

## DIVORCE IMPLICATIONS AND PROBLEMS FOR LGBTQIAP+ COUPLES IN A COUNTRY WHERE SAME-SEX MARRIAGE IS ILLEGAL

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### ABSTRACT

*Discourse on the LGBTQIAP+ community has recently been reaching new heights as it gains more media coverage and sympathy and support. The Apex Court deciding on the issue of gay marriage opens up other avenues that require looking into. It must be noted that an emblematic list of doorways, like intestate succession, tax deductions, and entitlement to a spouse's physical remains, is unlocked by the granting of the legality of marriage to people of the community. But in the process of hustling for gay marriage, the need for fixing the rules for gay divorce in India is overlooked. An often-overlooked facet of the campaign for marriage equality is the problem of gay divorce. Without legal marriage, getting legally divorced can pose to be a problem. The restriction on same-sex marriage has frequently made breaking the marriage far more difficult than getting married in the first place in a highly mobile nation like India. Some same-sex couples thus get married outside India. But if they return and keep residing here, and then, later on, want to divorce, it raises many complications because the current acts relating to divorce in India are heterosexually-inclined and prejudiced. This research paper aims to highlight the problems faced by same-sex couples who want to divorce in India, and the different avenues and loopholes available to them in order to bypass the system. For it seems there is no way through it, only a way around it.*

### INTRODUCTION

The term "same-sex divorce" refers to the formal ending of a union between two people who are of the same sex. It entails the dissolution of the marriage and the settlement of a number of issues, including property distribution, child custody, spousal support, and child support. Depending on the country where the couple resides, different jurisdictions may have different laws on same-sex divorce. It's important to remember that different countries around the world recognize same-sex marriage and divorce in different ways, with some recognizing them fully while others do not.

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Same-sex divorce normally follows the same legal standards and processes as opposite-sex divorces in jurisdictions that recognize same-sex marriage. A divorce petition must be filed, proof of the marriage's irretrievable breakdown must be provided, and agreements must be made about the division of property, child custody, and support obligations.<sup>1</sup> If the couple is unable to come to an agreement, a court may decide these issues based on the relevant laws and the best interests of any minor children involved.

There are a few frequent difficulties that must be resolved during a divorce, whether it involves same-sex or opposite-sex couples. The specifics may differ based on the jurisdiction and the circumstances of the parties, but the following are some common problems that crop up during the divorce process:

### **ISSUES DEALT WITH DURING DIVORCE PROCEEDINGS**

**Division of Marital Property:** Determining how the couple's assets and debts will be divided. This includes real estate, bank accounts, investments, vehicles, household items, and any other shared property.

**Child Custody and Visitation:** Establishing arrangements for the care and custody of any children from the marriage. This involves determining where the children will live, visitation schedules, decision-making authority, and child support.

**Spousal Support or Alimony:** Assessing whether one spouse is entitled to receive financial support from the other after the divorce. Factors considered include the length of the marriage, each spouse's income and earning capacity, and any economic imbalances resulting from the marriage.<sup>2</sup>

It's important to note that these issues are not exhaustive, and additional matters may arise depending on the specific circumstances of the couple.

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<sup>1</sup> 'Is Equitable Distribution Different for Same-Sex Couples?' (*Rech Law*, 20 February 2019) <<https://www.rechlaw.com/blog/2019/february/is-equitable-distribution-different-for-same-sex/>> accessed 15 June 2023.

<sup>2</sup> 'Divorce for same-sex couples' (*Jacksons Law Firm*, 6 November 2017) <<https://www.jacksons-law.com/2017/11/divorce-sex-couples/>> accessed 15 June 2023.

## LAWS GOVERNING DIVORCE IN INDIA

In India, the division of marital property during a divorce is governed by the laws outlined in the various acts, depending on the religious affiliation of the couple and their personal laws.

The *Hindu Marriage Act, 1955*<sup>3</sup>: This act applies to Hindus, Buddhists, Jains, and Sikhs and provides provisions for marriage, divorce, and related matters. It outlines grounds for divorce, procedures for filing divorce petitions, and conditions for granting a decree of divorce.

The *Special Marriage Act, 1954*<sup>4</sup>: This act applies to couples of different religions or those who choose a civil marriage. It allows for marriage registration and also provides provisions for divorce, including grounds for divorce and procedures for filing divorce petitions.

The *Indian Divorce Act, 1869*<sup>5</sup>: This act applies to Christians and governs matters related to marriage and divorce for Christian couples. It provides grounds for divorce, procedures for filing divorce petitions, and the authority of courts to grant divorce decrees.

The *Parsi Marriage and Divorce Act, 1936*<sup>6</sup>: This act applies to Parsis (Zoroastrians) and deals with matters of marriage and divorce within the Parsi community. It contains provisions related to divorce, including grounds for divorce, procedures for filing divorce petitions, and the powers of courts to grant divorce decrees.

The *Dissolution of Muslim Marriages Act, 1939*<sup>7</sup>: This act applies to Muslims in India and provides provisions for divorce among Muslims. It outlines various grounds for divorce, procedures for divorce proceedings, and the powers of courts to grant divorce decrees.

In India, same-sex marriages are not legally recognized, and there is no specific legislation that governs same-sex divorce. The acts mentioned do not provide for the legal recognition of same-sex marriages or same-sex divorce in India. As a result, they are considered discriminatory against same-sex couples. They are based on the assumption that marriage is between a man and a woman. Therefore, same-sex couples may face difficulties and legal obstacles in seeking a divorce or resolving property and custody matters.

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<sup>3</sup> Hindu Marriage Act 1955.

<sup>4</sup> Special Marriage Act 1954.

<sup>5</sup> Indian Divorce Act 1869.

<sup>6</sup> Parsi Marriage and Divorce Act 1936.

<sup>7</sup> Dissolution of Muslim Marriages Act 1939.

## PROBLEMS FACED BY SAME-SEX COUPLES WHEN DIVORCING IN INDIA

Gay and lesbian couples in nations that do not recognize same-sex unions are unable to end their relationships in family court. They must divide their assets according to the current contract regulations, which favor the side with the largest assets, in civil court.<sup>8</sup> Using civil courts also necessitates engaging legal counsel, a cost that doesn't always pay off because the majority of lawyers lack the expertise to understand the legal subtleties pertaining to same-sex partnerships and their dissolution. Sweat equity and implied contracts between homosexual couples are not items that civil courts are allowed to take into account. When it comes to child custody and visitation rights, this becomes very troublesome.

Some of the key problems include:

**Lack of Legal Recognition:** The primary issue is that same-sex marriages are not legally recognized in India. As a result, same-sex couples do not have the same legal rights and protections as opposite-sex couples when it comes to property division. The absence of specific legislation addressing the division of marital property for same-sex couples can create uncertainty and make it difficult to navigate the legal process.<sup>9</sup>

**Property Ownership:** In the absence of legal recognition, determining the ownership of shared assets can be complex. If the property is in the name of one spouse, it may be challenging for the other spouse to claim a share in the absence of clear legal provisions. This can lead to disputes and inequitable outcomes when dividing marital property.

**Lack of Statutory Guidelines:** Unlike in countries where same-sex marriages are recognized, there are no specific guidelines or laws in India that outline how the division of property should occur for same-sex couples. As a result, the resolution of property disputes may rely on general principles of contract law, principles of equity, or other legal doctrines<sup>10</sup>, which may not adequately address the unique circumstances of same-sex relationships.

**Social Stigma and Discrimination:** Same-sex couples may face additional challenges due to social stigma and discrimination. The lack of legal recognition and societal acceptance can

<sup>8</sup> Eun Kyung Kim, 'For gay couples, divorce comes with extra costs' (*Today*, 6 August 2013) <<https://www.today.com/news/gay-couples-divorce-comes-extra-costs-6c10660976>> accessed 15 June 2023.

<sup>9</sup> Tracy A. Thomas, 'Same-Sex Divorce' (2014) UA Law Faculty Publications <[https://ideaexchange.uakron.edu/ua\\_law\\_publications/201/](https://ideaexchange.uakron.edu/ua_law_publications/201/)> accessed 15 June 2023.

<sup>10</sup> Adv. Sanu, 'CAN GAY COUPLE GET DIVORCED?' (*Path Legal*, 27 November 2019) <<https://www.pathlegal.in/Can-Gay-Couple-Get-Divorced--blog-2383164>> accessed 15 June 2023.

make it harder to assert rights and navigate the legal system. Some same-sex couples may face hostility or bias from legal authorities or encounter difficulties in finding legal professionals who are knowledgeable about the unique issues faced by same-sex couples.

**Parental Rights and Guardianship:** Same-sex couples may face difficulties establishing and asserting their parental rights and guardianship over their children. The laws and personal laws in India may not provide clear guidance or recognition of the parental rights of same-sex partners who are not the biological or adoptive parents of the child.

