Currently, marriage in India is only recognised between heterosexual couples, depriving same-sex couples of the legal and societal benefits associated with marriage, such as inheritance, guardianship, and adoption rights.³ Even though the decriminalisation of consensual sexual acts was a step forward, the demand for marriage rights for same-sex couples is growing. Long-term same-sex relationships continue to face discrimination despite mere decriminalisation.

Certain legal benefits, such as succession, pension rights, employment benefits, and health benefits, which are automatically granted to married couples, are denied to same-sex couples. Thus, the recognition of same-sex relationships as equal to heterosexual unions is crucial. The U.S. Supreme Court's ruling in *Obergefell v. Hodges*⁴, where Justice Kennedy argued for the legalisation of same-sex marriage, holds relevance in this context. Justice Anthony Kennedy, writing on behalf of the majority, asserted that the right to marry is a fundamental right inherent in an individual's liberty, and the right to marry is also guaranteed by the equal protection clause, as there is a close connection between liberty and equality. He emphasised that the principles behind the fundamental nature of marriage apply equally to same-sex couples. Therefore, they too should be allowed to exercise their fundamental right to marry. The landmark decision established that denying same-sex couples the right to marry was a violation of their constitutional rights.

The question then arises: How can legal recognition of same-sex marriages be achieved? This issue is not solely political or legal; it also involves religious debates. India is undergoing a transformation from a traditional society to one that embraces fundamental values. Society's acceptance of change is crucial for LGBTQ+ marriages and rights, promoting legal recognition, social support, and inclusivity. Efforts from activists, allies, educators, and policymakers are essential for a compassionate society. However, opposition in the name of tradition, culture, and religion to liberal legislation still persists. Marriage in India is governed by personal laws

³ Shivam Garg, Legal Recognition of Same-Sex Marriage Rights in India, CNLU LJ (9) [2020] 158

⁴ *Obergefell v. Hodges*, 576 US 644 (2015)

deeply rooted in religious beliefs, and any changes to these laws may be perceived as an attack on those beliefs. Additionally, the Special Marriage Act of 1954, which recognises marriages irrespective of religion, currently only caters to heterosexual marriages. If the Parliament were to grant marriage rights to the LGBTQIA+ community, numerous challenges would need to be addressed regarding adoption, maintenance, custody rights, and inheritance.

The journey towards legal recognition of same-sex marriages in India is complex and multifaceted. While progress has been made through the decriminalisation of consensual same-sex relationships, the fight for social equality and full civil rights continues. The objective of the article is to highlight the on-going struggle for legal recognition of same-sex marriages in India and to emphasize the importance of achieving full civil rights and social equality for the LGBTQIA+ community. Achieving legal recognition of same-sex marriages would require navigating political, legal, and religious obstacles, as well as addressing the complexities surrounding adoption, maintenance, custody, and inheritance.

IV. IS HETEROSEXUALITY A FUNDAMENTAL COMPONENT OF MARRIAGE?

In India, marriage has a significant social and religious significance and is subject to specific personal laws based on various religions. Traditionally, marriage has been understood as a union between a man and a woman, reflecting societal norms and heterosexuality as the prevailing norm for marital relationships. However, it's crucial to acknowledge that the definition of marriage and societal norms have evolved over time, with many countries legally recognising same-sex marriage. This recognition demonstrates that marriage is not exclusively defined by heterosexuality. Love, commitment, mutual respect, and shared values are seen as fundamental elements of marriage, irrespective of the sexual orientation of the individuals involved. In a diverse country like India, religious beliefs and cultural norms play a significant role in shaping public opinion and legal considerations. Understanding how different religious communities view same-sex marriage and navigating potential conflicts between religious rights and individual rights is essential. When discussing marriage, it is important to promote inclusivity and respect for all individuals, regardless of their sexual orientation. While some individuals may have personal or religious beliefs that limit marriage to heterosexual unions, societal views are changing, and different cultures and legal systems may have varying perspectives on the matter.