**Custody Disputes:** In the event of a separation or divorce, custody disputes between same-sex partners can be complex. Without specific legal provisions addressing same-sex relationships, the determination of custody may rely on general principles such as the best interests of the child.<sup>11</sup> This can lead to uncertainty and potential biases in court decisions.

**Inconsistent Personal Laws:** Personal laws based on religious communities in India can further complicate matters for same-sex couples. These laws may not recognize or provide clear guidelines for same-sex relationships and parental rights, leading to disparities in how custody and visitation cases are handled.

**Limited Legal Precedents:** Due to the lack of legal recognition and limited legal precedents, same-sex couples may face a scarcity of legal cases or precedents to rely upon when seeking custody and visitation rights. This can result in uncertain outcomes and difficulties in establishing legal rights.

## **DOCUMENTS REQUIRED FOR MUTUAL DIVORCE IN INDIA**

- Address proof of husband and wife
- Details of their profession and remuneration via salary slips
- Income tax returns of the last 3 years
- Information regarding their family
- Details of assets owned by them
- Marriage Certificate and four wedding photos
- Proof that spouses had lived apart for more than a year<sup>12</sup>

<sup>11</sup> Stephen J. Heaney, 'Abortion, Divorce and "Same-Sex Marriage": No Blood, No Foul?' (2011) Public Discourse <<https://www.thepublicdiscourse.com/2011/10/3676/>> accessed 15 June, 2023.

<sup>12</sup> 'Property Distribution After Divorce in India' (*Vidhikarya*, 28 February 2022) <<https://www.vidhikarya.com/legal-blog/property-distribution-after-divorce-in-india>> accessed 15 June 2023.

- Evidence to show their failed attempts at reconciliation

Since India does not allow homosexual marriages, same-sex couples sometimes travel to other countries to consummate their partnerships and move away from the places where they were married. Some choose to marry in India, subsequently moving to a different country. As same-sex couples who were married in India attempt to be divorced in another, legal limbo is becoming more and more prevalent, because of the illegality of their marriages and the absence of verifiable documents.

Countries that do not recognize homosexual marriages will normally refuse to provide a divorce to a couple whose marriage they see as unlawful because divorce is traditionally granted by the state where the couple resides.<sup>13</sup> That implies that people would have to move back to the state where they got married in order to divorce, although doing so can be costly and difficult for the individual. The decision to grant a divorce can occasionally be made subjectively.

Because gay marriage is relatively new, same-sex couples seeking a divorce have discovered that, in the few places that are even ready to give them, their efforts come with large price tags and other expensive compromises. Besides, even if a couple gets married according to their own traditions and customs, authorities in India might deny them a marriage certificate based on their own prejudice and bias, mainly because same-sex marriage or unions are not legally recognized in India. The power to approve or refuse a divorce mostly rests at the discretion of the courts. Hence, they might refuse to consider the petition in the absence of a valid marriage certificate.

### **WHY THE HINDU MARRIAGE ACT IS CONSIDERED DISCRIMINATORY AND UNACCOMMODATING?**

The *Hindu Marriage Act, 1955*<sup>14</sup>, in its current form, does not recognize same-sex marriages or provide any legal provisions for same-sex couples. As a result, same-sex couples are excluded from the protections and rights afforded to opposite-sex married couples under this act, including the division of marital property.

The discriminatory nature of the Hindu Marriage Act can be seen in the following ways:

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<sup>13</sup> 'Same-Sex Couples Battle For Divorce Equality' (*wbur*, 22 March 2013) <<https://www.wbur.org/hereandnow/2013/03/22/same-sex-divorce>> accessed 15 June 2023.

<sup>14</sup> Hindu, *supra* note 3, at 2.

**Exclusion from Property Division:** The Hindu Marriage Act provides provisions for the division of marital property between spouses during divorce. However, since same-sex marriages are not recognized, same-sex couples are excluded from the scope of these provisions. This means that same-sex couples may not have a legal framework to determine how their shared assets and debts should be divided upon separation or divorce.

**Unequal Treatment:** By denying same-sex couples the right to have their marriages recognized under the Hindu Marriage Act, the law treats same-sex couples differently and unequally compared to opposite-sex couples. This unequal treatment extends to the division of marital property, creating a disadvantage for same-sex couples when seeking a fair and equitable distribution of assets.

**Inequitable Outcomes:** Without legal recognition and clear provisions for property division, same-sex couples may face difficulties in asserting their rights to shared property. The absence of legal guidance can lead to disparities in the division of assets, potentially resulting in unfair outcomes for same-sex couples.

The definition of the divorce condition in *Section 13 (1)*<sup>15</sup> of the legislation precludes any other interpretations and mainly excludes same-sex divorce proceedings. Even though same-sex couples have access to a completely different position, namely civil unions, it is mandatory that the dissolution of such be covered by the divorce clause as well. This will give same-sex couples a legally recognized institutionalized relationship and a respectable way to end such a union in the event of its dissolution.

If the Hindu Marriage Act is modified, India won't have an issue with conflicting legal systems or various jurisdictions since everyone who got married in accordance with *Section 5*<sup>16</sup> of the act and is a Hindu will be able to get a divorce and do so in a court with the proper jurisdiction. However, due to the fact that same-sex partnerships are less institutionalized than heterosexual ones, it was discovered through research that these unions have higher divorce rates.<sup>17</sup> Due to this, it is crucial to alter Sections 5 and 13 in order to include same-sex unions and divorces under their scope.

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<sup>15</sup> Hindu Marriage Act 1955, s 13(1).

<sup>16</sup> Hindu Marriage Act 1955, s 5.

<sup>17</sup> 'Divorce: The unique hurdles same-sex couples face' (*Fleischer Ravreby*, 20 July 2018) < <https://frfamilylaw.com/divorce-the-unique-hurdles-same-sex-couples-face/> > accessed 15 June 2023.

## DIVISION OF PROPERTY AND ASSETS

There isn't a single, comprehensive definition of marital property in India that is applicable everywhere. It's important to note that the division of marital property in India is not an automatic 50-50 split<sup>18</sup>. The court considers various factors, including the length of the marriage, financial contributions of each spouse, the welfare of any children, and other relevant factors when determining how to divide the property equitably. The division of property and assets in a divorce is typically determined through a combination of negotiation, mediation, or litigation<sup>19</sup>, depending on the specific circumstances and the willingness of the parties to reach a mutually agreeable settlement.

The *Hindu Marriage Act, 1955*<sup>20</sup> does not have specific sections that directly address the division of marital property upon divorce. However, the basic rule is that all property obtained by either spouse over the course of the marriage, whether jointly or individually, is regarded to be marital or joint property under the *Hindu Marriage Act of 1955*<sup>21</sup>. Both moveable and immovable property, as well as possessions and investments, are covered by this.

The Act primarily focuses on marriage, nullity, and divorce-related provisions<sup>22</sup>. The division of marital property is generally dealt with under separate laws or principles, depending on the jurisdiction and personal laws applicable to the parties involved. In India, the division of marital property is primarily governed by principles of equity, fairness, and judicial discretion rather than specific provisions in the Hindu Marriage Act. Courts consider various factors, including the financial status of each spouse, contributions made during the marriage, the welfare of any children<sup>23</sup>, and other relevant circumstances, while determining the division of property.

It's worth noting that specific personal laws applicable to different religious communities may have provisions addressing the division of property during divorce. For example,

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<sup>18</sup> 'DIVORCE IN SAME SEX MARRIAGES' (*Sills & Betteridge*, 1 June 2018) <

<https://www.sillslegal.co.uk/news/2018/06/divorce-in-same-sex-marriages> > accessed 15 June 2023.

<sup>19</sup> Meg Penrose, 'Unbreakable Vows: Same-Sex Marriage and the Fundamental Right to Divorce' (2013) VLR < <https://scholarship.law.tamu.edu/facscholar/328/> > accessed 15 June 2023.

<sup>20</sup> Hindu, *supra* note 3, at 2.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Sue Horton, 'The next same-sex challenge: divorce' *Los Angeles Times* (Providence, 25 July 2008).



**Section 27 of the Hindu Marriage Act**<sup>24</sup> provides provisions for the division of property during divorce. According to this law, the court has the power to make orders regarding the disposition of properties, both movable and immovable, owned by the spouses or jointly by them.

**Section 27 of the Special Marriage Act**<sup>25</sup> allows the court to make orders for the division of property in the event of divorce, similar to the provisions in the Hindu Marriage Act.

Under **Section 10 of the Indian Divorce Act**<sup>26</sup>, the court has the authority to make orders regarding the settlement of property and assets during divorce proceedings.

### ***Length of marriage***

Indian law takes into account the duration of a couple's cohabitation before marriage when settling a divorce. The period of pre-marital cohabitation is considered relevant in determining certain aspects of divorce proceedings, particularly when it comes to issues of property division and financial support. Under various personal laws and the general principles of Indian family law, the court may consider the length of the relationship before marriage, the nature of the cohabitation, and the contributions made by each party during that period<sup>27</sup>. These factors can be taken into account while determining the division of marital property and assets acquired during the period of pre-marital cohabitation.

The marital presumption, also known as the presumption of marriage, is a legal doctrine that assumes the validity of a marriage in the absence of evidence to the contrary. It is a legal presumption that a couple who presents themselves as married and live together as spouses are legally married, even if there is no formal marriage certificate or registration. The marital presumption is based on the principle that individuals who hold themselves out as married and live together in a marital relationship should be afforded the legal rights and protections that come with marriage.<sup>28</sup> This presumption is significant in various legal contexts, such as inheritance rights, property rights, and spousal benefits.

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<sup>24</sup> Hindu Marriage Act 1955, s 27.

<sup>25</sup> Special Marriage Act 1954, s 27.

<sup>26</sup> Indian Divorce Act 1869, s 10.

<sup>27</sup> Lizzie Crocker, 'The Gay Divorce Trap: When Same-Sex Marriage Goes Wrong' *The Daily Beast* (11 July 2017)

<sup>28</sup> 'IS IT CHALLENGING FOR A SAME-SEX COUPLE TO DIVORCE?' (*Mark R. Hinshaw*, 23 October 2019) <<https://www.hawkeyedivorce.com/blog/2019/october/is-it-challenging-for-a-same-sex-couple-to-divor/>> accessed 15 June 2023.

In India, same-sex partnerships or marriages are not legally recognized, and there is no particular clause stating that same-sex couples should be given the benefit of the doubt when it comes to marriage. In India, they are not afforded the same legal rights or recognition as couples of the opposite sex. As a result, same-sex couples often are not covered by the marital presumption.

According to the judgment in *Badri Prasad vs. Dy. Director of Consolidation*<sup>29</sup>, delivered by the SC, live-in relationships in India are legal but subject to caveats like age of marriage, consent, and soundness of mind. If there is a dispute regarding the validity of a marriage, or if the presumption is challenged, the burden of proof typically falls on the party seeking to negate or rebut the presumption. They would need to provide evidence to demonstrate that the marriage is invalid or did not meet the legal requirements. Also, since August 2022, as per the Indian Supreme Court judgment, LGBTQIA+ individuals can attain rights and benefits equal to married couples as a 'live-in couple', which is analogous to cohabitation<sup>30</sup>. However, legalizing same-sex live-in relationships is a huge step behind legalizing gay marriage. It is unclear how many of the benefits available to heterosexual couples, are granted to same-sex couples.

Live-in relationships between two consenting adults are not regarded as illegal, and the *Prevention of Domestic Violence Act of 2005*<sup>31</sup> considers such relationships to be "in the nature of marriage" if the couple presents themselves to society as husband and wife and live together for an extended period of time. As a result, the clauses of the agreement allow the female partner to request alimony.

#### *Partners' rights in cohabiting partnerships:*

As live-in relationships fall under Section 2(f)<sup>32</sup> of the law, which defines a domestic relationship as a "relationship between two persons who are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption, or are family members living together as a joint family, when they are living or have ever lived together in

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<sup>29</sup> *Badri Prasad vs. Dy. Director of Consolidation* [1978] AIR SC 1557.

<sup>30</sup> Jen Doll, 'After Gay Marriage Comes Gay Divorce' *The Atlantic* (U.S. 25 June 2012)

<sup>31</sup> Prevention of Domestic Violence Act 2005.

<sup>32</sup> Prevention of Domestic Violence Act 2005 s 2(f).

a shared household,” the Supreme Court ruled in 2013 that women are guarded under the *PWDV Act, 2005*<sup>33</sup>.

According to the 2016 Punjab High Court ruling in the *Ajay Bhardwaj vs. Jyotsana and Ors.*<sup>34</sup> case, women are also entitled to alimony payments in live-in partnerships.

The Supreme Court established standards for live-in relationships in *Velusamy v. D Patchaiammal*<sup>35</sup> in 2010, which comes the closest to "codifying" the issue of live-in relationships in the lack of any particular laws on the matter.

### **The Supreme Court established the subsequent standards:**

- The couple has to present themselves as being similar to spouses to society
- The legal marriageable age requirement must be met by them
- They must meet additional requirements to form a valid marriage, such as being unmarried.
- They had to have lived together freely and presented themselves to others as being akin to spouses for a considerable amount of time.

In order to present themselves as married under these demands, spouses would ideally have to be free from the fear of being persecuted by the members of their society and family. And we know that is far from being achieved in India. If they have to hide themselves, the main pre-requisite of being in a live-in relationship is not being fulfilled. In addition to this, they are not otherwise qualified to enter into a legal marriage as same-sex marriage is not recognized in India. However, there is no alimony option for males. Men in live-in relationships are likewise not eligible for relief under the PWDV Act, 2005. In this regard, it is important to note that the Court stated in the case of *S. Khushboo v. Kanniammal*<sup>36</sup> that initiating and maintaining a live-in relationship is most often done by a man.

It is unclear if other religions, like Islam or Christianity, have the same advantages. Pre-marital sex, a necessary component of live-in relationships, involves Zina, which is prohibited by Islamic law<sup>37</sup>. Children of Muslim live-in partners would be regarded as

<sup>33</sup> Prevention, *supra* note 31, at 9.

<sup>34</sup> *Ajay Bhardwaj vs. Jyotsana and Ors.* [2017] LAWHERALD 4 3442.

<sup>35</sup> *Velusamy v. D Patchaiammal* [2010] SCC 10 469.

<sup>36</sup> *S. Khushboo v. Kanniammal And Another* [2010] SCC 5 600

<sup>37</sup> Shelly Gigante, 'Divorcing same-sex couples face unique challenges' (*Mass Mutual*, 1 November 2022) <<https://blog.massmutual.com/about-massmutual/same-sex-divorce>> accessed 15 June 2023.

illegitimate under existing law because court judgments on such partnerships thus far do not apply to Muslim personal law.

We can see how problematic such decisions and laws turn out to be if we start viewing same-sex relationships as coming within their ambit. We find against questions like, what homosexual males are supposed to do in case they suffer from domestic violence while staying with their partner, what the court is supposed to do if alimony is demanded in a male-male relationship, who would pay alimony to whom in a female-female relationship, and how homosexuals of different religions are affected.

Who contributed what to the relationship and when? Before the union or partnership, how much money did each partner make? What proof—bank statements, real estate transactions, tax receipts<sup>38</sup>, etc.—do they have to back up their claims? If anything was "comingled" or combined even just by living together and having shared bank accounts, it can also be used against a spouse during the divorce process, including debts that existed before the marriage.

The basic rule is that all property obtained by either spouse over the course of the marriage, whether jointly or individually, is regarded to be marital or joint property under the *Hindu Marriage Act of 1955*<sup>39</sup>, which applies to Hindus, Buddhists, Jains, and Sikhs. Both moveable and immovable property, as well as possessions and investments, are covered by this.

For many same-sex couples who have lived together for a long time and accumulated property in one or both partners' names previous to the date of their so-called marriage or union, this legal reality can be at odds with the day-to-day reality. For instance, if a heterosexual couple contributed equally to their mortgage, this would often be taken into account in court starting from the moment they got married<sup>40</sup>. Property division could be more challenging depending on when a same-sex couple considers themselves to be married.

Even if they may have invested a sizeable sum of money in it, the party whose name is not on the deed may eventually have little legal recourse in establishing possession. The assets that each spouse brought into the union will typically be regarded as separate property of that

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<sup>38</sup> Alex Ashcroft, 'THE SAME-SEX DIVORCE PROCESS: WHAT DO I NEED TO KNOW?' (*LGBT Lawyers*, 4 January 2021) <<https://lgbtlawyers.co.uk/2021/01/04/same-sex-divorce-process/>> accessed 15 June 2023.

<sup>39</sup> Hindu, *supra* note 3, at 2.

<sup>40</sup> Nancy Hetrick, 'Advice For Boomer Same-Sex Couples Facing Divorce' *Forbes* (14 February 2019)

spouse rather than marital assets that might be divided in a divorce. The allocation of property in same-sex divorce proceedings may not be equitable because the parties involved may have amassed large amounts of wealth prior to getting married.

### **CHILD CUSTODY, CHILD SUPPORT, AND VISITATION RIGHTS**

When a heterosexual couple gets divorced, a judge decides on child support and visitation rights based on the child's best interests. Since the adoption rules and laws in India (the *Hindu Adoption and Maintenance Act, 1956*<sup>41</sup>, the *Juvenile Justice Act, 2015*<sup>42</sup>, and the *CARA Adoption Regulations of 2022*<sup>43</sup>) do not allow homosexuals to adopt children as a couple, if only one is an adoptive parent, that could be difficult for same-sex couples who have raised children together.