In recent years, there has been a growing recognition and acceptance of diverse relationships and families. Many countries have legalised same-sex marriage, acknowledging that the right to marry should not be restricted based on sexual orientation. This recognition reflects a broader understanding that the core elements of marriage are not exclusive to heterosexual relationships. The core elements of marriage revolve around love, commitment, companionship, mutual support, and the intention to build a life together. These elements are not inherently dependent on the gender or sexual orientation of the individuals involved. People of any sexual orientation can experience love, form committed relationships, and build families based on these core elements.

While different cultures, religions, and individuals may have diverse views on marriage, it is crucial to foster a society that respects and upholds the rights and dignity of all individuals, including those who identify as LGBTQIA+. Denying marriage rights to non-heterosexual couples in India can be considered a violation of constitutional rights, particularly Article 14⁵ that is equality before the law and Article 15⁶; it deals with prohibition of discrimination based on sex. This discrimination infringes upon their fundamental rights to personal liberty and privacy as outlined in Article 21⁷. Thus, not granting marriage rights to non-heterosexual couples goes against constitutional principles of equality and personal liberty, prompting the need for a reconsideration of India's marriage laws. Marriage equality, including the recognition and legal support of same-sex marriages, is a significant step towards creating a more inclusive and equal society. In conclusion, although marriage has traditionally been associated with heterosexuality, the essential elements of marriage, such as love, commitment, and mutual support, are not inherently tied to any specific sexual orientation. As societal perspectives continue to evolve, it is important to recognise and celebrate the diversity of relationships in order to foster inclusivity and promote equality.

V. ROUTES FOR THE LEGAL RECOGNITION OF SAME-SEX MARRIAGES IN INDIA

As of 2023, there were 32 countries that had formally acknowledged same-sex marriages.⁸The Netherlands led the way in 2000 by becoming the first country to legalise same-sex marriage

⁵ INDIA CONST. art. 14

⁶ INDIA CONST. art. 15

⁷ INDIA CONST. art. 21

⁸ Khadija Khan, SC, to hear pleas on same-sex marriages from April 18: Which countries allow such unions, and through what routes? *The Indian Express* (May 15, 2023, 19:00),

through parliamentary legislation, which granted same-sex couples the rights to marry, divorce, and adopt children⁹. In India, while same-sex marriages are not explicitly prohibited by law, the existing marriage laws do not include provisions for such unions, indicating a preference for heterosexual relationships. This research delves into different methods of legally recognising same-sex relationships, examines their consequences, and proposes the most effective approaches for achieving recognition. The potential routes for recognising same-sex marriage are as follows:

1. Amending the Special Marriage Act
2. Judicial reading down of the Act
3. Introducing new legislation for recognition
4. Recognising same-sex unions as "civil unions"

The most feasible and effective way to legally recognise same-sex marriage in India is by amending the Special Marriage Act of 1954¹⁰ either through statutory amendments or through judicial interpretation of the Act. The Special Marriage Act is a law that allows for the registration and dissolution of special marriages involving individuals from different religions, castes, or races. Although the Act does not explicitly define marriage, it contains elements that favour heterosexual relationships, such as the definition of a "prohibited relationship" based on familial ties between a man and a woman. Additionally, Section 4(c) of the Act specifies the minimum age for marriage, which currently applies only to heterosexual couples. However, it is not difficult to accommodate same-sex marriages within the existing framework of the Act. A specific provision declaring same-sex marriage legal and amending Section 4(c) would be necessary. Identifying potential legal challenges to integrating same-sex marriage into the Special Marriages Act of 1954 is essential. This includes examining precedents from other countries and understanding how challenges related to recognition, adoption, and inheritance rights have been addressed in jurisdictions that legalised same-sex marriage.

Another approach is to interpret the Special Marriage Act through judicial means to encompass same-sex marriages. "Judicial reading down" refers to a legal doctrine or principle where a court interprets a law in a manner that narrows its scope or effect to bring it in line with

<https://indianexpress.com/article/explained/explained-global/which-countries-in-the-world-allow-same-sex-marriage-8494555/>

⁹ Burgerlijk Wetboek (Civil Code), art. 1:30a

¹⁰ The Special Marriage Act, 1954, No. 43, Acts of Parliament 1954 (India).

constitutional or human rights protections. In the context of same-sex marriage legalisation, it typically means that a court, after examining the existing marriage laws, determines that the exclusion of same-sex couples from marriage is unconstitutional or violates fundamental human rights. This approach has been utilised by foreign courts, which deemed laws that prohibited or failed to recognise same-sex marriages unconstitutional, invoking principles of due process and equal protection. These courts emphasised that the right to marry is an individual liberty that includes equality. Denying a specific group, the right to marry, which is granted to others, without substantial justification is considered unjust. For instance, the Constitutional Court of South Africa ruled that laws prohibiting same-sex marriages violated Section 9(3) of the Constitution¹¹, which prohibits unfair discrimination based on factors such as sexual orientation. Likewise, Canadian courts concluded that the common law definition of marriage as the union between "one man and one woman" violated the equality rights of same-sex couples. The recent Navtej Singh Johar case in India strengthens the argument that the Special Marriage Act should be judicially interpreted to permit same-sex marriages. The court's ruling affirmed the Delhi High Court's stance in the Naz Foundation case¹², which stated that the term "sex" in Article 15 of the Indian Constitution¹³ encompasses sexual orientation and prohibits discrimination based on it. Discrimination against individuals due to their sexual orientation stems from stereotypes and generalisations about their behaviour. It can be contended that if the Special Marriage Act only recognised marriages between individuals of different sexes, it would discriminate against same-sex couples based on their sexual orientation, thus contravening Article 15 of the Indian Constitution. Therefore, it is suggested that the relevant provisions of the Act be interpreted in a way that allows same-sex couples to marry under the Special Marriage Act of 1954.

Another option for legal recognition of same-sex marriages is to enact separate legislation that comprehensively addresses the civil rights of the transgender community. This legislation should cover aspects such as marriage, adoption, divorce, custody of children, succession, and inheritance. Since no existing statute in India defines marriage, this new legislation could specifically define marriage and partnership. The definition of marriage should include unions between a man and a woman, a man and another man, a woman and another woman, a transgender person and another transgender person, or a transgender person and a man or

¹¹ South African Constitution S.9(3)

¹² Naz Foundation v. Govt. of NCT of Delhi, 2009 SCC OnLine Del 1762

¹³ INDIA CONST. art. 15

woman. Additionally, the legislation should legally recognise the union of same-sex couples without marriage as partnerships. The Act must also ensure that religious or customary practises cannot prohibit or hinder such marriages, and if necessary, the marriages should be solemnised with police protection. It is crucial that the legislation not only recognises their unions but also guarantees the right of same-sex couples to legally adopt children without their sexual orientation serving as a barrier. Divorce, custody rights, succession, and inheritance should also be addressed under this new legislation.

Given the prevailing traditional resistance to same-sex marriage in Indian society, an alternative route to legal recognition is to grant same-sex unions the status of civil unions. Various countries, including the United States, the United Kingdom, Australia, New Zealand, and several Latin American and European countries, have enacted legislation recognising same-sex unions as civil unions. However, it is important to note that many of these countries have since legalised same-sex marriages. Initially, civil unions provided legal recognition and rights to same-sex couples, similar to those of spouses in marriages. Alternatively, domestic partnerships serve as a relationship option that provides restricted rights to couples who opt not to marry or are legally prohibited from doing so. In the United States, specific city councils and private companies acknowledge domestic partnerships and extend spousal benefits to same-sex couples. These alternatives are commonly seen as a compromise, aiming to reconcile the principles of equal rights for LGBTQIA+ individuals with the belief that marriage should be reserved for heterosexual unions.¹⁴