India does not recognize "de facto" parents. According to the American Law Institute, "de facto" parents "share (at least) equally in primary childcare responsibilities while residing with a child for reasons other than money."<sup>44</sup> As a result, a biological or adoptive parent can figuratively slam the door in the other parent's face—and vice versa; the other parent can simply walk away—and the judge won't even consider the other parent's request for visitation or payment of child support.

Even while the custody issue can prolong the divorce process, same-sex couples may find the divorce procedure to be burdensome on its own. Legal problems could occur if a kid was born to a same-sex couple before marriage and the non-biological parent hasn't applied for second-parent adoption.<sup>45</sup> When one biological parent's partner wishes to formally create a parent-child relationship, this is known as second-parent adoption. If this has not happened, the non-biological parent will be recognized as the child's de facto parent since in the eyes of the law they do not possess any inherent rights to the child.

Moreover, through stepparent adoption, a person who married someone who was already a parent of a kid might be recognized as that child's legal parent. They must have the other

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<sup>41</sup> Hindu Adoptions and Maintenance Act 1956.

<sup>42</sup> Juvenile Justice Act 2015.

<sup>43</sup> CARA Adoption Regulations 2022.

<sup>44</sup> 'What Same-Sex Couples Should Know About Divorce' (*Rodier Family Law*, 18 December 2020) <<https://www.rodierfamilylaw.com/news/2020/12/what-same-sex-couples-should-know-about-divorce/>> accessed 15 June 2023.

<sup>45</sup> 'How is Child Custody Determined in Same-Sex Divorces in Canada?' (*Ganapathi Law Group*) <<https://www.ganapathico.com/blog/how-is-child-custody-determined-in-same-sex-divorces-in-canada/>> accessed 15 June 2023.

parent's parental rights terminated if the child was not born naturally and was not adopted by them or their spouse.<sup>46</sup> First, the child's biological parent—whether they have been cohabiting or not—must provide their approval for the adoption. They will then need to file a court application with this biological parent to acquire an adoption order and register with CARA. If the other biological parent is alive and contactable, their approval is required.<sup>47</sup> The other partner technically does not have any rights over the child unless the above-mentioned procedure is followed. This can be tough, considering how most Indians aren't open to the idea of the community's existence.

LGBTQIAP couples who have kids can face more difficulties if they get divorced. There may not be any precedents to instruct the judges in this case because it is such a new area of the law. And if a couple has not come to an agreement beforehand over matters pertaining to children, such as custody, maintenance, and visitation, it worsens the matter at hand. The courts will take into account, who the legal parent is, which parent adopted the child, and, whether the child is biological or not.<sup>48</sup>

Along with sibling connections, parenting abilities, work schedules, and, if the child is old enough, what the youngster wants, a court may also take these factors into consideration. Indian family law primarily recognizes biological or adoptive parents as the legal parents of a child. De facto parenting, which refers to individuals who have assumed the role and responsibilities of a parent but may not have a legal or biological relationship with the child, is not explicitly recognized or regulated by Indian law.<sup>49</sup> However, in certain cases, the courts may consider the best interests of the child as the paramount factor in determining custody and visitation rights. This means that if a person has functioned as a de facto parent and has developed a strong emotional bond with the child, the court may take that into account while deciding custody matters. The court's focus is on the welfare and well-being of the child, and it may consider the nature and quality of the relationship between the child and the de facto

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<sup>46</sup> 'What aspects of divorce between same-sex couples are different from divorce between heterosexual' (*Fenchel Family Law*) <<https://www.fenchelfamilylaw.com/video-center/lgbt-family-law/what-aspects-of-divorce-between-same-sex-couples/>> accessed 15 June 2023.

<sup>47</sup> Madhvi Patidar, 'Same-Sex Marriage: Issues And Challenges' (*Legal Service India*) <<https://www.legalserviceindia.com/legal/article-6467-same-sex-marriage-issues-and-challenges.html>> accessed 15 June 2023.

<sup>48</sup> Jeffrey A. Dodge, 'SAME-SEX MARRIAGE AND DIVORCE: A PROPOSAL FOR CHILD CUSTODY MEDIATION' (2006) *Family Court Review* <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1744-1617.2006.00069.x>> accessed 15 June 2023.

<sup>49</sup> 'How divorce differs for LGBTQ couples' (*Massucci Law Group*, 3 June 2021) <<https://www.massuccilawgroup.com/blog/2021/06/how-divorce-differs-for-lgbtq-couples/>> accessed 15 June 2023.

parent. When just one person is a biological parent, such as in lesbian couples where one spouse had artificial insemination or gay couples where only one of the husbands contributed genetic material to a surrogate, the situation can be very difficult.<sup>50</sup> In India, birth certificates are crucial in determining legal parentage. The names of the biological parents are typically listed on a child's birth certificate, establishing a legal presumption of parenthood. The government agencies in charge of keeping records of births normally issue birth certificate, which acts as proof of the child's parentage.

When both parents are married at the time of a child's birth, the names of both parents are typically listed on the birth certificate. The legal parenthood of both people is established in this way. The birth certificate is regarded as reliable parental proof in these situations. The requirements regarding same-sex couples in this area are blurred. It's crucial to keep in mind that parenthood may not always be proven beyond a reasonable doubt by birth certificates alone. In some cases, parentage may even be contested or questioned. For instance, additional legal processes and paperwork may be necessary to prove parentage in situations involving assisted reproduction, surrogacy, or adoption.<sup>51</sup>

It is possible to dispute or contest paternity or maternity if there is information indicating that the person named as a parent on the birth certificate is not a biological or legal parent. In order to establish or terminate parenthood, this may include presenting proof via DNA tests, court orders, or other legal procedures. Under the marital presumption theory, a child born to a couple who is presumed to be married is generally assumed to be the legal child of both parties. The legal presumption of paternity or maternity arises, and it is presumed that the child is the biological child of both spouses. The marital presumption of paternity or maternity is based on the principle that children born to married couples are presumed to be the legitimate offspring of both parents.<sup>52</sup> This presumption is significant in determining legal rights and obligations, such as parental rights, child custody, inheritance, and other matters related to the child's welfare.

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<sup>50</sup> 'SAME SEX MARRIAGE AND DIVORCE' (*Collas Crill*, 31 December 2020)

<<https://www.collascrill.com/knowledge-documents/guides/same-sex-marriage-and-divorce/>> accessed 15 June 2023.

<sup>51</sup> 'IS SAME-SEX DIVORCE HANDLED DIFFERENTLY FROM OTHER NY DIVORCES?' (*DRV Law*, 7 February 2022) <<https://www.drvetranolaw.com/blog/2022/february/is-same-sex-divorce-handled-differently-from-oth/>> accessed 15 June 2023.

<sup>52</sup> 'SAME-SEX DIVORCE AND UNIQUE ISSUES' (*Malech Law*, 20 June 2021)

<<https://malechlaw.com/same-sex-divorce-and-unique-issues/>> accessed 15 June 2023.

However, it's important to note that the marital presumption of paternity or maternity can be rebutted or challenged by providing evidence to the contrary. For example, if there is evidence to prove that one of the spouses is not the biological parent of the child, the presumption may be overcome, and the legal parentage may be questioned.

### *Who is a Guardian?*

Below the age of 18, every kid in India is required to have a legal guardian. All significant decisions must be made on behalf of the minor by this guardian.

According to the *Hindu Minority and Guardianship Act of 1956*<sup>53</sup>, a Hindu minor's father is their natural guardian. The mother only serves as a guardian "after" the father. This suggests that a woman must apply for custody of her child in the event of a divorce because she is not considered the child's "natural guardian." However, it is deemed that the mother is the minor's natural guardian if they are 5 years old or younger. If the child is not legitimate, the mother will get custody.<sup>54</sup>

A Muslim child's mother has custody of them up until they become seven years old for boys and until they reach puberty or the age of majority for girls. However, a father is regarded as the minor child's natural guardian under Muslim law, regardless of whether they belong to the Shia or Sunni sect.<sup>55</sup> Even after her husband's passing, the mother is not accorded the title of natural guardian. The mother is automatically granted custody of the kid if the child's parents are not married. The father is only entitled to visitation rights. This begs the question of what homosexual couples are supposed to do when fighting for custody and guardianship.

### **ALIMONY**

The choice of alimony may provide a problem for same-sex couples who are filing for divorce. After a divorce, one party may be granted alimony as financial support to help them maintain their standard of living. The current financial stability and physical well-being of each party<sup>56</sup> are only a few of the many considerations that go into determining the amount of spousal support awarded. The length of the marriage is one issue that gets more complicated

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<sup>53</sup> Hindu Minority and Guardianship Act 1956.

<sup>54</sup> Id.

<sup>55</sup> 'Same-sex Marriage Law (Marriage, Divorce, Custody, and Adoption)' (*Law Office of Daniel Hutto*) < <https://azcriminalandfamilylaw.com/family-law/same-sex-marriage-law/> > accessed 15 June 2023.

<sup>56</sup> Michael P. Hodes, 'The Changing Landscape of Marriage (and Divorce) for Same-Sex Couples' (*Boyd Collar Nolen Tuggle & Roddenbery*) < <https://www.bcnlaw.com/blog/the-changing-landscape-of-marriage-and-divorce-for-same-sex-couples/> > accessed 15 June 2023.



in same-sex divorce situations. For instance, spousal support may be significant if a heterosexual couple has been married for 30 years and has raised children together, with one spouse providing care. This is because the caretaker has been financially dependent for that entire time. The same is true for same-sex couples; but, because their marriage was not recognized as legal by the law for that period of time, it may complicate how alimony should be determined. From case to case, it will differ.

The Supreme Court of India has determined that 25% of the net monthly salary of the husband shall be apportioned to the wife by him if the alimony is being paid in the form of monthly installments.<sup>57</sup> If alimony is paid as a lump sum, the amount typically falls between one-fifth and one-third of the husband's annual wage. So what happens when one wife has to pay alimony to the other, or when there are two husbands in a relationship?

### ADULTERY AS A GROUND FOR DIVORCE

According to the *Hindu Marriage Act*<sup>58</sup>, adultery is defined as consensual and voluntary sexual activity between a married person and a person of the opposite sex who is either married or unmarried. According to the *HMA*<sup>59</sup>, adultery as a ground for divorce is available only to heterosexual couples, when clearly enough, same-sex couples face this problem too.

#### The Essentials of Adultery

- One of the spouses having sex with a person of the opposite sex, whether they are married or not.<sup>60</sup>
- Sexual activity should be voluntary and consent-based.
- At the time of the deed, the marriage was subsisting.
- There must be enough circumstantial evidence to establish the other spouse's responsibility.

According to *Section 497 of the Indian Penal Code, 1860*<sup>61</sup>, adultery is defined as: "Anyone who engages in sexual activity with someone they know or has reason to suspect is the wife

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<sup>57</sup> S. Murlidharan, 'Divorce, alimony, domestic violence and other legal questions facing same-sex marriage' (CNBC TV 18, 18 April 2023) < <https://www.cnbctv18.com/views/life-that-matters-same-sex-marriage-wedding-isnt-the-challenge-but-more-serious-legal-issues-are-the-divorce-alimony-and-domestic-violence-16183291.htm> > accessed 15 June 2023.

<sup>58</sup> Hindu, *supra* note 3, at 2.

<sup>59</sup> Id.

<sup>60</sup> 'THE COMPLEXITIES OF DIVORCE FOR SAME-SEX COUPLES' (Bruce N. Adams, PC) < <https://bruceadamslaw.com/the-complexities-of-divorce-for-same-sex-couples/> > accessed 15 June 2023.

of another man without the knowledge or agreement of that man is guilty of adultery, even if it does not constitute rape." In this situation, the wife is not subject to an abettor penalty. **Section 497**<sup>62</sup> was struck as unconstitutional in the case of *Joseph Shine vs. the Union of India*.

**Section 27 of the Special Marriage Act, 1954**<sup>63</sup>, lists adultery as a reason for divorce. "A petition for divorce may be filed with the district court by either the husband or the wife, subject to the provisions of this Act and the rules made thereunder, on the grounds that the respondent—has, following the solemnization of the marriage, engaged in voluntary sexual relations with any person other than his or her spouse."

Adultery is not clearly defined in the provisions of the *Indian Divorce Act, 1869*<sup>64</sup>. However, **Section 10(1) (a)**<sup>65</sup> of the Act commonly construes adultery as a cause of divorce. This clause allows for the filing of a divorce petition on the basis that the respondent (the spouse against whom the petition is filed) has engaged in adultery. While the Act does not define adultery specifically, it is usually regarded as willing sexual activity between a married individual and someone other than their spouse.

Being a fault-based ground for divorce, adultery requires the party requesting the divorce to provide evidence of the adultery in order to establish the ground. Adultery is only mentioned as a basis for divorce under **Section 32(d) of the Parsi Marriage and Divorce Act, 1936**<sup>66</sup>, without being defined. According to **Section 50 of the Act**, if the wife has committed adultery, the property will be divided, and her children will each receive a portion for their benefit. No such provision is made for men.

The *Dissolution of Muslim Marriages Act, 1939*<sup>67</sup> offers no respite because the law specifies in **Section 2(viii) (b)**<sup>68</sup> that a woman may sue a man for cruelty if he leads an infamous life or mixes with women of bad repute. This is the closest the current Muslim legal system comes to the idea of adultery.

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<sup>61</sup> Indian Penal Code 1860 s 497.

<sup>62</sup> Id.

<sup>63</sup> Special, *supra* note 25, at 8.

<sup>64</sup> Indian, *supra* note 5, at 3.

<sup>65</sup> Indian Divorce Act 1869 s 10(1) (a).

<sup>66</sup> Parsi Marriage and Divorce Act 1936 s 32(d).

<sup>67</sup> Dissolution, *supra* note 7, at 3.

<sup>68</sup> Dissolution of Muslim Marriages Act 1939 s 2(viii) (b).

Adultery is not expressly defined in the *Christian Marriages Act of 1872*<sup>69</sup>. There is no specific set of divorce-related rules under the *Act*<sup>70</sup>. In place of that, it makes reference to the clauses of the *Indian Divorce Act of 1869*<sup>71</sup> when discussing divorce for Christian couples. Therefore, Christian couples seeking a divorce under the *Christian Marriages Act of 1872*<sup>72</sup> would normally be subject to the definition and rules pertaining to adultery as a reason for divorce under the *Indian Divorce Act of 1869*<sup>73</sup>. According to the Indian *Christian Marriage Act*<sup>74</sup>, the husband simply needed to show that his wife had committed an adulterous act; the wife had to prove the existence of other causes, such as cruelty, a change in religion, insanity, etc.

We can see how both the *Dissolution of Muslim Marriages Act*<sup>75</sup> and the *Christian Marriages Act*<sup>76</sup> are gender-biased and have unequal terms and punishments for men and women. Not to mention that they do not even consider transgender people to be under their purview. Suing a spouse for divorce on the ground of adultery proves by same-sex couples, to be tricky when such inimical laws exist. Furthermore, according to the common understanding of society, and most of the laws in force, adultery can only be done with a person of the opposite sex.

Both Islam and Christianity treat homosexuality as a sin. Because a Muslim man is allowed to have up to four wives, the scope of his wives treating certain actions of his as adulterous is highly narrowed. If it was a relationship that had two males or two females, matters would be further complicated, as then the definitions of husband and wife would become too constricted.

Unless the opposing party has previously admitted the adultery and they are certain the petition will not be defended, parties are frequently warned against relying on adultery as the "fact" that has caused the irretrievable breakup of the marriage.<sup>77</sup> This is due to the challenging and unpleasant nature of "proving" infidelity. Anyone who finds oneself in this

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<sup>69</sup> Christian Marriages Act 1872.

<sup>70</sup> Id.

<sup>71</sup> Indian, *supra* note 5, at 3.

<sup>72</sup> Christian, *supra* note 70 at 17.

<sup>73</sup> Indian, *supra* note 5, at 3.

<sup>74</sup> Christian, *supra* note 70, at 17.

<sup>75</sup> Dissolution, *supra* note 7, at 3.

<sup>76</sup> Christian, *supra* note 70, at 17.

<sup>77</sup> 'Same-sex divorce – Equal rights, equal wrongs' (Simon Dippenaar, 5 August 2016) < <https://divorceattorneycapetown.co.za/same-sex-divorce-cape-town/> > accessed 15 June 2023.

circumstance will essentially be confined to filing for divorce based on unreasonable behavior.

Even if defining sexual intercourse in same-sex marriages can be challenging, it is obvious that the legislation regarding non-consummation is outdated, given the growing acceptance of asexuality and the changing nature of the marriage-sex relationship. Leaving that aside, if it is permitted in heterosexual marriage, same-sex couples who choose to dissolve their union owing to their partner's inability or willful reluctance to engage in sexual activity with them must also have access to it.<sup>78</sup> Those spouses could be at a disadvantage since they would have to stay together for at least a year before getting a divorce was an option, and they might have chosen to stay together for moral or personal reasons. There can also be detrimental financial effects.