However, civil unions cannot be equated with the institution of marriage, especially in a country like India where marriage holds historical, cultural, and social significance that civil unions lack. Considering same-sex unions as civil unions would result in discriminatory treatment based on sexual orientation and violate the fundamental rights of individuals. The concept of "separate but equal" status for civil unions has been rejected by the Connecticut Supreme Court in the case of *Kerrigan v. Commr. of Public Health*¹⁵, which deemed it unconstitutional to maintain a second-class status for same-sex couples by excluding them from marriage. While civil unions may offer certain tangible benefits and state-recognised rights,

¹⁴ Nayantara Ravichandran, "Legal Recognition of Same-Sex Relationships in India", Manupatra, (May 15, 2023, 19:50), <http://docs.manupatra.in/newslines/articles/Upload/B07BDF52-0AA4-4881-96AC-C742B9DB217D.pdf>,

¹⁵ *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135 (2008).

they fail to provide the intangible benefits associated with marriage, such as social esteem, self-definition, and the stabilising influence of societal expectations.

Marriage represents a profound personal commitment and encompasses ideals of mutual support, companionship, intimacy, fidelity, and building a family. It fulfils the desire for security, a safe haven, and a sense of connection, all of which express our shared humanity. Decisions regarding marriage and choosing a life partner are significant acts of self-definition. By denying recognition of same-sex marriages, the state denies gay individuals the value of self-identification and the cultural context that marriage offers. Granting them the status of "married" couples would provide same-sex couples with self-definition and contribute to public understanding of their relationships. While some countries have opted for civil unions as an intermediate step towards legal recognition, this approach is not recommended in India. Civil unions, which provide legal recognition and rights similar to marriage, have been criticised for perpetuating a separate but unequal status. They fail to provide the intangible benefits and social recognition associated with marriage. In India, where marriage holds great cultural and social significance, conferring a lower status on same-sex unions through civil unions would amount to discrimination based on sexual orientation and violate their fundamental rights. The best and most viable route for legally recognising same-sex marriages in India is to amend the Special Marriage Act of 1954. Alternatively, enacting new legislation specifically addressing the civil rights of the transgender community could also be considered. While civil unions have been implemented in some countries, they are not recommended in India due to the cultural significance attached to marriage.

VI. SOCIOLOGICAL PERSPECTIVES ON LGBTQ+ MARRIAGE

The differing sociological attitudes towards LGBTQ+ marriage in India between urban and rural areas stem from a combination of cultural, economic, educational, and demographic disparities. In rural regions, strong adherence to traditional cultural norms and religious beliefs often leads to conservative views on gender roles and family structures, emphasising the significance of heterosexual marriage and reproduction, thereby hindering acceptance of LGBTQ+ individuals and relationships. On the other hand, urban centres tend to be more cosmopolitan, exposed to diverse cultures, and receptive to alternative lifestyles, including LGBTQ+ relationships. Access to better educational facilities and exposure to global influences in urban areas foster increased awareness and understanding of LGBTQ+ issues, promoting inclusivity and support for marriage equality. In contrast, limited educational

opportunities and reduced exposure to diverse perspectives in rural settings may contribute to the persistence of conservative attitudes.

Social structures and family ties in rural areas, often tightly knit, place great emphasis on conforming to established norms, leading LGBTQ+ individuals to face social elimination and a reluctance to openly express their identities and relationships. Urban settings, with more diverse and fluid social structures, allow for a wider range of identities and relationships to be acknowledged and accepted.¹⁶ Economic conditions in rural areas can also influence attitudes, with economic struggles sometimes reinforcing traditional family values and roles to preserve stability within the community. In contrast, urban areas, with greater economic opportunities and job diversity, tend to foster more individualistic and progressive perspectives. Additionally, exposure to LGBTQ+ advocacy groups, pride events, and awareness campaigns in urban centres helps challenge stereotypes and prejudices, leading to greater acceptance and support for LGBTQ+ rights, including marriage equality. The lack of such exposure in rural areas contributes to the perpetuation of negative stereotypes and misconceptions. The absence of nationwide recognition of same-sex marriage leaves many LGBTQ+ individuals in rural areas without access to legal protections and benefits, which could otherwise improve acceptance.