It is inadmissible that adultery as a fact, no matter how infrequently it occurs, may only occur if the "guilty" spouse has engaged in sexual activity with a person of the other sex. Both heterosexual and homosexual couples experience this, and the difference diminishes the respect for same-sex marriage.

## **RIGHT TO DIVORCE**

The fundamental right to marry recognized under Article 21 of the Indian Constitution, includes the fundamental right to divorce.<sup>79</sup> The right to marry is considered a personal choice and an essential aspect of individual autonomy and dignity. Along with the right to enter into a marriage, the right to exit or dissolve that marriage through divorce is also recognized. The right to divorce allows individuals to seek legal termination of a marital relationship that is irretrievably broken or has become unsustainable. It enables individuals to dissolve a marriage and seek legal remedies regarding issues such as division of assets, child custody, and spousal support.

The Supreme Court of India, in several cases, has affirmed that the right to marry is a fundamental right protected under Article 21 of the Indian Constitution, which guarantees the

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<sup>78</sup> 'LGBTQ+ Guide to Divorce and Separation' (*Hello Divorce*, 9 December 2022) < <https://resources.hellodivorce.com/lgbtq-guide-to-divorce-and-separation> > accessed 15 June 2023.

<sup>79</sup> 'THE RIGHT TO DIVORCE FOR SAME-SEX COUPLES' (*Caraciolo Law Group*, 4 August 2015) < <https://www.theharrisburglawyers.com/blog/2015/august/the-right-to-divorce-for-same-sex-couples/> > accessed 15 June 2023.

right to life and personal liberty.<sup>80</sup> One prominent case that recognized the right to marry as a fundamental right is:

*Shri Krishna Singh vs. Mathura Ahir & Ors.*<sup>81</sup> - In this case, the Supreme Court held that the right to marry is a part of the fundamental right to life and personal liberty guaranteed under Article 21. The court observed that marriage is an important social institution, and individuals have the right to choose their life partners and marry according to their own free will.

The court has emphasized the significance of marriage as a fundamental social institution and recognized the right of individuals to enter into a lawful and consensual marriage. In various judgments, the Supreme Court has acknowledged that the right to seek a divorce is a legal right available to individuals under the personal laws applicable to their religion and that it is an important aspect of personal liberty and autonomy.

**Here are a few notable judgments in which the Supreme Court has acknowledged the availability of divorce as a legal remedy:**

*V. Bhagat vs. D. Bhagat*<sup>82</sup> - In this case, the Supreme Court reiterated that divorce is an important legal remedy available to individuals under the Hindu Marriage Act. The court emphasized the significance of providing an exit from a marital relationship that has irretrievably broken down.

*Nil Ratan Kundu & Anr. vs. Abhijit Kundu & Ors.*<sup>83</sup> - In this case, the Supreme Court recognized that divorce is a legal remedy available to couples under the Special Marriage Act. The court emphasized that the right to seek a divorce is an inherent aspect of personal liberty.

*Hadiya Marriage Case*<sup>84</sup> - While not directly related to divorce, this case involved the right to choose one's life partner and the validity of a marriage. The Supreme Court upheld the right of individuals to choose their partners and recognized the importance of personal autonomy in matters of marriage and personal relationships.

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<sup>80</sup> Sarah O' Brien, 'Same-sex divorce poses complications for some splitting couples' (*CNBC*, 10 November 2017) < <https://www.cnbc.com/2017/11/10/same-sex-divorce-poses-complications-for-some-splitting-couples.html> > accessed 15 June 2023.

<sup>81</sup> *Shri Krishna Singh vs. Mathura Ahir & Ors.* [1980] AIR SC 707.

<sup>82</sup> *V. Bhagat vs. D. Bhagat* [1994] AIR SC 710.

<sup>83</sup> *Nil Ratan Kundu & Anr. vs. Abhijit Kundu & Ors.* [2009] AIR SC 732

<sup>84</sup> *Shafin Jahan (S) v. Asokan K.M. (S)* [2018] SCC 16 368.

While the fundamental right to divorce has not been explicitly recognized as a standalone right, the Supreme Court has emphasized the significance of the right to exit an irretrievably broken or unsustainable marital relationship. It has recognized the right of individuals to seek legal remedies for the dissolution of a marriage, division of assets, child custody, and other related matters.

Surely, if divorce were made illegal in any nation, the people would rise against such tyranny by demanding that it be protected by the Constitution. However, when it comes to same-sex marriage, the reaction to divorce is typically more muted. What harm would it do to not allow divorce in "those" marriages since they are not legitimate in the first place? Countries that reject same-sex unions for welfare reasons may theoretically reject them even for the relatively narrow goal of divorce, which necessitates a legal union as a prerequisite.<sup>85</sup> This method fails to recognize how essential divorce is to marriage.

There may be a basic right to divorce, according to numerous cases. And, logically speaking, divorce would seem to be a necessary consequence of marriage. Without a doubt, the state cannot force people to continue to be legally wed against their wishes, despite what is spoken at the marriage ceremony.<sup>86</sup> Without a doubt, marriage and the range of privileges it confers must include both an entrance and an exit. This customary exit has frequently been blocked, denied, or otherwise prevented for same-sex couples.

Therefore, same-sex couples must persuade judges that divorce is a fundamental right and not a privilege that countries can deny to specific or marginalized communities. The only protection from imposing irrevocable vows is the fundamental freedom to divorce.<sup>87</sup>

Contrary to the popular misconception that homosexuals only want marriage equality for status reasons, many gay and lesbian people want marriage for the divorce it provides. When the sentiments wane and the marital structure breaks down, the parties to that relationship have no legal recourse if a country declines to recognize that connection for the express purpose of divorce. Marriage offers security because, if a relationship fails, protection is

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<sup>85</sup> Aaron Hoy, 'The Invisibility of Same-Sex Divorce' (*National Council on Family Relations*, 28 February 2020) < <https://www.ncfr.org/cfle-network/winter-2020-lgbtq/invisibility-same-sex-divorce> > accessed 15 June 2023.

<sup>86</sup> 'Issues in Same-Sex Divorces' (*Steven E. Springer*, 1 May 2023) < <https://www.springerlawfirm.com/blog/issues-in-same-sex-divorces/> > accessed 15 June 2023.

<sup>87</sup> 'A Guide to Divorce for Same Sex Marriages' (*ward hadaway*, 30 June 2022) < <https://www.wardhadaway.com/insights/updates/a-guide-to-same-sex-divorce/> > accessed 15 June 2023.

supplied in the form of divorce. Numerous courts have ruled that there cannot be a divorce without a marriage.<sup>88</sup>

A Constitution Bench presided over by Justice Sanjay Kishan Kaul began hearing from amicus curiae and Senior Attorney Indira Jaisingh on September 28, 2022, about the scope of the Supreme Court's authority under Article 142 to resolve marriage issues.

Ms. Jaisingh cited the Supreme Court's judgment in *Sivasankaran v. Santhimeenal* to define marriage, in which the Bench discussed the essence of marriage and what is expected from it. She stated that it is the national policy in India not to dissolve marriages by the court without first trying to get the parties to reconcile and that she vehemently disagreed with the idea that marriage is a sacrament. According to Ms. Jaisingh, ideas and public policy that do not recognize the "irretrievable breakdown of marriage" as a basis for divorce should not be taken into account. It was maintained that the fundamental right to marriage belongs to everyone. Therefore, everyone must possess the fundamental right to get a divorce. The Supreme Court must allow divorce if a marriage has failed and the parties seeking divorce are unable to carry out the court's ordered reconciliation.<sup>89</sup>

### **A VIABLE ALTERNATIVE TO DIVORCE**

Same-sex marriage can also be voided or annulled by one of the parties.<sup>90</sup> Courts in nations with same-sex marriage bans may accept this as a workable solution to reconcile the parties' desire for a divorce with the ban on recognizing same-sex unions.

In nations where same-sex marriage is prohibited, it is prohibited from the beginning by legislation and constitutional requirements. By definition, voidance does not acknowledge the legitimacy of the marriage; rather, it is "based on the premise that the marriage is void" from the beginning.

Although voidance does not "recognize or effectuate a marriage," it helps the same-sex parties achieve their main goal of detaching their private and business lives.<sup>91</sup>

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<sup>88</sup> 'LGBT DIVORCE' (Skylark Law & Mediation)

<<https://skylarklaw.com/divorceandfamilylaw/divorce/samesexdivorce/>> accessed 15 June 2023.

<sup>89</sup> Awstika Das, 'Right to Exit a Marriage a Fundamental Right, Locating Fault Not Necessary For Divorce: Indira Jaising Argues Before Supreme Court' (*Live Law*, 29 September 2022) <<https://www.livelaw.in/top-stories/supreme-court-right-to-divorce-fundamental-right-article-142-irretrievable-breakdown-of-marriage-indira-jaising-210627>> accessed 15 June 2023.

<sup>90</sup> '5 Must-Know Facts About LGBT Divorce' (*Pride Legal*, 25 January 2021) <<https://pridelegal.com/5-facts-lgbt-divorce/>> accessed 15 June 2023.

The typical procedure for getting a judicial declaration nullifying a marriage is through annulment. However, there are certain potential restrictions on annulment actions.

Short statutes of limitations after the marriage celebration or the discovery of the flaw may restrict the availability of annulments. Annulment proceedings might not provide same-sex couples with the full range of marital remedies they would need, such as property partition and spousal maintenance.<sup>92</sup>

In the absence of state approval of same-sex marriage, courts have a number of options for handling same-sex divorce applications. Courts that forbid divorces based on a public policy prohibiting same-sex unions must go further and assess the constitutionality of that policy in light of equal protection and due process. Alternatively, the marriage could be declared null and void by having the issue handled as an annulment.<sup>93</sup> Then, in the event that a specific statute, comparable equitable principles, or principles of contract law are applicable, they will be used to address property, support, and custody concerns. Given these various legal options, courts are now required to fully evaluate the same-sex divorce claim rather than simply dismiss it outright.

### COMMON REASONS FOR LGBTQIAP+ DIVORCE AND SEPARATION

LGBTQIAP+ couples have particular difficulties that may ultimately result in divorce or separation, despite the fact that evidence suggests that same-sex couples feel more satisfaction and harmony in marriage than their heterosexual counterparts.

**Social problems:** Despite the fact that same-sex couples are legally permitted to cohabitate, societal prejudice persists. The health of the couple's relationship as well as the individuals' emotional and physical well-being may be impacted by this stress.<sup>94</sup>

**Family problems:** A lot of LGBTQ+ people deal with families who don't accept them for who they are and who they marry.<sup>95</sup> Their marriage may experience a lot of emotional strain as a result.

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<sup>91</sup> Hal Armstrong, 'Same-Sex Divorce: What You Need to Know' (*Find Law*, 10 December 2021) < <https://www.findlaw.com/family/marriage/same-sex-divorce-what-you-need-to-know.html> > accessed 15 June 2023.

<sup>92</sup> 'Same Sex Couples and the dangers of Divorce' (*In Court*) < <https://www.incourt.co.uk/post/same-sex-couples-and-the-dangers-of-divorce> > accessed 15 June 2023.

<sup>93</sup> Ryne Vickery, 'What Same-Sex Couples Need to Know About Divorce' *The Street* (20 June 2022).

<sup>94</sup> Stephanie Chen, 'Serious legal hurdles for gay divorce' (*CNN*, 3 May 2010) < <http://edition.cnn.com/2010/LIVING/05/03/texas.gay.divorce/index.html> > accessed 15 June 2023.



Financial concerns: After many years of being financially independent, same-sex couples who marry must deal with the realities of sharing a financial life.<sup>96</sup>

Children: Just like in other-sex marriages, bringing up kids can reveal quite diverse parenting approaches and ideals.<sup>97</sup> When marital rights are at best, nonexistent for same-sex couples, the right to divorce becomes especially crucial.

## QUESTIONS THAT ARISE WHEN DISCUSSING SAME-SEX DIVORCE

Will it be permissible for a woman in a same-sex marriage to request alimony under section 36 of the Indian Divorce Act, 1869, while the divorce petition is being processed?

Will a man in a same-sex marriage be required to support the man he married and is now divorcing and their children?

Given that the PWDV Act targets the husband and his family, would the provisions of the Act apply to same-sex marriages more specifically to the WW category?

Would the accusation of infidelity hold true in both a WW and MM marriage?

Do same-sex marriages fall under the provisions of the income tax legislation that refer to the transfer of property to a spouse by the husband or wife, as the case may be, without consideration?<sup>98</sup>

Does same-sex marriage qualify for the stamp duty or property tax exemption for women?<sup>99</sup>

Would same-sex marriages, especially those of the MM form, be eligible for programs like the Pradhan Mantri Awas Yojana, under which dwellings for the EWS group are created in the name of the wife?

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<sup>95</sup> 'Gay Divorce and Straight Divorce: The Difference' (*Pride Legal*, 12 January 2021) < <https://pridelegal.com/gay-divorce-versus-straight-divorce/> > accessed 15 June 2023.

<sup>96</sup> 'Common High Net Worth Divorce Issues Encountered by Same-Sex Couples' (*Sean M. Cleary*, 8 November 2022) < <https://www.seanclearypa.com/blog/high-net-worth-divorce-issues-same-sex-couples/> > accessed 15 June 2023.

<sup>97</sup> 'Same-Sex Marriage Divorce and Child Custody Disputes' (*Hughes Law Group*) < <https://hugheslawgroup.com/same-sex-marriage-divorce-and-child-custody-disputes/> > accessed 15 June 2023.

<sup>98</sup> 'Division of Assets in Same Sex Divorce Cases' (*HG.org*) < <https://www.hg.org/legal-articles/division-of-assets-in-same-sex-divorce-cases-50216> > accessed 15 June 2023.

<sup>99</sup> 'Separation and Divorce: An Overview for Same-sex Families' (*Michigan Legal Help*) < <https://michiganlegalthelp.org/resources/family/separation-and-divorce-overview-same-sex-families> > accessed 15 June 2023.

Will a Hindu's intestate estate be available to the widow or widower, if applicable, solely for inheritance purposes?

When the bride and groom do not specify which property regime they want to use, Limited Community of Property will, in accordance with Portuguese Civil Code regulations, take effect. The assets obtained after the marriage will be considered marital property under the Limited Community of Property rule.<sup>100</sup> Each spouse's assets from before the marriage will continue to be his or her sole property. Will same-sex couples in Goa still be subject to this regime?

If a Hindu who is married and still alive adopts a child, the wife is considered to be the adoptive mother. The wife who has been married the longest among them will be considered the adoptive mother, and the other wives will be considered stepmothers, in cases when an adoption has been conducted with the permission of more than one wife. How will this clause be implemented in a same-sex union, especially one with an MM hue?

Will the proposed same-sex marriage law be accepted by all religions as the first example of a unified civil code?<sup>101</sup> As it stands, Muslims have a distinctive civil law that regulates marriages.

The collection of ponderable discussed above is by no means complete or thorough. They serve just as examples. If the legislation passed to legalize same-sex marriage required a couple of the same sex trapped in a marriage to choose who will wear the robes of a husband and who will do so of a wife from the very beginning, perhaps some of the issues envisioned could be handled.

There are many conflicts in the debate over homosexual divorce: How can a country dissolve a homosexual marriage if it doesn't recognize gay marriage? What happens if a country that

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<sup>100</sup> 'How do you end a same-sex marriage or civil partnership?' (*Stewarts Law*. 15 February 2022) < <https://www.stewartslaw.com/news/how-do-you-end-a-same-sex-marriage-or-civil-partnership/> > accessed 15 June 2023.

<sup>101</sup> Inmaculada Puertas Cañaverl, José Manuel Jiménez-Cabello, Diego Becerril-Ruiz, and José Luis Paniza Prados, 'Same-Sex Marriages, Divorce and Children from the Prism of Methodological Triangulation' (2023) *Social Sciences* < <https://www.mdpi.com/2076-0760/12/2/107> > accessed 15 June 2023.

forbids homosexual marriage also permits same-sex divorce? Does that suggest that gay marriage is legal?<sup>102</sup>

## SUGGESTIONS

Making it obvious that they are LGBTQ-friendly is important for divorce mediators and anyone who offer information and support to divorced people and their families. This can be done in a variety of ways, some of which are relatively straightforward, such as advertising in LGBTQIAP community publications. Given the invisibility of same-sex divorce, making it abundantly clear to the public that one is indeed LGBTQIAP-friendly<sup>103</sup> would go a long way towards reassuring and inspiring LGBTQIAP individuals who are in or have undergone the process of ending same-sex marriage, and it may inadvertently help to partially reverse the invisibility of same-sex divorce.

They can be particularly reticent to talk about their divorce with friends and relatives.<sup>104</sup> As a result, individuals might not receive all the necessary emotional and financial assistance as they go through the divorce process. Additionally, due to the fact that same-sex marriage and divorce are such recent developments, many people are probably unsure of how the larger LGBTQIAP community will see and treat members of the community who have ended a same-sex marriage.<sup>105</sup> As a result, divorced LGBTQIAP people may experience worry and struggle while attempting to move on from marriage by meeting new people and considering new relationships. Working with LGBTQIAP individuals on connecting and talking with others after their divorce may be extremely beneficial in this case.

Prenuptial agreements, commonly referred to as prenups or premarital agreements<sup>106</sup>, are not specifically acknowledged or regulated by law in India. However, the Indian legal system does give some prenuptial agreement provisions recognition and validity.