Embracing LGBTQ+ marriages are essential for several reasons, including human rights, equality and justice, social cohesion, mental health and well-being, family and community support, economic benefits, social progress, role modelling for future generations, reduced social tensions, and fulfilment of love and happiness. These reasons include the right to marry the person they love, which is a basic human right, and the need for a more inclusive, supportive, and compassionate society. The shortcomings of denying LGBTQ+ marriages include violating human rights principles, perpetuating inequality and discrimination, promoting social cohesion, and reducing mental health and well-being. It also strengthens family and community support networks, enhancing communication, trust, and emotional bonds within families and communities.

Economic benefits of marriage equality include legal and financial protections, inheritance rights, and healthcare benefits that married heterosexual couples enjoy. It also signals a

¹⁶ Rebecca Rose Varghese, Data Point: Situating the Debate on Same-Sex Marriage, *The Hindu*, (May 17, 2023, 11:00), <https://www.thehindu.com/data/data-point-situating-the-debate-on-same-sex-marriage/article66799714.ece>

willingness to challenge outdated norms and embrace diversity, signalling a more progressive and inclusive society. Future generations can benefit from accepting LGBTQ+ marriages, as it helps create a society where all individuals can live authentically and without fear of discrimination based on their sexual orientation or gender identity. Accepting diversity and inclusion fosters peaceful coexistence, reducing conflicts arising from discrimination and prejudice. In conclusion, embracing LGBTQ+ marriages are not only a matter of fairness and justice but also essential for fostering social harmony, mental well-being, and progress. By embracing marriage equality, society can create a more inclusive, supportive, and compassionate society that values the dignity and rights of all members, regardless of their sexual orientation or gender identity. Sociological attitudes are not fixed, and education, awareness, and exposure to diverse perspectives can lead to evolving perspectives and greater acceptance.

VII. UCC AND SAME-SEX MARRIAGE

A Uniform Civil Code (UCC) is a set of laws that would apply to all citizens of India, regardless of their religious affiliation, governing personal matters such as marriage, divorce, inheritance, and adoption. Currently, personal laws in India differ based on religious communities. The implementation of a UCC has been a long-debated topic in India, with proponents arguing that it would promote equality, secularism, and gender justice. They believe it would eliminate discriminatory practises present in various personal laws and foster national integration¹⁷. However, India is a diverse country with deep-rooted cultural and religious beliefs. The acceptance of concepts like legalising same-sex marriage, which goes against prevailing customs and societal norms, requires increased awareness and time for societal adjustment. To recognise and provide legal protection for same-sex marriage, there is a need for both societal awareness and stringent laws.

A draught proposal for a UCC was submitted to the central government in 2017, including the definition of marriage as the union of various combinations, including same-sex marriages and partnerships¹⁸. Implementing UCC would have several benefits for same-sex couples, such as

¹⁷Lovely Chugh, Uniform Civil Code (UCC): Positive response towards equality and progress, The Times of India, (May 17, 2023, 12:00), <https://timesofindia.indiatimes.com/readersblog/mywriteexpress/uniform-civil-code-ucc-positive-response-towards-equality-and-progress-56242/>

¹⁸ Scroll staff, Allow gay marriages, give couples police protection if needed, suggest a draught Uniform Civil Code, Scroll (May 28, 2023, 9:29 PM), <https://scroll.in/latest/853850/allow-gay-marriages-give-couples-police-protection-if-needed-suggests-draught-uniform-civil-code>.

the renunciation of personal law barriers, inheritance rights, legal protection, adoption and custody rights, and recognition and safeguarding against societal cruelty. However, there are differing opinions on the implementation of UCC. Critics argue that it may infringe upon the rights of religious minorities and their freedom to practise their own personal laws, which they believe should be protected.¹⁹

The readiness of India for UCC depends on various factors, including social, political, and legal considerations. It requires extensive dialogue, consensus-building, and careful consideration of the concerns and interests of different religious communities. It is crucial to ensure that any proposed UCC respects constitutional principles, protects individual rights, and addresses the specific needs and sensitivities of diverse religious groups. To gauge public sentiment and ensure broad-based support, the Indian government would need to engage in thorough consultations with various stakeholders, including religious leaders, legal experts, and representatives from different communities. It is crucial to approach the issue with sensitivity and ensure that any proposed UCC respects the diverse religious and cultural fabric of India. Ultimately, the decision to introduce a UCC rests with the Indian government, considering the aspirations of its citizens, constitutional principles, and the need to promote social harmony and justice. The implementation of a UCC would require careful deliberation, consideration of multiple perspectives, and a well-rounded approach that balances the ideals of equality and the preservation of religious diversity.

VIII. CONCLUSION

To conclude the article contributes to a comprehensive understanding of the legal status and recognition of same-sex marriage by addressing legal, societal, cultural, and constitutional dimensions. It underscores the necessity of legal recognition for LGBTQIA+ individuals and emphasizes the broader societal and ethical implications of this recognition. Based on the information and arguments presented above, it is evident that merely decriminalising consensual same-sex relations is not sufficient to ensure full equality and dignity for the LGBTQIA+ community in society. Legal recognition of their relationships is necessary to

¹⁹ ET staff, What's the Uniform Civil Code (UCC)? What does the Constitution say, and why is it such a controversial topic in India? Economic Times (May 30, 2023, 9:29 PM), <https://economictimes.indiatimes.com/news/how-to/what-is-uniform-civil-code-what-does-constitution-say-about-it-why-its-such-a-controversial-topics-in-india/articleshow/101348565.cms?from=mdr>.

grant them equal rights and dignity. The Navtej Johar case judgement marks an important initial step, but further significant measures are still awaited. A vital socio-legal aspect is assessing the level of awareness and education within society about LGBTQ+ issues. Raising awareness and dispelling myths and stereotypes can lead to greater acceptance and support for legalising same-sex marriage. Society's acceptance of change is crucial for upholding LGBTQ+ marriages and advancing LGBTQ+ rights. It positively influences legal recognition and social support, reduces stigma, increases visibility, challenges prejudice, enhances inclusivity, strengthens relationships, promotes social progress, empowers LGBTQ+ youth, and contributes to collective well-being. However, achieving societal acceptance requires ongoing efforts from activists, allies, educators, and policymakers. Focusing on empathy, understanding, and shared human experiences is essential for a more inclusive and compassionate society.

With the Supreme Court removing the obstacle to legalising same-sex marriage, various options are now available for the government to legally recognise such marriages and fulfil its duty to protect the fundamental rights and freedoms of all individuals. It is apparent from the arguments provided that granting same-sex unions a legal status equivalent to equal rights may not withstand constitutional scrutiny. The concept of "separate but equal" has been rejected by foreign courts for violating the principle of equality and could face similar challenges in the Indian Supreme Court. In a society where marriage holds significant religious importance, denying third-gender people the right to marry would further reinforce discrimination and treat them as unequal. The legislature of a country is responsible for enacting laws that protect and benefit its citizens. It is crucial to eliminate the ambiguity in personal laws and recognise same-sex marriage, particularly considering the increasing cruelty and discrimination against the vulnerable LGBTQIA+ community.

Article 14 of the Indian Constitution guarantees equality to all citizens, and individuals have an inherent right to live their lives as they choose, including choosing their partners. The choices of the LGBTQIA+ community should be respected and legalised, allowing them to exercise their basic civil rights. Recognising same-sex marriage will bring about a revolutionary change in modern society and transform the institution of marriage. Society must acknowledge that individuals are diverse, with varying preferences and needs. Accepting and accommodating their needs, promoting harmony, and walking alongside them are all ways to achieve justice for future generations.