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<sup>102</sup> Ashmita Mitra and Amulya Baid, 'MOVING AWAY FROM TRADITIONAL HOMOGENOUS FAMILIES: A CASE FOR SAME-SEX MARRIAGES IN INDIA' *Supremo Amicus* < <https://supremoamicus.org/wp-content/uploads/2019/11/A5vol14.pdf> > accessed 15 June 2023.

<sup>103</sup> 'Can Married Same Sex Couples Get a Divorce?' (*Legal Match*) < <https://www.legalmatch.com/law-library/article/same-sex-divorce.html> > accessed 15 June 2023.

<sup>104</sup> '3 challenges same-sex couples face in divorce' (*Maddox & Gerock*, 6 August 2020) < <https://www.maddoxandgerock.com/blog/2020/08/3-challenges-same-sex-couples-face-in-divorce/> > accessed 15 June 2023.

<sup>105</sup> 'LGBT Rights in India' (*Equaldex*) < <https://www.equaldex.com/region/india> > accessed 15 June 2023.

<sup>106</sup> 'What Are the Unique Challenges of a Same-Sex Divorce?' (*Lyons & Associates*, 1 February 2022) < <https://www.lyonspc.com/2022/02/01/unique-challenges-same-sex-divorce/> > accessed 15 June 2023.

Prenuptial agreements may be regarded as legally binding contracts between the parties under Indian law if certain conditions are met. A prenuptial agreement must be signed voluntarily by both spouses, based on free consent, without any coercion or fraud, in order to be enforceable.<sup>107</sup> The contract must be reasonable and fair, and it shouldn't contravene any laws or standards of decency.

Although prenuptial agreements are not always legally enforceable or binding in India, courts there may still take them into account as proof of the parties' intentions and agreements. In the event of a divorce or separation, the court may consider the terms of a prenuptial agreement when deciding on subjects like property partition, financial arrangements, and other pertinent matters. The court may take into account elements like the agreement's fairness, the parties' financial situation at the time of enforcement, and the effect on any children.

Prenuptial agreements have major relevance for couples thinking about getting married and serve several crucial objectives. Prenuptial agreements are significant in the following ways:

Explicitly defining financial obligations and rights: Prenuptial agreements let spouses specify their respective financial responsibilities and rights both throughout the marriage and in the case of divorce or separation. They can discuss matters including how to divide up property<sup>108</sup>, how to pay spousal support, and how to handle debts and assets accumulated during the marriage.<sup>109</sup>

Safeguarding Separate Property: Prenuptial agreements can assist in defending the assets and possessions that each party brings to the marriage. In order to guarantee that it will remain separate in the event of a divorce or separation, they might specify how separate property will be handled.

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<sup>107</sup> Chikirsha Mohanty, 'Child Custody Laws in India' (*Law Rato*, 11 April 2023) < <https://lawrato.com/indian-kanoon/child-custody-law/child-custody-laws-in-india-2691#:~:text=The%20court%20will%20decide%20on,and%20religion%20of%20the%20minor> > accessed 15 June 2023.

<sup>108</sup> Pranitha Pai, 'Settlement of Spousal property: A Brief Overview' (*iPleaders*, 16 July 2018) < <https://blog.ipleaders.in/settlement-spousal-property/> > accessed 15 June 2023.

<sup>109</sup> 'What Are the Exact Alimony Laws on Divorce in India?' (*Vakil Search*, 31 May 2023) < <https://vakilsearch.com/blog/alimony-laws-on-divorce-in-india/#:~:text=In%20case%20the%20wife%20is%20not%20earning%2C%20the%20amount%20of,the%20husband%20by%20the%20court> > accessed 15 June 2023.

Addressing Business Interests: When one or both parties have business interests, prenuptial agreements can be especially helpful. They can describe how to divide up or preserve company assets and intellectual property, reducing conflict and assuring the survival of the company.

Prenuptial agreements set explicit expectations between spouses about financial matters and provide clarity, preventing disputes.<sup>110</sup> They can lessen misunderstandings and potential conflicts in the future by addressing potential conflict factors in advance.

Protecting Family Interests: People who have children from prior marriages or who want to safeguard inheritances<sup>111</sup> or family assets may find prenuptial agreements to be helpful. Children's or other family members' interests can be protected with their assistance.<sup>112</sup>

Saving Time and Money: Having a prenuptial agreement can potentially speed up the legal procedure and lower legal costs in the case of a divorce or separation. Couples may be able to avoid drawn-out negotiations and contentious legal disputes by already having agreed-upon agreements.

In some situations, one party may lose a lot of legal protections if there isn't a formal agreement between parties before or throughout their marriages outlining what should happen when they separate. For instance, courts can make these decisions on an individual basis even in the absence of any official papers specifying who has custody of the children and where each parent resides. Prenups can prove to be very conducive and advantageous to same-sex couples in defining their relationship and drawing lines and delineating their duties and roles.

## CONCLUSION

According to the majority rule government, in order to protect any potential offspring born as a result of their sexual union, marriage can only be between one man and one woman. One

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<sup>110</sup> 'Joint Property After Divorce – Ownership of property' (*Vakil Search*, 6 June 2023) < <https://vakilsearch.com/blog/what-happens-to-joint-property-after-a-divorce/#:~:text=Various%20factors%2C%20such%20as%20the,joint%20property%20during%20a%20divorce> > accessed 15 June 2023.

<sup>111</sup> Khushbu T., 'Child Maintenance Alimony in India & How it Works?' (*Vakil Search*, 31 May 2023) < <https://vakilsearch.com/blog/child-support-alimony-in-india-how-it-works/#:~:text=The%20court%20decides%20on%20child,for%20calculating%20the%20Child%20support> > accessed 15 June 2023.

<sup>112</sup> Sanghamitra Sengupta, 'What are the visitation rights for divorcees in India?' (*iPleaders*, 18 December 2017) < <https://blog.ipleaders.in/visitation-rights-divorcees-india/> > accessed 15 June 2023.

can contend that same-sex couples are hurt by their lack of marital status since it is owed to them under a different interpretation of marriage.

Marriage only exists as the connection of one man and one woman that is publicly acknowledged because children, who are the result of their sexual union, are of interest to the community. Because both same-sex marriage and divorce are still considered taboo in our society, LGBTQIAP people endure special hardships both during and after divorce. In contemporary society, divorce is primarily portrayed as involving heterosexual couples. For LGBTQIAP people, a hetero-normative view of divorce and the invisibility it places on same-sex divorce have far-reaching negative effects.

The inability to get a divorce prevents same-sex couples from getting remarried, exposes them to the psychological anguish of forced partnerships, and places them under ongoing financial strain due to joint commitments including debt, insurance, and federal taxes. It is also possible to characterize the differing divorce procedures for same-sex spouses as an unconstitutional restriction of access to the courts. Because people are unable to divorce themselves through private agreement, they must turn to the courts. The community would not be interested in the relationship, any more than it would be in any other friendship or a casual relationship if it were not true that sex naturally results in children (albeit not always). On the other hand, proponents of same-sex "marriage" assert that sex and marriage are only as meaningful as what the parties to a relationship wish them to be.

If marriage is what the government claims it to be, then it is merely a contract. And if it's just a contract, then the government should stop interfering in marriage altogether. The purpose of the law would then be limited to assisting in the resolution of conflicts between parties alleging breach of contract. Any harm would wholly result from the contract's provisions, not from the personalities or situations of the parties. Divorce is particularly challenging for LGBT people because it confirms conservative beliefs about their incapacity to maintain monogamous relationships, in addition to a number of legal disadvantages. Early marriage and divorce might cause some couples to "internalize an unwarranted sense of guilt or shame."

The historic Obergefell v. Hodges ruling made same-sex marriage lawful in each of the 50 states of the U.S. Gay couples now have the freedom to wed wherever and whenever they choose according to the verdict. But even in the United States, same-sex couples may run

into problems when they divorce, despite the fact that the freedom to marry represents a significant triumph for homosexual rights. It would seem logical for everyone who has the freedom to marry to likewise have the freedom to end a marriage. However, that right doesn't necessarily apply to same-sex relationships, exposing a system of law that is fundamentally defective and may take years to catch up to heterosexual marriage. The LGBTQIAP+ community in India is further inconvenienced by not having access to either.

In a country where the decision on the legality of same-sex unions is yet to be passed, it becomes even more important to exercise caution when addressing other issues related to it. It would be a huge, and successful accomplishment for the community, no doubt. But as further troubles will crop up, the war between the judiciary and the legislature will grow bitterer, resulting in a buildup in the inventory of unsolved cases. This is why it is advised to weigh and measure both sides equally before passing a judgment that will change the lives of millions in this country.

